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CASES REPORTED

	Vol.		Page
Abdallah v. Jacob, App.	40	P.2d	918
Adair; People v., App.	39	P.2d	274
Adkisson; Southwest Finance Co. of California v., App.	40	P.2d	858
Adolph Ramish, Inc., v. Woodruff, Sup.	40	P.2d	509
Adolph Wexler Building & Finance Corporation; Duckett v., Sup.	40	P.2d	506
Aguinaldo; People v., App.	39	P.2d	505
Agullana; People v., App.	40	P.2d	848
Andersen v. La Rinconada Country Club, App.	40	P.2d	571
Anderson; People v., App.	40	P.2d	270
Angel City Baseball Ass'n; Martin v., App.	40	P.2d	287
Anschutz; Cadwell v., App.	39	P.2d	886
Appellate Division of Superior Court in and for Los Angeles County; Kempton v., App.	39	P.2d	846
Argue v. Wilson, App.	40	P.2d	297
Arnold; Sondel v., Sup.	39	P.2d	793
Associated Oil Co. v. Orange County, App.	40	P.2d	887
Aufdemkamp v. Pierce, App.	40	P.2d	599
Axelson v. Superior Court in and for Los Angeles County, App.	39	P.2d	486
Babcock v. Wood, App.	39	P.2d	475
Bailey v. Market St. R. Co., two cases, App.	40	P.2d	281
Bank of America v. City of Glendale, App.	39	P.2d	280
Bank of America Nat. Trust & Savings Ass'n v. Hoover, App.	39	P.2d	884
Bank of America Nat. Trust & Savings Ass'n v. Kellenberg, App.	40	P.2d	579
Bank of America Nat. Trust & Savings Ass'n; Kirby v., App.	40	P.2d	943
Bank of America Nat. Trust & Savings Ass'n; Phillips v., App.	40	P.2d	316
Bank of America Nat. Trust & Savings Ass'n; Purdy v., Sup.	40	P.2d	481
Bank of Tehama County v. Federal Realty Co., Sup.	40	P.2d	507
Banty; People v., App.	39	P.2d	478
Baroni v. Musick, App.	39	P.2d	435
Barrett v. Board of Osteopathic Examiners of California, App.	40	P.2d	923
Barton v. State Bar of California, Sup.	40	P.2d	502
Baxter v. Baxter, App.	40	P.2d	536
Beach v. Faust, Sup.	40	P.2d	822
Beadle S. S. Co.; Spencer v., App.	40	P.2d	273
Beal; People v., App.	39	P.2d	504
Beckjord v. Traeger, App.	39	P.2d	523
Beebe; Hualde Ranch Co. v., App.	40	P.2d	545
Belt Casualty Co.; Lamb v., App.	40	P.2d	311
Benafel; Chandler v., App.	39	P.2d	890
Benafel; Chandler v., App.	39	P.2d	892
Bennett Film Laboratories; Penfield v., App.	40	P.2d	587
Berkeley School Dist. of Alameda County; Davis v., Sup.	40	P.2d	835
Berkeley School Dist. of Alameda County; Fuller v., Sup.	40	P.2d	831
Bermijo; People v., Sup.	40	P.2d	823
Bettencourt v. Oliveria, App.	39	P.2d	243
B. H. Dyas Co.; Blodgett v., App.	40	P.2d	865
Biddlecomb v. Haydon, App.	40	P.2d	873
Birkhofer v. Krumm, App.	40	P.2d	553
Bishop's Estate, In re, Sup.	39	P.2d	201
Blodgett v. B. H. Dyas Co., App.	40	P.2d	865
Blue Diamond Co. v. Gollos, App.	39	P.2d	284
Board of Education of City of Los Angeles v. Industrial Accident Commission of California, App.	39	P.2d	521

	Vol.		Page
Board of Medical Examiners of California; Lanterman v., App.	40	P.2d	913
Board of Osteopathic Examiners of California; Barrett v., App.	40	P.2d	923
Board of Playground and Recreation of City of Los Angeles; Kabisius v., App.	39	P.2d	264
Board of Sup'rs of Alameda County; Wallace v., Sup.	39	P.2d	423
Borum v. Graham, App.	40	P.2d	866
Bourne v. Northern Counties Title Ins. Co., App.	40	P.2d	583
Boyington; People v., App.	39	P.2d	867
Bradner; J. S. Morgan & Sons v., App.	39	P.2d	225
Brea v. McGlashan, App.	39	P.2d	877
Brecht; Tracy v., App.	39	P.2d	498
Brickell's Estate, In re, App.	40	P.2d	579
Brickert; People v., App.	39	P.2d	450
Briggs v. Marcus-Lesoine, Inc., App.	39	P.2d	442
Brinkerhoff; Liuzza v., App.	39	P.2d	283
Broad; Wells Fargo Bank & Union Trust Co. v., App.	39	P.2d	241
Brock; Slye v., App.	40	P.2d	290
Brodie; Forney v., App.	39	P.2d	516
Brovelli; Vila v., App.	39	P.2d	855
Brown v. Butler, App.	39	P.2d	244
Bruneman; People v., App.	40	P.2d	891
Buchanan, Ex parte, App.	40	P.2d	935
Bunney; Shuey v., App.	40	P.2d	859
Burket; Gardiner v., App.	40	P.2d	279
Butler; Brown v., App.	39	P.2d	244
Butler v. Superior Court in and for Napa County, App.	39	P.2d	860
Cadwell v. Anschutz, App.	39	P.2d	886
California Christian College; Griffith v., App.	40	P.2d	566
California Cotton Mills; Patek v., App.	40	P.2d	927
California Farming Co. v. Hammonds, App.	40	P.2d	850
California Farming Co.; Miller & Lux v., App.	40	P.2d	850
California Farming Co.; Scott v., App.	40	P.2d	850
California Grape Control Board v. California Produce Corporation, App.	40	P.2d	846
California Machinery & Supply Co. v. University City Syndicate, App.	39	P.2d	853
California Produce Corporation; California Grape Control Board v., App.	40	P.2d	846
Callegari v. Maurer, App.	40	P.2d	883
Cantlay & Tanzola; Morris v., App.	39	P.2d	471
Carpenter; People v., App.	40	P.2d	524
Carr; People v., App.	39	P.2d	463
Cecil B. De Mille Productions; North v., Sup.	39	P.2d	199
Central Const. Co. v. Stansbury Contracting Co., App.	40	P.2d	852
Chamberlin v. Davis, App.	39	P.2d	519
Chamberlin; Davis v., App.	39	P.2d	519
Chamberlin; First Nat. Trust & Savings Bank v., App.	39	P.2d	519
Chandler v. Benafel, App.	39	P.2d	890
Chandler v. Benafel, App.	39	P.2d	892
Chandler; Phillips v., App.	39	P.2d	516
Chaplin; Imperial Gypsum & Oil Corporation v., App.	40	P.2d	596
Chauvin v. Krupin, App.	40	P.2d	904
Chin Ah Len; Mercantile Mortg. Co. v., App.	39	P.2d	817
Chin Jok; Mercantile Mortg. Co. v., App.	39	P.2d	817
Chiropractic League of California, People ex rel., v. Steele, App.	40	P.2d	959
City of Glendale; Bank of America v., App.	39	P.2d	280
City of Long Beach v. Industrial Accident Commission, App.	39	P.2d	850
City of Los Angeles; Irwin v., App.	39	P.2d	851
City of Los Angeles v. Superior Court in and for Los Angeles County, Sup.	39	P.2d	401

	Vol.		Page
City of Redondo Beach; Redondo Improvement Co. v., App.	39	P.2d	438
City of Vallejo; Derrick v., App.	40	P.2d	949
City of Vallejo; Peabody v., Sup.	40	P.2d	486
Civil Service Commission of City and County of San Francisco; Dunn v., App.	40	P.2d	310
Claeys; Ganley v., Sup.	40	P.2d	817
Cleary; Hague v., App.	39	P.2d	219
Clifford F. Reid, Inc.; Phillips v., App.	39	P.2d	512
Clifford F. Reid, Inc.; Phillips v., App.	39	P.2d	515
Clough v. Steen, App.	39	P.2d	889
Coats v. General Motors Corporation, App.	39	P.2d	838
Coats; Harnischfeger Sales Corporation v., App.	40	P.2d	875
Cobb v. Pacific Mut. Life Ins. Co. of California, App.	40	P.2d	574
Cochens v. Prudential Ins. Co. of America, App.	40	P.2d	902
Cohn-Chernis-Grunsfeld, Inc.; Farmers' & Merchants' Nat. Bank of Los Angeles v., App.	40	P.2d	550
Colburn Biological Institute v. Superior Court of Los Angeles County, App.	40	P.2d	298
Collins; People v., App.	40	P.2d	542
Colmar v. Pinckard, App.	39	P.2d	262
Comegys v. National Union Assur. Soc., App.	39	P.2d	861
Commercial Discount Co. v. Wilson, App.	40	P.2d	594
Connor; People v., App.	40	P.2d	316
Constantian v. Mercedes Benz Co., App.	39	P.2d	496
Cook v. La Vina Land Co., App.	39	P.2d	458
Cook v. Mielke, App.	40	P.2d	301
Cooper v. Cooper, two cases, App.	39	P.2d	820
Cope v. Steckel, App.	39	P.2d	482
Cope v. Steckel, App.	40	P.2d	901
Coryell; Strange v., App.	40	P.2d	289
Cox; Filcher v., App.	40	P.2d	864
Crawford v. Herzog, App.	40	P.2d	954
Crawford v. Rose, App.	39	P.2d	217
Crawford v. Rose, App.	40	P.2d	277
Crocker Co. v. Lake County, App.	40	P.2d	931
Crooks v. Doeg, App.	40	P.2d	590
Currie; People v., App.	39	P.2d	215
Curtis v. Title Guarantee & Trust Co., App.	40	P.2d	562
Daily v. Superior Court in and for Monterey County, App.	40	P.2d	936
Dark v. Prudential Ins. Co. of America, App.	40	P.2d	906
Davidson, People ex rel., v. Mertz, Sup.	39	P.2d	422
Davis v. Berkeley School Dist. of Alameda County, Sup.	40	P.2d	835
Davis v. Chamberlin, App.	39	P.2d	519
Deibert; Livesay v., App.	39	P.2d	466
De Martini v. Scavenger's Protective Ass'n, App.	40	P.2d	317
Democrat-Herald Pub. Co. v. Pettit, App.	40	P.2d	584
Den v. Luton, Sup.	39	P.2d	418
Den's Estate, In re, Sup.	39	P.2d	418
Department of Motor Vehicles; Pacific Electric R. Co. v., Sup.	40	P.2d	820
Department of Motor Vehicles; Vadnais v., App.	40	P.2d	559
Derrick v. City of Vallejo, App.	40	P.2d	949
De Vaughn; People v., App.	39	P.2d	223
De Young; Harrison v., App.	39	P.2d	866
Deysher; People v., Sup.	40	P.2d	259
Dingman v. J. E. French Co., App.	39	P.2d	826
Dionne; Seccombe v., App.	40	P.2d	299
Doeg; Crooks v., App.	40	P.2d	590
Dolney v. National Thrift Corporation of America, App.	39	P.2d	277
Donovan; Turner v., App.	39	P.2d	858

	Vol.		Page
Dorland; People v., Sup.	40	P.2d	474
Downs v. Municipal Court of City of Los Angeles, App.	40	P.2d	541
Drew; Goldhahn v., App.	39	P.2d	279
Duckett v. Adolph Wexler Building & Finance Corporation, Sup.	40	P.2d	506
Dunn v. Civil Service Commission of City and County of San Francisco, App.	40	P.2d	310
Earl Ranch, Limited, v. Industrial Accident Commission, App.	39	P.2d	463
Elliott v. Market St. R. Co., App.	40	P.2d	547
Elsinore Oil Co. v. Signal Oil & Gas Co., App.	40	P.2d	523
Ewell v. State Bar of California, Sup.	40	P.2d	264
Farmers' & Merchants' Nat. Bank of Los Angeles v. Cohn-Chernis-Grunsfeld, Inc., App.	40	P.2d	550
Farrar v. Policy Holders' Life Ins. Ass'n, App.	39	P.2d	229
Faust; Beach v., Sup.	40	P.2d	822
Federal Realty Co.; Bank of Tehama County v., Sup.	40	P.2d	507
Fidelity & Deposit Co. of Maryland; Miller v., App.	40	P.2d	951
Filcher v. Cox, App.	40	P.2d	864
Fink v. Retail Credit Co., App.	39	P.2d	483
First Nat. Trust & Savings Bank v. Chamberlin, App.	39	P.2d	519
Fitzgerald; Hickey Pipe & Supply Co. v., App.	39	P.2d	472
Fonseca v. Goodwin, App.	40	P.2d	570
Forman v. Hancock, App.	39	P.2d	249
Forney v. Brodie, App.	39	P.2d	516
Foster; People v., App.	39	P.2d	271
Fralick; Markham v., Sup.	39	P.2d	804
Frazier; Mayers v., App.	39	P.2d	429
Frazier; Ohlson v., App.	39	P.2d	429
Fredenhagen; Loop Bldg. Co. v., App.	39	P.2d	222
Frowenfeld, In re, App.	40	P.2d	552
Fuhrman v. Superior Court in and for City and County of San Francisco, Sup.	39	P.2d	802
Fuller v. Berkeley School Dist. of Alameda County, Sup.	40	P.2d	831
Fullerton Oil Co. v. Johnson, Sup.	39	P.2d	796
Ganley v. Claeys, Sup.	40	P.2d	817
Gardiner v. Burket, App.	40	P.2d	279
General Motors Corporation; Coats v., App.	39	P.2d	838
Gerson v. Kelsey, App.	40	P.2d	543
Goldberg; Gorden v., App.	40	P.2d	276
Goldhahn v. Drew, App.	39	P.2d	279
Gollos; Blue Diamond Co. v., App.	39	P.2d	284
Goodman v. Pasadena City High School Dist., App.	40	P.2d	854
Goodwin; Fonseca v., App.	40	P.2d	570
Gorden v. Goldberg, App.	40	P.2d	276
Graham; Borum v., App.	40	P.2d	866
Gray; Johnson v., App.	40	P.2d	575
Great Atlantic & Pacific Tea Co. of Nevada; Pierre v., App.	40	P.2d	909
Great Lakes Aircraft Corporation; Ruckstell Corporation v., Sup.	40	P.2d	499
Griffith v. California Christian College, App.	40	P.2d	566
Gromeeko; Tesluck v., App.	40	P.2d	296
Gunderson v. Gunderson, App.	40	P.2d	956
Hague v. Cleary, App.	39	P.2d	219
Hahn v. Wilde, App.	39	P.2d	473
Hale; Smith v., App.	39	P.2d	445
Hall v. Williams, Sup.	39	P.2d	419
Hammonds; California Farming Co. v., App.	40	P.2d	850
Hampton v. Rose, App.	39	P.2d	447
Hampton v. Rose, App.	39	P.2d	449
Hancock; Forman v., App.	39	P.2d	249
Harnischfeger Sales Corporation v. Coats, App.	40	P.2d	875

	Vol.		Page
Harris' Estate, In re, App.	40	P.2d	566
Harrison v. De Young, App.	39	P.2d	866
Harrison v. Superior Court in and for City and County of San Francisco, App.	39	P.2d	825
Haskins v. Southern Pac. Co., App.	39	P.2d	895
Haydel v. Morton, App.	39	P.2d	454
Haydon; Biddlecomb v., App.	40	P.2d	873
Hayes; People v., App.	39	P.2d	213
Hazel; Knickrihm v., App.	40	P.2d	305
Hazel; Piola v., App.	40	P.2d	305
Hemet Home Builders Ass'n v. Wells, App.	39	P.2d	233
Herbert's of Los Angeles, Inc.; People v., App.	39	P.2d	829
Herzog; Crawford v., App.	40	P.2d	954
Hickey, Ex parte, App.	39	P.2d	869
Hickey Pipe & Supply Co. v. Fitzgerald, App.	39	P.2d	472
Hines v. Miller, App.	39	P.2d	427
Hollister Estate Co.; Union Sugar Co. v., App.	39	P.2d	254
Hoover; Bank of America Nat. Trust & Savings Ass'n v., App.	39	P.2d	884
Horne v. Rainey, App.	39	P.2d	481
Horton v. Stoll, App.	40	P.2d	603
Hotchkiss; Koeberle v., App.	40	P.2d	911
House v. Schmelzer, App.	40	P.2d	577
H. S. Crocker Co. v. Lake County, App.	40	P.2d	931
Hualde Ranch Co. v. Beebe, App.	40	P.2d	545
Hughes' Estate, In re, App.	40	P.2d	295
Hull v. Laugharn, App.	39	P.2d	478
Imperial Gypsum & Oil Corporation v. Chaplin, App.	40	P.2d	596
Industrial Accident Commission of California; Board of Education of City of Los Angeles v., App.	39	P.2d	521
Industrial Accident Commission; City of Long Beach v., App.	39	P.2d	850
Industrial Accident Commission; Earl Ranch, Limited, v., App.	39	P.2d	463
Industrial Accident Commission; Johnson v., Sup.	40	P.2d	518
Industrial Accident Commission; Lillibridge v., App.	40	P.2d	856
Industrial Accident Commission; Los Angeles County v., App.	39	P.2d	477
Industrial Accident Commission; National Automobile Ins. Co. v., App.	39	P.2d	477
Industrial Accident Commission; State Compensation Ins. Fund v., Sup.	39	P.2d	201
Industrial Accident Commission; State Compensation Ins. Fund v., App.	40	P.2d	277
Industrial Accident Commission; State Compensation Ins. Fund v., App.	40	P.2d	278
Industrial Accident Commission; State Compensation Ins. Fund v., App.	39	P.2d	870
Industrial Accident Commission; Wickstrom v., App.	39	P.2d	887
Ingly; People v., App.	39	P.2d	868
Irwin v. City of Los Angeles, App.	39	P.2d	851
Jackson's Estate, In re, Sup.	40	P.2d	505
Jacob; Abdallah v., App.	40	P.2d	918
Jacobs v. Norwich Union Fire Ins. Soc., App.	40	P.2d	899
Jacobson; Walsh v., App.	39	P.2d	455
James E. Granger, Inc.; Parker v., App.	39	P.2d	833
J. E. French Co.; Dingman v., App.	39	P.2d	826
Johanson v. Riverson County Select Groves, App.	40	P.2d	530
Johnson; Fullerton Oil Co. v., Sup.	39	P.2d	796
Johnson, In re, App.	40	P.2d	836
Johnson v. Gray, App.	40	P.2d	575
Johnson v. Industrial Accident Commission, Sup.	40	P.2d	518
Johnson v. Wilson, App.	40	P.2d	836
Jones v. Noble, App.	39	P.2d	486

	Vol.		Page
Jones' Estate, In re, App.	39	P.2d	847
J. S. Morgan & Sons v. Bradner, App.	39	P.2d	225
Julian v. Schwartz, Sup.	40	P.2d	818
Jurras; Petersen v., Sup.	40	P.2d	257
Kabisius v. Board of Playground and Recreation of City of Los Angeles, App.	39	P.2d	264
Kellenberg; Bank of America Nat. Trust & Savings Ass'n v., App.	40	P.2d	579
Kellett v. Kellett, Sup.	39	P.2d	203
Kellett v. Kellett, Sup.	39	P.2d	206
Kelsey; Gerson v., App.	40	P.2d	543
Kempton v. Appellate Division of Superior Court in and for Los Angeles County, App.	39	P.2d	846
Kern County Land Co. v. Railroad Commission of State of California, Sup.	39	P.2d	402
Kern Island Canal Co. v. Railroad Commission of State of California, Sup.	39	P.2d	402
Kerstens v. Pacific Gas & Electric Co., App.	39	P.2d	469
Kiekhoefer v. United States Nat. Bank, Sup.	39	P.2d	807
Killough v. Lee, App.	40	P.2d	897
Kinchloe v. Retail Credit Co., two cases, App.	39	P.2d	483
Kirby v. Bank of America Nat. Trust & Savings Ass'n, App.	40	P.2d	943
Kittle Mfg. Co. v. Speer, App.	39	P.2d	278
Klenzendorf v. Shasta Union High School Dist., App.	40	P.2d	878
Knickrihm v. Hazel, App.	40	P.2d	305
Koeberle v. Hotchkiss, App.	40	P.2d	911
Krumm; Birkhofer v., App.	40	P.2d	553
Krupin; Chauvin v., App.	40	P.2d	904
Kuhlemeier v. Los Angeles County, Sup.	40	P.2d	828
Lake County; H. S. Crocker Co. v., App.	40	P.2d	931
Lamb v. Belt Casualty Co., App.	40	P.2d	311
Lander; Stanley v., App.	39	P.2d	225
Landgraf v. Unrau, App.	39	P.2d	462
Lanterman v. Board of Medical Examiners of California, App.	40	P.2d	913
La Rinconada Country Club; Andersen v., App.	40	P.2d	571
Latter; Sproston v., App.	39	P.2d	266
Laugharn; Hull v., App.	39	P.2d	478
La Vina Land Co.; Cook v., App.	39	P.2d	458
Lawrence; Stumpf v., App.	40	P.2d	920
Lee; Killough v., App.	40	P.2d	897
Lennon v. Woodbury, App.	40	P.2d	292
Lesser v. Pomin, two cases, App.	39	P.2d	451
Lillibridge v. Industrial Accident Commission, App.	40	P.2d	856
Lincoln v. Superior Court in and for Los Angeles County, Sup.	39	P.2d	405
Liuzza v. Brinkerhoff, App.	39	P.2d	283
Livesay v. Deibert, App.	39	P.2d	466
Long Beach, City of v. Industrial Accident Commission, App.	39	P.2d	850
Loock v. Pioneer Title Insurance & Trust Co., App.	40	P.2d	526
Loop Bldg. Co. v. Fredenhagen, App.	39	P.2d	222
Los Angeles, City of v. Superior Court in and for Los Angeles County, Sup.	39	P.2d	401
Los Angeles County v. Industrial Accident Commission, App.	39	P.2d	477
Los Angeles County; Kuhlemeier v., Sup.	40	P.2d	828
Los Angeles Junk Co.; Mills v., App.	40	P.2d	285
Los Angeles News Pub. Co.; Misao Yoshimura Kurata v., App.	40	P.2d	520
Luton; Den v., Sup.	39	P.2d	418
McColgan v. Scoble, Sup.	40	P.2d	483
McCoy v. Northwestern Casualty & Surety Co., App.	39	P.2d	864
McDougall v. Williams, Sup.	39	P.2d	421
McDowell v. Snodgrass, App.	40	P.2d	569

	Vol.		Page
McGlashan; Brea v., App.	39	P.2d	877
McGuire; Southern California Roads Co. v., Sup.	39	P.2d	412
Machen; People v., App.	39	P.2d	893
McKeon v. Santa Barbara Polo Club, App.	40	P.2d	275
McKinley; People v., Sup.	39	P.2d	411
McLean; Squiar v., App.	39	P.2d	437
McLeod v. Reyes, App.	40	P.2d	839
McPherson; Securities Research Associates v., two cases, App.	40	P.2d	586
McQuate; People v., Sup.	39	P.2d	408
Mapes v. Williams, Sup.	39	P.2d	421
Marcus-Lesoine, Inc.; Briggs v., App.	39	P.2d	442
Market St. R. Co.; Bailey v., two cases, App.	40	P.2d	281
Market St. R. Co.; Elliott v., App.	40	P.2d	547
Markham v. Fralick, Sup.	39	P.2d	804
Marquez, Ex parte, App.	40	P.2d	886
Marsh v. State Bar of California, Sup.	39	P.2d	403
Martin v. Angel City Baseball Ass'n, App.	40	P.2d	287
Maryland Casualty Co.; Price v., App.	40	P.2d	593
Mascot Pictures Corporation v. Municipal Court of City of Los Angeles, App.	40	P.2d	272
Maurer; Callegari v., App.	40	P.2d	883
Maus v. Scavenger Protective Ass'n, App.	39	P.2d	209
Mayer v. State Bar of California, Sup.	39	P.2d	206
Mayers v. Frazier, App.	39	P.2d	429
Meldrum; People v., Sup.	39	P.2d	202
Mercantile Mortg. Co. v. Chin Ah Len, App.	39	P.2d	817
Mercantile Mortg. Co. v. Chin Jok, App.	39	P.2d	817
Mercedes Benz Co.; Constantian v., App.	39	P.2d	496
Mertz; People ex rel. Davidson v., Sup.	39	P.2d	422
Mielke; Cook v., App.	40	P.2d	301
Miller v. Fidelity & Deposit Co. of Maryland, App.	40	P.2d	951
Miller; Hines v., App.	39	P.2d	427
Miller & Lux v. California Farming Co., App.	40	P.2d	850
Mills v. Los Angeles Junk Co., App.	40	P.2d	285
Minehan v. Silveria, App.	40	P.2d	285
Misao Yoshimura Kurata v. Los Angeles News Pub. Co., App.	40	P.2d	520
Monolith Portland Cement Co.; Wyman v., App.	39	P.2d	510
Morales, Ex parte, App.	40	P.2d	870
Morcom v. San Francisco Shopping News Co., App.	40	P.2d	940
Morgan & Sons v. Bradner, App.	39	P.2d	225
Morris v. Cantlay & Tanzola, App.	39	P.2d	471
Morton; Haydel v., App.	39	P.2d	454
Morton; Sugaya v., App.	40	P.2d	581
Municipal Court of City of Los Angeles; Downs v., App.	40	P.2d	541
Municipal Court of City of Los Angeles; Mascot Pictures Corporation v., App.	40	P.2d	272
Musick; Baroni v., App.	39	P.2d	435
National Automobile Ins. Co. v. Industrial Accident Commission, App.	39	P.2d	477
National Thrift Corporation of America; Dolney v., App.	39	P.2d	277
National Union Assur. Soc.; Comegys v., App.	39	P.2d	861
Newman v. Steuernagel, App.	40	P.2d	925
Noble; Jones v., App.	39	P.2d	486
Nolan; Wheaton v., App.	39	P.2d	457
North v. Cecil B. De Mille Productions, Sup.	39	P.2d	199
Northern Counties Title Ins. Co.; Bourne v., App.	40	P.2d	583
Northwestern Casualty & Surety Co.; McCoy v., App.	39	P.2d	864
Norwich Union Fire Ins. Soc.; Jacobs v., App.	40	P.2d	899
Nulsen v. Nulsen, App.	39	P.2d	509
Nuttle; Security-First Nat. Bank v., App.	39	P.2d	475

	Vol.		Page
Nuttle's Estate, In re, App.	39	P.2d	475
Ohlson v. Frazier, App.	39	P.2d	429
Oliveria; Bettencourt v., App.	39	P.2d	243
Orange County; Associated Oil Co. v., App.	40	P.2d	887
O'Rourke; People v., App.	39	P.2d	819
Ounjuian's Estate, In re, App.	39	P.2d	427
Owl Drug Co.; Shaw v., App.	40	P.2d	588
Pacific Electric R. Co. v. Department of Motor Vehicles, Sup.	40	P.2d	820
Pacific Gas & Electric Co.; Kerstens v., App.	39	P.2d	469
Pacific Gas & Electric Co.; Ray v., two cases, App.	39	P.2d	812
Pacific Mut. Life Ins. Co. of California; Cobb v., App.	40	P.2d	574
Pacific Nat. Co. v. Southwest Finance Co. of California, App.	40	P.2d	862
Parker v. James E. Granger, Inc., App.	39	P.2d	833
Parker; People v., App.	40	P.2d	836
Pasadena City High School Dist.; Goodman v., App.	40	P.2d	854
Patek v. California Cotton Mills, App.	40	P.2d	927
Peabody v. City of Vallejo, Sup.	40	P.2d	486
Penfield v. Bennett Film Laboratories, App.	40	P.2d	587
People v. Adair, App.	39	P.2d	274
People v. Aguinaldo, App.	39	P.2d	505
People v. Agullana, App.	40	P.2d	848
People v. Anderson, App.	40	P.2d	270
People v. Banty, App.	39	P.2d	478
People v. Beal, App.	39	P.2d	504
People v. Bermijo, Sup.	40	P.2d	823
People v. Boyington, App.	39	P.2d	867
People v. Brickert, App.	39	P.2d	450
People v. Bruneman, App.	40	P.2d	891
People v. Carpenter, App.	40	P.2d	524
People v. Carr, App.	39	P.2d	463
People v. Collins, App.	40	P.2d	542
People v. Connor, App.	40	P.2d	316
People v. Currie, App.	39	P.2d	215
People v. De Vaughn, App.	39	P.2d	223
People v. Deysher, Sup.	40	P.2d	259
People v. Dorland, Sup.	40	P.2d	474
People v. Foster, App.	39	P.2d	271
People v. Hayes, App.	39	P.2d	213
People v. Herbert's of Los Angeles, Inc., App.	39	P.2d	829
People v. Ingly, App.	39	P.2d	868
People v. Machen, App.	39	P.2d	893
People v. McKinley, Sup.	39	P.2d	411
People v. McQuate, Sup.	39	P.2d	408
People v. Meldrum, Sup.	39	P.2d	202
People v. O'Rourke, App.	39	P.2d	819
People v. Parker, App.	40	P.2d	836
People v. Schneider, App.	39	P.2d	258
People v. Skelly, App.	40	P.2d	304
People v. Taylor, App.	40	P.2d	870
People v. Taylor, App.	40	P.2d	894
People v. Taylor, App.	40	P.2d	895
People v. Terman, App.	40	P.2d	915
People v. Thompson, App.	39	P.2d	425
People v. Valdez, App.	40	P.2d	592
People v. West, App.	40	P.2d	278
People ex rel. Chiropractic League of California v. Steele, App.	40	P.2d	959
People ex rel. Davidson v. Mertz, Sup.	39	P.2d	422
Petersen v. Jurras, Sup.	40	P.2d	257
Pettit; Democrat-Herald Pub. Co. v., App.	40	P.2d	584

	Vol.		Page
Phillips v. Bank of America Nat. Trust & Savings Ass'n, App.	40	P.2d	316
Phillips v. Chandler, App.	39	P.2d	516
Phillips v. Clifford F. Reid, Inc., App.	39	P.2d	512
Phillips v. Clifford F. Reid, Inc., App.	39	P.2d	515
Pierce v. Aufdemkamp, App.	40	P.2d	599
Pierre v. Great Atlantic & Pacific Tea Co. of Nevada, App.	40	P.2d	909
Pinckard; Colmar v., App.	39	P.2d	262
Piola v. Hazel, App.	40	P.2d	305
Pioneer Title Insurance & Trust Co.; Loock v., App.	40	P.2d	526
Policy Holders' Life Ins. Ass'n; Farrar v., App.	39	P.2d	229
Pomin; Lesser v., two cases, App.	39	P.2d	451
Preston; Stuart v., App.	39	P.2d	441
Price v. Maryland Casualty Co., App.	40	P.2d	593
Prudential Ins. Co. of America; Cochens v., App.	40	P.2d	902
Prudential Ins. Co. of America; Dark v., App.	40	P.2d	906
Purdy v. Bank of America Nat. Trust & Savings Ass'n, Sup.	40	P.2d	481
Railroad Commission of State of California; Kern County Land Co. v., Sup.	39	P.2d	402
Railroad Commission of State of California; Kern Island Canal Co. v., Sup.	39	P.2d	402
Rainey; Horne v., App.	39	P.2d	481
Ramish, Inc., v. Woodruff, Sup.	40	P.2d	509
Ranch, Limited, v. Industrial Accident Commission, App.	39	P.2d	463
Ray v. Pacific Gas & Electric Co., two cases, App.	39	P.2d	812
Redondo Improvement Co. v. City of Redondo Beach, App.	39	P.2d	438
Retail Credit Co.; Fink v., App.	39	P.2d	483
Retail Credit Co.; Kinchloe v., two cases, App.	39	P.2d	483
Reyes; McLeod v., App.	40	P.2d	839
Riverside County Select Groves; Johanson v., App.	40	P.2d	530
Rose; Crawford v., App.	39	P.2d	217
Rose; Crawford v., App.	40	P.2d	277
Rose; Hampton v., App.	39	P.2d	447
Rose; Hampton v., App.	39	P.2d	449
Roth, Ex parte, App.	39	P.2d	490
Rothschild; Smith v., App.	39	P.2d	464
Rozier, Ex parte, App.	40	P.2d	599
Ruckstell Corporation v. Great Lakes Aircraft Corporation, Sup.	40	P.2d	499
Rugen; Walling v., App.	39	P.2d	827
Sanborn v. Sanborn, App.	39	P.2d	830
San Francisco Shopping News Co.; Morcom v., App.	40	P.2d	940
San Pedro Lumber Co. v. Wilson, App.	40	P.2d	605
Santa Barbara Polo Club; McKeon v., App.	40	P.2d	275
Scavenger Protective Ass'n; Maus v., App.	39	P.2d	209
Scavenger's Protective Ass'n; De Martini v., App.	40	P.2d	317
Schmelzer; House v., App.	40	P.2d	577
Schneider; People v., App.	39	P.2d	258
Schnurr's Estate, In re, Sup.	39	P.2d	402
Schwartz; Julian v., Sup.	40	P.2d	818
Scoble; McColgan v., Sup.	40	P.2d	483
Scott v. California Farming Co., App.	40	P.2d	850
Seccombe v. Dionne, App.	40	P.2d	299
Securities Research Associates v. McPherson, two cases, App.	40	P.2d	586
Security-First Nat. Bank v. Nuttle, App.	39	P.2d	475
Senning v. Ward, App.	39	P.2d	847
Shasta Union High School Dist.; Klenzendorf v., App.	40	P.2d	878
Shaw v. Owl Drug Co., App.	40	P.2d	588
Sheridan; Vogel v., App.	40	P.2d	946
Shuey v. Bunney, App.	40	P.2d	859
Signal Oil & Gas Co.; Elsinore Oil Co. v., App.	40	P.2d	523

	Vol.		Page
Silveria; Minehan v., App.	40	P.2d	285
Skelly; People v., App.	40	P.2d	304
Slye v. Brock, App.	40	P.2d	290
Smith v. Hale, App.	39	P.2d	445
Smith v. Rothschild, App.	39	P.2d	464
Snodgrass; McDowell v., App.	40	P.2d	569
Soboslay's Estate, In re, App.	39	P.2d	871
Sondel v. Arnold, Sup.	39	P.2d	793
Southern California Roads Co. v. McGuire, Sup.	39	P.2d	412
Southern Pac. Co.; Haskins v., App.	39	P.2d	895
Southwest Finance Co. of California v. Adkisson, App.	40	P.2d	858
Southwest Finance Co. of California; Pacific Nat. Co. v., App.	40	P.2d	862
Speer; Kittle Mfg. Co. v., App.	39	P.2d	278
Spencer v. Beadle S. S. Co., App.	40	P.2d	273
Sproston v. Latter, App.	39	P.2d	266
Sproston's Estate, In re, App.	39	P.2d	266
Squiar v. McLean, App.	39	P.2d	437
Stanley v. Lander, App.	39	P.2d	225
Stansbury Contracting Co.; Central Const. Co. v., App.	40	P.2d	852
State Bar of California; Barton v., Sup.	40	P.2d	502
State Bar of California; Ewell v., Sup.	40	P.2d	264
State Bar of California; Marsh v., Sup.	39	P.2d	403
State Bar of California; Mayer v., Sup.	39	P.2d	206
State Compensation Ins. Fund v. Industrial Accident Commission, Sup.	39	P.2d	201
State Compensation Ins. Fund v. Industrial Accident Commission, App.	40	P.2d	277
State Compensation Ins. Fund v. Industrial Accident Commission, App.	40	P.2d	278
State Compensation Ins. Fund v. Industrial Accident Commission, App.	39	P.2d	870
Steckel; Cope v., App.	39	P.2d	482
Steckel; Cope v., App.	40	P.2d	901
Steele; People ex rel. Chiropractic League of California v., App.	40	P.2d	959
Steen; Clough v., App.	39	P.2d	889
Stein; Ex parte, App.	40	P.2d	934
Steuernagel; Newman v., App.	40	P.2d	925
Stewart v. Superior Court in and for Los Angeles County, App.	40	P.2d	529
Stoll; Horton v., App.	40	P.2d	603
Stone Drill Corporation v. Stoody Co., App.	40	P.2d	945
Stoody Co.; Stone Drill Corporation v., App.	40	P.2d	945
Strange v. Coryell, App.	40	P.2d	289
Stuart v. Preston, App.	39	P.2d	441
Stumpf v. Lawrence, App.	40	P.2d	920
Sturdevant v. Sturdevant, App.	39	P.2d	433
Sugaya v. Morton, App.	40	P.2d	581
Superior Court in and for City and County of San Francisco; Fuhrman v., Sup.	39	P.2d	802
Superior Court in and for City and County of San Francisco; Harrison v., App.	39	P.2d	825
Superior Court in and for City and County of San Francisco; Zellerbach v., App.	39	P.2d	252
Superior Court in and for Humboldt County; William Pitt White Estate Co. v., App.	39	P.2d	275
Superior Court in and for Los Angeles County; Axelson v., App.	39	P.2d	486
Superior Court in and for Los Angeles County; City of Los Angeles v., Sup.	39	P.2d	401
Superior Court in and for Los Angeles County; Lincoln v., Sup.	39	P.2d	405
Superior Court in and for Los Angeles County; Stewart v., App.	40	P.2d	529
Superior Court in and for Monterey County; Daily v., App.	40	P.2d	936
Superior Court in and for Napa County; Butler v., App.	39	P.2d	860
Superior Court of Los Angeles County; Colburn Biological Institute v., App.	40	P.2d	298

	Vol.		Page
Taylor; People v., App.	40	P.2d	870
Taylor; People v., App.	40	P.2d	894
Taylor; People v., App.	40	P.2d	895
Terman; People v., App.	40	P.2d	915
Tesluck v. Gromeeko, App.	40	P.2d	296
Tesluck v. Wells Fargo Bank & Union Trust Co., App.	40	P.2d	295
Thomas v. Thomas, App.	40	P.2d	581
Thompson; People v., App.	39	P.2d	425
Title Guarantee & Trust Co.; Curtis v., App.	40	P.2d	562
Tracy v. Brecht, App.	39	P.2d	498
Traeger; Beckjord v., App.	39	P.2d	523
Turner v. Donovan, App.	39	P.2d	858
Union Sugar Co. v. Hollister Estate Co., App.	39	P.2d	254
United States Nat. Bank; Kiekhoefer v., Sup.	39	P.2d	807
University City Syndicate; California Machinery & Supply Co. v., App.	39	P.2d	853
Unrau; Landgraf v., App.	39	P.2d	462
Vadnais v. Department of Motor Vehicles, App.	40	P.2d	559
Valdez; People v., App.	40	P.2d	592
Vila v. Brovelli, App.	39	P.2d	855
Vogel v. Sheridan, App.	40	P.2d	946
Wallace v. Board of Sup'rs of Alameda County, Sup.	39	P.2d	423
Walling v. Rugen, App.	39	P.2d	827
Walsh v. Jacobson, App.	39	P.2d	455
Ward; Senning v., App.	39	P.2d	847
Wells; Hemet Home Builders Ass'n v., App.	39	P.2d	233
Wells Fargo Bank & Union Trust Co. v. Broad, App.	39	P.2d	241
Wells Fargo Bank & Union Trust Co.; Tesluck v., App.	40	P.2d	295
West; People v., App.	40	P.2d	278
Westreicher, Ex parte, App.	39	P.2d	474
Wheaton v. Nolan, App.	39	P.2d	457
White Estate Co. v. Superior Court in and for Humboldt County, App.	39	P.2d	275
Wickstrom v. Industrial Accident Commission, App.	39	P.2d	887
Wilde; Hahn v., App.	39	P.2d	473
William Pitt White Estate Co. v. Superior Court in and for Humboldt County, App.	39	P.2d	275
Williams, Ex parte, App.	40	P.2d	890
Williams; Hall v., Sup.	39	P.2d	419
Williams; McDougall v., Sup.	39	P.2d	421
Williams; Mapes v., Sup.	39	P.2d	421
Wilson; Argue v., App.	40	P.2d	297
Wilson; Commercial Discount Co. v., App.	40	P.2d	594
Wilson; Johnson v., App.	40	P.2d	836
Wilson; San Pedro Lumber Co. v., App.	40	P.2d	605
Wilson v. Wilson, App.	39	P.2d	208
Wood; Babcock v., App.	39	P.2d	475
Woodbury; Lennon v., App.	40	P.2d	292
Woodruff; Adolph Ramish, Inc., v., Sup.	40	P.2d	509
Wyman v. Monolith Portland Cement Co., App.	39	P.2d	510
Zellerbach v. Superior Court in and for City and County of San Francisco, App.	39	P.2d	252



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39 PACIFIC REPORTER

SECOND SERIES

, Cal.2d 55

NORTH et al. v. CECIL B. DE MILLE PRODUCTIONS, Inc.

L. A. 13421.

Supreme Court of California.

Dec. 14, 1934.

1. Usury ⇐110

Receivers of corporation pendente lite could be joined with corporation in action to recover usurious interest paid by corporation, since both receivers and corporation had interest in subject-matter of action (Code Civ. Proc. § 378).

2. Pleading ⇐68

Complaint in action for recovery of usurious interest paid, which alleged on information and belief value of property conveyed for use of sums borrowed, *held* sufficient, where value of property was unknown to verifiers of complaint except by information furnished to them by others (Code Civ. Proc. § 446).

3. Usury ⇐111(3)

Complaint for recovery of usurious interest paid which alleged that transactions were loans and that leaseholds conveyed for use of money loaned had definite value on day each loan was made *held* not demurrable for failure to allege that defendant intended to consummate usurious transaction (Gen. Laws 1931, Act 3757).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Richard L. North and another, as receivers of the Elmer Company, Limited, and another against the Cecil B. De Mille Productions, Inc. From a judgment of dismissal, plaintiffs appeal.

Reversed.

Prior opinion, 34 P.(2d) 724.

Walter J. Little and W. Eugene Craven, both of Los Angeles, for appellants.

Neil S. McCarthy, Earl L. Banta, Harmel L. Pratt, and Howard P. Hall, all of Los Angeles, for respondent.

THOMPSON, Justice.

This action was commenced by the plaintiffs to recover from defendant usurious interest alleged to have been paid to it by the corporate plaintiff, and to collect treble damages therefor. Richard L. North and J. Grover Kelley, prior to the commencement of this action, had been appointed receivers for their coplaintiff, which was insolvent, in an action pending in the United States District Court, and had been authorized to maintain and prosecute this action. Both the receivers and the company are named as plaintiffs. The complaint is in four counts and alleges that between January 25, 1930, and November 6, 1930, the plaintiff corporation negotiated four different ninety-day loans from the defendant and transferred and conveyed to the defendant certain interests in leasehold estates for the use of the sums so borrowed for the period of ninety days. Each borrowing is made the subject of a different count, but in each case it is alleged "upon information and belief that the said property so conveyed to said" defendant was, on the day the loan was made, of the value of $15,000, although the conveyance in each instance is alleged to have been of an interest in a different leasehold. There is no direct allegation to the effect that the parties intended to consummate a usurious transaction or that the defendant knew the value of the leasehold or royalty interests conveyed to it.

The defendant demurred to the complaint upon two grounds, as follows: (1) Misjoinder of parties plaintiff for the reason that the receivers of the plaintiff corporation were joined with it in the action; and (2) that the complaint did not, nor did any of the counts, state a cause of action.

The demurrer was sustained with leave to amend. However, the receivers elected to stand upon their pleading, and judgment was rendered dismissing them from the action. The appeal is prosecuted from this judgment.

In support of the judgment the respondent asserts: (1) That there was a misjoinder of parties plaintiff; (2) that the allegations of value, being upon information and belief, are insufficient; and (3) that the complaint was defective for failing to directly allege an intent to enter into an usurious contract. Appellants, of course, insist that none of the contentions advanced by respondent is sound.

[1] Considering them in the order named, it must be acknowledged, under the authority of Scott v. Hollingsworth, 215 Cal. 314, 9 P.(2d) 836, 82 A. L. R. 995, that appellants were proper parties plaintiff. That action involved a complaint to recover usurious interest and was brought by receivers of the Julian Petroleum Corporation. As here, judgment went for defendant upon the theory that the receivers were not proper parties. The holding of this court was to the

contrary, and the judgment was reversed. Respondent argues, however, that, if the receivers were proper parties, the corporate plaintiff was not. But this does not necessarily follow. With respect to the title of receivers and of the persons or corporations whose property is placed in the hands of receivers, we read in Clark on Receivers (2d Ed.) vol. 1, p. 460: "A receiver pendente lite is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties as they may be determined by the judgment of the action." And on page 463 of volume 1 of the same authority we find this language: "When a receiver pendente lite is appointed, the legal title remains in the individual or corporation whose property is placed in the hands of a receiver. However, the receiver has complete dominion over the property, subject to the orders of the court; he holds it for the benefit of others; he has possession. All the title, if any, which remains in the individual or corporation is merely the formal legal title which is held by it in trust for the receiver, which title it could be compelled by the court at any time to convey to the receiver for the purposes of the trust. The receiver must therefore have the equitable title because the court has imposed on the property an equitable trust. And this is a qualified equitable title because it is the subject of an interlocutory decree." Manifestly, therefore, both the receiver and the corporation are interested in the subject-matter of the action and, under section 378 of the Code of Civil Procedure, may be joined as parties, even though the participation of both may not be necessary, a point not here decided.

[2] Nor do we think the complaint was vulnerable to the general demurrer because the value was alleged upon information and belief. It requires no argument to demonstrate the propriety of the allegation in so far as the appellants here are concerned. They came into the case long after the transactions were completed, and must of necessity rely upon information furnished to them by others. In so far as the plaintiff corporation is concerned, the complaint was verified by the secretary. It may be that the secretary had no opinion concerning the value of the interests transferred except that which came from others, i. e., information furnished by others. Under such circumstances it would be improper to require a verification of an allegation which could not be made. Section 446 of the Code of Civil Procedure was adopted for the express purpose of permitting an allegation to be verified upon information and belief rather than upon knowledge where the fact was not within the personal knowledge of the person sworn. In this connection it is not inappropriate to call attention to the fact that value, of the character of property here involved, is the subject of opinion rather than absolute knowledge—which is a further reason for the propriety of the form of the allegation.

[3] We have left the question of whether it was essential to allege directly that defendant intended to consummate a usurious transaction. The allegations leave no doubt concerning the nature of the transaction; i. e., that it was a loan. And we have pointed out allegations to the effect that the property had a definite value on the day each loan was made and that the property was conveyed to the defendant for the use of the money borrowed. Had the complaint alleged the payment of $15,000 in money instead of in property, no doubt would have existed with respect to the sufficiency of the allegation. Martin v. Kuchler, 212 Cal. 536, 299 P. 52; Wood v. Angeles Mesa Land Co., 120 Cal. App. 313, 324, 325, 7 P.(2d) 748. We see no reason for a different rule where the value of the thing transferred is sufficiently alleged.

In other words, the complaint makes the positive charge that the transactions were simple loans; hence, under the rule that the allegations stand admitted by the demurrer, if defendant exacted "money, goods or things in action," to employ the words of the Usury Law (Deering's Gen. Laws, 1931, Act 3757, p. 1908), in a "greater sum" or of a "greater value" than the permissible 12 per cent. per annum, it is guilty under the act of charging usurious interest. Martin v. Kuchler, supra. Those authorities which deal with transactions where it is doubtful whether the parties intended a loan, an exchange, or some other agreement, are not in point under the allegations of this complaint. In the class of cases just referred to the intent of the parties becomes an important element, as it does in all instances where the contract is not

usurious on its face. But here, if the value of the property conveyed to respondent was not sufficient to render the contract usurious or if there be other circumstances sufficient to take the contract as alleged out of the condemned class, we must hold that such matter must be raised by answer as a defense to the complaint.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.



2 Cal.2d 94

STATE COMPENSATION INS. FUND v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 15251.

Supreme Court of California.

Nov. 22, 1934.

Rehearing Denied Dec. 20, 1934.

Master and servant ⊂=367

Where deceased employee at time of his death was performing duties arising out of special employment distinct from his ordinary activities in which he was independent contractor, awarding compensation for death was proper.

In Bank.

Proceeding in certiorari by the State Compensation Insurance Fund against the Industrial Accident Commission and others to review an order of the Industrial Accident Commission awarding compensation for death.

Affirmed.

PER CURIAM.

The petition for a writ of review herein is denied.

An Application for Rehearing.

PER CURIAM.

The petition for rehearing herein is denied, for the reason that the deceased employee, at the time of his death, was performing duties arising out of a special employment; and that such special employment was distinct from his ordinary activities, in which he was an independent contractor.



2 Cal.2d 132

In re BISHOP'S ESTATE.

S. F. 15069.

Supreme Court of California.

Dec. 26, 1934.

Wills ⊂=166(1)

In proceeding to contest will for lack of testamentary capacity and for fraud and undue influence, evidence that proponent, a spiritualist, convinced decedent that deceased wife was urging him to join her and to make will in favor of proponent, *held* to sustain judgment denying probate.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

In the matter of the estate of Frank E. Bishop, deceased, in which Bessie Pugh and others filed a contest of the will, opposed by Gertrude Dickson. From judgment denying probate, proponent appeals.

Affirmed.

Roy Daily and Clifton Hildebrand, both of San Francisco (Thomas P. McCue, of San Francisco, of counsel), for appellant.

Reisner & Deming, of San Francisco, for respondents.

PER CURIAM.

This is a contest of a will. The testator committed suicide April 26, 1932, leaving a holographic will dated February 15, 1932. The said will, in proper form, made gifts of small cash sums to his sisters, and left the balance of the estate to Mrs. Gertrude Dickson. A contest was instituted by the sisters, who alleged that the testator lacked testamentary capacity and had executed the will as a result of fraud and undue influence. The case was tried before a jury, and a verdict was entered in favor of the contestants on all the issues. The court thereupon entered judgment denying probate. Prior motions on behalf of the proponent for directed verdict and judgment notwithstanding the

verdict were denied, and a motion for a new trial was likewise denied. This appeal followed.

A good deal of evidence was offered on behalf of both sides, and it would serve no purpose to review it in detail. The contestants presented testimony which gave substantial support to their contention that the proponent, a spiritualist, together with her husband, also a spiritualist, succeeded in making the decedent a regular attendant at their seances, convinced him that he was in communication with the spirit of his deceased wife, and produced spirit messages purporting to come from his wife, urging him to join her, and telling him to make his will in favor of Mrs. Dickson, so that she could use it in furtherance of the Spiritualist Church. A number of witnesses testified that decedent became wholly engrossed with spiritualism, and acted only in accordance with directions from his "guides," who appeared in spirit form at the seances. It is true that there were other witnesses who testified that the decedent appeared rational and able to take care of his business. However, we think that the record sustains the verdict.

The judgment is affirmed.



2 Cal.2d 52

PEOPLE v. MELDRUM.

Cr. 3793.

Supreme Court of California.

Dec. 13, 1934.

Forgery ⇐43

Exclusion of copy of corporation's bylaws, authorizing president to withdraw funds from corporate bank account without supporting signatures, from evidence in his trial for forgery by raising amount of check on such account, *held* prejudicial error (Pen. Code, § 470).

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

T. Ben Meldrum was convicted of forgery, and, from an order denying his motion for a new trial, he appeals.

Reversed.

Prior opinion, 32 P.(2d) 400.

S. S. Hahn, of Los Angeles, and W. O. Graf, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

In an information filed by the district attorney of Los Angeles county, the appellant was charged with the crime of forgery. He was tried and convicted, and appeals from the order denying his motion for a new trial.

The record discloses that appellant and one Frances M. Boon promoted a corporation known as the Hollywood Vogue, Inc. They, with three employees who apparently had no financial interest in the company, were named as directors in the articles of incorporation. There was an agreement between appellant and Mrs. Boon to the effect that neither should draw a fixed salary, but that each from time to time as business permitted should draw an equal amount. A bank account was opened with the Bank of America in the name of Hollywood Vogue, Inc. On the signature card filed with the bank is printed a copy of what purports to be a resolution adopted by the board of directors authorizing the establishment of the account and further authorizing the appellant as president and Mrs. Boon as vice president, or B. S. Duper as secretary, to withdraw corporate funds from the account. On the reverse side of the card appear the signatures of these corporate officers. During the course of the trial, a bank employee testified that two of the above signatures were required on all checks. However, this same witness identified other checks, introduced in evidence by the appellant, that had been recognized and cashed by the bank, though signed by the appellant alone.

On August 23, 1933, Mrs. Boon requested appellant to sign with her a check for $10 for her personal account. He agreed to this, provided she would in turn sign a check for a like amount payable to him. Two checks were thereupon drawn, each for $10, one payable to appellant and the other to Frances M. Boon. Before presenting his check for payment, appellant admittedly altered it so as to call for the payment of $50, and thereafter cashed it. This admitted act of altering and cashing the check as altered led to the charge of forgery of which appellant now stands convicted.

Section 470 of the Penal Code provides, in part, that "every person who, with intent to defraud, * * * alters * * * any * * *

check * * * or * * * passes * * * as true and genuine, any of the above-named * * * altered * * * matters, as above specified and described, knowing the same to be * * * altered * * * with intent to * * * defraud any person * * * is guilty of forgery." As is readily apparent from the section, the intent to defraud is an essential and important element of the offense. In the record now before us, the evidence addressed to this issue is in conflict. The prosecution offered in evidence the altered check and the signature card above referred to, and produced other testimony tending to indicate that the check had been altered without Mrs. Boon's knowledge or consent. The appellant took the stand, and testified that he had altered the check in order to cause his withdrawals to more nearly approximate those of Mrs. Boon, but declared that he did so in her presence without the intent to defraud and under the belief that he had authority so to do. In support thereof, he produced in evidence other canceled checks signed by him alone and drawn on the account of Hollywood Vogue, Inc., and in addition a canceled check signed by him as president and Mrs. Boon as vice president that passed unquestioned through the bank, though bearing an obvious alteration on its face. A penciled memorandum, signed by appellant and Mrs. Boon and bearing date March 6, 1933, was next offered by appellant and admitted in evidence by the court as having some bearing on the issue of intent. It reads in part: "Until such time as T. B. M. (appellant's initials) has been reimbursed for all moneys he has advanced to Hollywood Vogue, he may at any time draw checks for full amount thereof, to which I hereby give my full consent, provided sufficient funds are on deposit in the company account at that time. This also applies to money advanced to me personally." Appellant also offered in evidence what purported to be a copy of the by-laws of Hollywood Vogue, Inc., wherein he was authorized, as president thereof, to withdraw funds, without supporting signatures, from the corporate bank account. The proffered offer was rejected on the ground of immateriality. This ruling, in our opinion, constituted prejudicial error. The evidence directed to the issue of fraudulent intent being in sharp conflict and the bank having recognized other checks drawn by appellant alone, the trial court should have admitted in evidence a copy of the by-laws purporting to authorize appellant alone to draw on the corporate funds. Such authorization, if shown to the jury, undoubtedly would have had a material bearing on its disposition of the issue of intent, and might reasonably have caused it to determine that appellant, having assumed from such authorization that he alone had authority to draw corporate checks, had altered the same without intending to injure or defraud any one. The weight to be attached to such evidence was, of course, for the jury's determination.

Our conclusion makes it unnecessary to determine the question propounded by appellant, viz., whether "three directors, acting independently of the corporation, can by their declaration, written or otherwise, alter the by-laws of the corporation, or change the duties and responsibilities of the president of the corporation." Regardless of the solution of the foregoing query, the by-laws were admissible, as stated, as having some bearing upon the issue of intent.

The order denying a new trial is reversed.

We concur: LANGDON, J.; PRESTON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.



2 Cal.2d 45

KELLETT v. KELLETT.

L. A. 13200.

Supreme Court of California.

Dec. 11, 1934.

Rehearing Denied Jan. 10, 1935.

1. Affidavits ⇐18

As evidence, affidavit made on information and belief is hearsay and no proof of facts stated therein.

2. Divorce ⇐182

Husband's admission that he owned property worth $25,000, subject to $1,500 incumbrance on small portion thereof, and received salary of $550 per month, *held* sufficient to support order granting wife, suing for divorce, reasonable support and costs on appeal from order denying her new trial after decree for husband.

3. Divorce ⇐182

Granting of alimony and costs to wife pending appeal from order denying her new trial after decree for husband in her divorce action rests in trial court's sound discretion.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Divorce ⇐184(5)

Trial court's ruling on wife's application for alimony and costs pending appeal from order denying her new trial after decree for husband in her divorce action will not be disturbed by reviewing court, unless abuse of discretion is shown.

5. Divorce ⇐182

While trial court may allow wife costs and alimony pending appeal from judgment granting husband divorce, her right to prosecute appeal at his expense is not absolute.

6. Divorce ⇐184(1)

In passing on trial court's denial of wife's motion for costs on, and maintenance pending, appeal from order denying her new trial after decree for husband in her divorce action, Supreme Court may consider other proceedings before it relative to parties' marital and property rights.

7. Divorce ⇐182

Denial of wife's application for costs, attorneys' fees, and alimony, pending appeal from order denying her new trial after decree for husband in her divorce action, *held* within trial court's discretion, in view of history of litigation, results of which were uniformly unfavorable to wife.

8. Appeal and error ⇐713(1)

Matters improperly included in clerk's transcript, certified by trial judge as well as clerk, instead of reporter's transcript, may be considered by Supreme Court as properly part of record on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Marion Clara Kellett against Thomas N. Kellett. From an order denying plaintiff's application for costs, attorneys' fees, and alimony, pending her appeal from an order denying her a new trial after a final decree for defendant, plaintiff appeals.

Affirmed.

For prior opinion, see 26 P.(2d) 859.

L. H. Phillips, Chas. R. Thompson, C. C. Caswell, A. Edward Nichols, R. C. W. Friday, J. Paul Elliott, James R. Jaffray, and George D. Higgins, all of Los Angeles, Marion Kellett and Griffith Jones, of Los Angeles, for appellant.

Wm. M. Morse, Jr., Sidney A. Shoop, and C. S. Wagner, all of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal from an order denying appellant's application for costs on appeal, attorneys' fees, and alimony pendente lite. Plaintiff brought an action for divorce, and judgment therein was granted on the default of the defendant failing to answer. A property settlement between the parties was agreed upon, and this agreement was incorporated in and made a part of the interlocutory decree of divorce. Thereafter the plaintiff, who is the appellant herein, moved to set aside said interlocutory decree and property settlement under section 473 of the Code of Civil Procedure. This motion was denied, and on appeal the order of denial was affirmed. Kellett v. Kellett, 110 Cal. App. 691, 294 P. 755. After the affirmation of said order by the District Court of Appeal, the defendant in said action made application for a final decree, which application plaintiff opposed. Said application, together with plaintiff's objection thereto, came on for hearing, and was decided adversely to plaintiff. Plaintiff made a motion for a new trial, and, while the same was pending, applied to the court for costs and attorneys' fees for the prosecution of said motion and for support and maintenance. Upon the hearing of that application, the court ordered defendant to pay plaintiff the sum of $200 as and for attorneys' fees and costs of obtaining certain portions of the transcript to be used on said motion for a new trial. From this order the defendant appealed, and our information is that that appeal is now pending before the District Court of Appeal of the Second District. Notwithstanding that appeal, which stayed the order of the court directing defendant to pay said sum of $200 to plaintiff, plaintiff prepared and presented her motion for a new trial, which motion the court denied. From the order denying this motion the plaintiff has appealed, and this appeal, as we are informed, is now pending before the District Court of Appeal of the Second District. After the taking of this appeal from the order denying her a new trial, the plaintiff moved the trial court for an order for attorneys' fees, costs, and alimony pending said appeal, said attorneys' fees and costs to apply both for services and expenses of plaintiff in her appeal from said order denying her a new trial and in resisting defendant's appeal from the order directing him to pay plaintiff said sum of $200. The court denied this motion of plaintiff for attorneys' fees, costs, and alimony, and plaintiff appealed from the order denying said motion. This

appeal is now before us, and is the only matter which we have to consider at this time.

[1, 2] The evidence taken at the hearing of said motion was principally by means of affidavits. There was but slight, if any, conflict in this evidence. By affidavit, plaintiff showed her necessitous condition, and that she was without money either to support herself or to prosecute her appeal. The only denial of this evidence was the affidavit of defendant made upon information and belief. As evidence, an affidavit made upon information and belief is hearsay and no proof of the facts stated therein. 1 Cal. Jur. § 17, p. 672, and supporting authorities cited. As to defendant's ability to pay for plaintiff's support and the costs of her appeal, the evidence was also free from conflict. Defendant admitted that he was the owner of property of the value of $25,000, subject to an incumbrance of $1,500 on one small portion thereof. He also testified that he was in receipt of a salary of $550 per month. This showing was sufficient to support an order granting to plaintiff reasonable support and costs on appeal. In fact, it may be said that such evidence would ordinarily have compelled the granting of said order unless there were other facts and circumstances before the court which influenced its action and led it to a different conclusion.

[3-5] It is well settled that the granting of alimony and costs pending appeal rests in the sound discretion of the trial court and its action relative to an application therefor will not be disturbed by a reviewing court unless it is shown that the court has abused such discretion. Gay v. Gay, 146 Cal. 237, 79 P. 885. While it is within the power of a trial court after an appeal from a judgment granting the husband a divorce to allow to the wife costs and alimony pending the appeal (Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445), the right of the defeated wife to prosecute her appeal at the expense of her husband is not an absolute right. Stewart v. Stewart, 156 Cal. 651, 105 P. 955. Furthermore, it was held in that case (page 656 of 156 Cal., 105 P. 955, 957) that, "where the trial court is satisfied, from the record before it, that the proposed appeal is not undertaken in good faith, or with reasonable belief that it has merit (Gay v. Gay [146 Cal. 237, 79 P. 885], supra), the application should be denied."

[6, 7] In passing upon the trial court's denial of plaintiff's motion for costs on appeal and for maintenance pending appeal, it is proper to take into consideration, not only the particular action that was then before the court, but other proceedings before said court relative to the marital and property rights of the parties hereto. It is not necessary to here set forth in detail a statement of this extended and apparently bitter litigation which began soon after the marriage of these parties in 1925. It is sufficient to state that, in one way or in another, the issues growing out of plaintiff's attempt to set aside said divorce decree and to vacate the property settlement between herself and husband had, before the decision in the present proceeding, been before the trial court in four or five separate and distinct trials. In the trial of one of these former proceedings, the court spent eight or nine days and carefully reviewed every phase of plaintiff's claim to have the divorce and property settlement set aside. In that, as in all of the other of these proceedings, the trial court decided against the plaintiff and refused her any relief whatever. The trial court in passing upon plaintiff's motion for costs and alimony on appeal undoubtedly took into consideration the history of the litigation between the plaintiff and defendant and the fact that the result of said litigation had been uniformly unfavorable to plaintiff. With the record of all these proceedings before it, the trial court may well have questioned the good faith of the plaintiff in taking said appeal, or at least have been of the opinion that she had no reasonable belief in its merits. In these circumstances it was within its discretion to deny the application of plaintiff for funds to prosecute the appeal. The matter was so wholly in the discretion of the trial court that, in order to set aside its order refusing the application, a very strong case must be made out in favor of the plaintiff. We do not find the showing made by plaintiff sufficiently strong to warrant us setting aside the order of the trial court, and for that reason it should be affirmed.

[8] Plaintiff's motion to withdraw the record herein for correction is hereby denied. The error in the records of which plaintiff complains is that certain papers and other matters which should have been incorporated in and made a part of the reporter's transcript were omitted therefrom and were improperly included in the clerk's transcript. As the clerk's transcript was certified to by the trial judge as well as by the clerk, these matters improperly included in the clerk's transcript may be and were considered by us as properly a part of the record on appeal to the same extent and effect as if they had

been physically a part of the reporter's transcript.

The order appealed from is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.



2 Cal.2d 50

KELLETT v. KELLETT.

L. A. 14942.

Supreme Court of California.

Dec. 11, 1934.

Appeal and error ⊂=657(1)

Clerk's and reporter's transcripts, certified by trial judge, need not be returned to trial court for correction because of erroneous inclusion of certain orders and papers in clerk's, instead of reporter's, transcript, but Supreme Court may consider any matter in either transcript (Code Civ. Proc. § 953a).

In Bank.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Marion Clara Kellett against Thomas N. Kellett. Decree for defendant, and, from certain orders, plaintiff appeals. On plaintiff's motion to withdraw the record for the purpose of rearranging and amending the authenticative certificate.

Motion denied.

R. C. W. Friday, of Los Angeles, for appellant.

Wm. M. Morse, Jr., Sidney A. Shoop, Morse & Shoop, George R. Maury, and C. S. Wagner, all of Los Angeles, for respondent.

PER CURIAM.

Motion of plaintiff to withdraw the record in this case for the purpose of rearranging and amending the authenticative certificate thereupon on the ground that by inadvertence the orders appealed from and the papers used on the hearing resulting in said orders are found in the clerk's transcript instead of the reporter's transcript. An inspection of the purported clerk's transcript shows that a number of papers used on the hearing of the motions which resulted in the orders appealed from are contained and bound in what purports to be the clerk's transcript, and that these papers are not contained in the reporter's transcript filed herein. It appears further, however, that the purported clerk's transcript is certified to by the trial judge in the same manner in which said trial judge has certified to the reporter's transcript. This certificate in each instance meets the requirements of section 953a, Code of Civil Procedure. The judge's certificate to the clerk's transcript is unusual and is not required by any provision of law. However, as the complete record is now before the court in these two transcripts, and each of them bears the certificate of the trial judge as to its correctness, we think there is no need to have the transcripts returned for correction to the trial court, but that the court in passing upon the merits of said appeal may consider any matter found in either of said transcripts to all intents and purposes as if the same were contained in the reporter's transcript.

While this proceeding bears the same title and is between the same parties as (Cal. Sup.) 39 P.(2d) 203, this day filed, it is entirely different and separate from said last-named proceeding. A similar motion to the one involved herein was made in said cause which was denied upon the same ground as that upon which we have based the denial of the motion in the present proceeding.

The motion is denied.



2 Cal.2d 71

MAYER v. STATE BAR OF CALIFORNIA.

L. A. 14222.

Supreme Court of California.

Dec. 18, 1934.

1. Attorney and client ⊂=58

Attorney who solicited professional employment by sending post cards to other attorneys relative to Mexican divorces almost immediately after he was suspended for one year for advertising to procure divorces *held* guilty of unprofessional conduct warranting his disbarment (St. 1929, p. 1258, § 29; Code Civ. Proc. § 287, subd. 5; Pen. Code, § 159a).

2. Appeal and error ⊂=833(3)

That petition for rehearing was not filed by State Bar within 20 days after entry of order of suspension of attorney *held* not to de-

prive Supreme Court of power to grant rehearing, since court could vacate order of its own volition and thereby retain jurisdiction of proceedings for further consideration, regardless whether petition for rehearing was filed.

In Bank.

Proceeding by Joseph Mayer to review the action of the Board of Governors of the State Bar of California in recommending the disbarment of petitioner as an attorney at law.

Petitioner disbarred.

Prior opinion, 26 P.(2d) 9.

Joseph Mayer, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

CURTIS, Justice.

This is a proceeding instituted for the purpose of reviewing the action of the board of governors of the State Bar of California in recommending the disbarment of petitioner as an attorney at law of this state. The local administrative committee before whom the charges against petitioner were originally heard made its findings that the petitioner had violated section 29 of the State Bar Act (St. 1927, p. 42, as amended by St. 1929, p. 1258) by willfully breaching rule 2 of the Rules of Professional Conduct; that petitioner had committed acts involving moral turpitude, as defined by section 287, subdivision 5, of the Code of Civil Procedure, in the course of his activities as an attorney at law; and that petitioner had committed a misdemeanor in violating section 159a of the Penal Code of the state of California. The committee recommended his suspension from the practice of the law for one year. The board of governors adopted the findings of the local administrative committee, but made the recommendation to this court that petitioner be disbarred from the practice of the law.

Rule 2 of the Rules of Professional Conduct of the State Bar reads as follows: "A member of The State Bar shall not solicit professional employment by advertisement, or otherwise. This rule shall not apply to the publication or use of ordinary professional cards, or to conventional listings in legal directories." 204 Cal. xci. Section 287, Code of Civil Procedure, enumerates the causes for which an attorney may be removed, and subdivision 5 specifies: "For the commission of any act involving moral turpitude. * * *" Section 159a of the Penal Code reads as follows: "Whoever advertises, prints, publishes, distributes, or circulates, or causes to be advertised, printed, published, distributed, or circulated, any circular, pamphlet, card, hand-bill, advertisement, printed paper, book, newspaper, or notice of any kind, offering to procure or obtain, or to aid in procuring or obtaining, any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage or appear or act as attorney, counsel, or referee in any suit for alimony or divorce, or the severance, dissolution, or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. * * *"

When this proceeding was first before us for consideration, we were of the opinion that the findings of the local administrative committee were supported by the evidence presented in the record, but, in the hopes that the petitioner might be made to realize the seriousness of his offense through the imposition of a lesser penalty than that recommended by the board of bar governors, we made our order that petitioner be suspended for one year beginning on the thirtieth day from and after the filing of the order. Said order was filed October 23, 1933.

[1] Thereafter the State Bar filed its petition for a rehearing asking the court to reconsider and recall its former order and to impose the penalty of disbarment upon petitioner. This petition for a rehearing was based upon the fact that it had come to the knowledge of the State Bar that petitioner, instead of refraining from the practices which had called forth the censure of the State Bar and this court, had engaged in more gross and glaring violations of the rules of professional conduct. In substantiation of said fact, there was presented to this court at least eighty post cards, addressed to various attorneys in Los Angeles, with every indication that the entire list of attorneys of said city had been circularized, which on their face show a flagrant violation by petitioner of rule 2 of the Rules of Professional Conduct. Petitioner's action, moreover, falls squarely within the prohibition of section 159a of the Penal Code, making it a misdemeanor to advertise to procure divorce. Said post cards read as follows:

"For Attorneys Only.

"New Mexican Divorce Law

"No Actual Residence Requirement

"Free Extract to Lawyers

"We have in our organization Joseph Mayer, an American, who is both a Mexican &

American Lawyer, and has practiced Twenty Years

"Also an Ex Federal Judge of Mexico

"Reference: State National Bank, El Paso.

"Dependable Prompt Service

"Joseph Mayer & Associates

"Mail Address

"P. O. Box 737. El Paso, Texas.

"Free information also on any other legal matter in Mexico or Texas."

Petitioner does not dispute the fact that such post cards were sent by him, but claims that such conduct does not warrant disbarment. If the respect of the people in the honor and integrity of the legal profession is to be retained, both lawyers and laymen must recognize and realize the fact that the legal profession is a profession and not a trade, and that the basic ideal of that profession is to render service and secure justice for those seeking its aid. It is not a business, using bargain counter methods to reap large profits for those who conduct it. The blatant methods and the offensive type of advertising used by petitioner are utterly intolerable. Such methods cast discredit, not only upon the petitioner himself, but upon every member of the legal profession. Such advertising is not only contrary to the ethics of the profession, but is repugnant to all canons of good taste, and is made a crime by the statutes of this state. Section 159a, Pen. Code.

Petitioner's argument that the post cards were addressed only to attorneys, and therefore do not fall within the prohibition of section 159a of the Penal Code, is merely sophistic quibbling, and merits no discussion.

[2] In answer to petitioner's objection that the court was without power to grant the rehearing at the request of the State Bar, inasmuch as said petition for rehearing was not filed within twenty days after the entry of the order of suspension, we need only call attention to the fact that, regardless of whether or not any petition for a rehearing has been filed, the court may of its own volition vacate and set aside its former judgment, thereby retaining jurisdiction of said proceedings for further consideration and appropriate action. Other objections of petitioner to the validity of the proceedings are equally without merit.

We are of the opinion that the conduct of the petitioner in sending out the above-described post cards, almost immediately after the making of the former order of suspension and before said order became final, demonstrates the complete unfitness of petitioner to continue as a member of the State Bar of California.

It is therefore ordered that the petitioner, Joseph Mayer, be, and he is hereby, disbarred from the further practice of law in this state as an attorney and counselor, and that his name be, and it hereby is, stricken from the roll of attorneys and counselors at law of the state of California.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.



3 Cal.App.2d 125

WILSON v. WILSON.

Civ. 9025.

District Court of Appeal, Second District, Division 2, California.

Dec. 17, 1934.

1. Husband and wife ⇐49½(8)

Husband's possession of bonds at time of marriage and continued possession at all times thereafter were prima facie evidence of ownership, as against wife's claim of gift (Code Civ. Proc. § 1963).

2. Appeal and error ⇐1011(1)

In wife's action for husband's alleged conversion of bonds where evidence as to whether husband had made gift of bonds to wife was in substantial conflict, trial court's finding for husband *held* conclusive (Code Civ. Proc. § 1963).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Elizabeth H. Wilson against Herbert D. Wilson. Judgment for defendant, and plaintiff appeals.

Affirmed.

Barton Darlington and John E. Carson, both of Los Angeles, for appellant.

L. G. Campbell, of Los Angeles, for respondent.

CRAIL, Justice.

The plaintiff sued her husband for damages for the conversion of certain bonds.

The trial court found that the bonds belonged to defendant and entered judgment for him. Appellant says in her brief: "The main and only question in this appeal is the ownership of said bonds." A more accurate wording of the question would be: "Is there any substantial evidence to sustain the finding of the trial court as to the ownership of said bonds?"

[1, 2] The bonds belonged to the defendant at the time the plaintiff married him and they remained in his possession at all times. Throughout the trial defendant consistently denied that he made a gift of the bonds to appellant and denied that he ever made delivery of the bonds to her, and he denied most of the conversations and the circumstances in evidence upon which the plaintiff relied to establish ownership. Furthermore, the possession of the property by the defendant was prima facie evidence of his ownership. 21 Cal. Jur. 650; Code Civ. Proc. § 1963. Obviously there is a substantial conflict in the evidence, and this court must not concern itself as to where the preponderance lies.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



2 Cal.App.2d 624

MAUS v. SCAVENGER PROTECTIVE ASS'N.

Civ. 9152.

District Court of Appeal, First District, Division 1, California.

Dec. 6, 1934.

1. Automobiles ⇐208

That motorist first entering intersection has right of way does not justify motorist disregarding obvious dangers (St. 1931, p. 2126, § 131 (a).

2. Automobiles ⇐208

That motorist having right of way by reason of first reaching intersection exceeds permitted speed constitutes negligence which, if proximate cause of injury, will bar recovery (St. 1931, pp. 2120, 2126, §§ 113 (a, d), 131 (a).

3. Trial ⇐296(3, 4, 5)

In automobile collision case, instruction that defendant motorist was liable for any act or omission on his part which was negligent *held* not error, where instruction did not purport to contain all elements necessary to recovery, and jury were fully instructed elsewhere on proximate cause and contributory negligence.

4. Appeal and error ⇐996

In automobile collision case in which evidence was sufficient to support inference that plaintiff's negligence was not proximate cause of injuries, appellate court would not review such finding, although in its judgment opposite inference was equally justifiable, nor would it pass upon weight or preponderance of evidence.

5. Automobiles ⇐168(2)

Motorist is not relieved from liability in automobile collision case because he is not exceeding specific speed limit (St. 1931, p. 2120, § 113 (d).

6. Automobiles ⇐168(1)

Operation of automobile in excess of speed limit, or in violation of requirement that vehicle be driven at careful and prudent speed with due regard to traffic, constitutes negligence which, if proximate cause of injury to another who was not contributorily negligent, would give injured party right to recover (St. 1931, pp. 2120, 2126, §§ 113 (a, d). 131 (a).

7. Trial ⇐241

Instruction in language of act is not error.

8. Trial ⇐256(10)

Instruction in automobile collision case that it is lawful for motorist to drive at speed not exceeding 15 miles per hour in traversing intersection, where motorist's view is obstructed, *held* not error, although motorist did not have right under all conditions to travel at that speed, where defendant did not request more specific instructions (St. 1931, p. 2120, § 113 (b).

9. Negligence ⇐1

Negligence is relative to some circumstance of time, place, or person, and what would be due care under one set of circumstances would be negligence in changed circumstances.

10. Automobiles ⇐246(44)

In automobile collision case, in which truck with smoothly worn hard rubber tires approached intersection on wet pavement at speed in excess of legal limit, instruction that operation of motor vehicle on public highway was unlawful, unless vehicle was in such safe condition mechanically that its

operation would not endanger life of driver or lives of occupants of other vehicles on highway, *held* proper (St. 1931, p. 2115, § 93½).

11. Trial ⇐296(11)

Damage instruction which did not state that award should be limited to amount which would compensate for detriment proximately caused *held* not error, where other instructions charged that verdict should be controlled wholly by evidence and law, and that damages for permanent injury must be based upon evidence showing with reasonable certainty that such consequences would ensue from original injury.

12. Damages ⇐37

Commission salesman who suffered sacroiliac strain could recover as special damages commissions lost while he was disabled, although exact computation of such loss could not be made.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Theodore J. P. Maus against the Scavenger Protective Association. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

Edwin T. McMurray, of San Francisco, for respondent.

PER CURIAM.

An action to recover damages for personal injuries alleged to have been caused by defendant's negligence.

The suit arose out of a collision between an automobile driven by plaintiff and a truck driven by defendant's servant. At about 8 o'clock a. m. on October 30, 1931, the plaintiff was driving east along Harrison street in San Francisco. As he approached its intersection with Sixth street, defendant's truck also neared the intersection from the north along the latter street. Plaintiff claimed damages generally for personal injuries and medical expenses, and special damages for loss of earnings for a period during which he was incapacitated. The defendant denied negligence on its part, and alleged that plaintiff's injuries were due to his contributory negligence. A jury returned a verdict in the sum of $4,250, and defendant has appealed. As grounds therefor it is claimed that the evidence shows contributory negligence as a matter of law, and that certain of the court's rulings and instructions were prejudicially erroneous.

[1, 2] The plaintiff testified that his car entered the intersection first and was traveling between 15 and 20 miles an hour; that defendant's truck, which approached from the left, was traveling at from 20 to 30 miles an hour. Various estimates within these limits of the speed of the respective vehicles were given by other witnesses. There was also testimony that the pavement was wet. According to the driver of the truck, its tires, which were of solid rubber, were worn quite smooth, and, when he applied the brakes in an effort to stop, the truck skidded and the collision followed. The fact of skidding was also testified to by others. The parties agree that the speed limit at the intersection was 15 miles an hour, and that both vehicles were exceeding this limit. Plaintiff, however, was the first to enter, and consequently had the right of way. California Vehicle Act, § 131, subd. (a), St. 1923, p. 560, § 131 (a), as amended by St. 1931, p. 2126. This would, of course, not justify him in disregarding an obvious danger (Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045); and the fact that he was exceeding the permitted speed constituted negligence which, if it proximately contributed to his injuries, would bar a recovery (Burtt v. Bank of California, etc., 211 Cal. 548, 296 P. 68). It is the duty of the operator of a vehicle to drive at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, California Vehicle Act, § 113, subd. (a), St. 1923, p. 553 § 113 (a), amended by St. 1931, p. 2120. We have referred to the fact that the pavement was wet and that the tires of the truck were worn and smooth. In addition, the truck was moving at a speed which not only exceeded that permitted by statute but, in view of the condition of the surface of the street and of the tires, would have justified the jury in concluding that this in itself was careless and imprudent. Plaintiff's car was struck near its rear, and we cannot say that the collision was necessarily due to the fact that he was exceeding the speed limit.

[3] An instruction was given which, after referring to the driver of the truck, read in part as follows: "* * * The defendant, Scavenger Protective Association, is liable and responsible for any act or omission on its part which you believe from the evidence was negligent, if you believe there was any such

act or omission." Defendant urges that the instruction was in effect a formula instruction, and was invalid, in that it did not require that the negligence of said defendant's employee should be a proximate cause of the injury and did not consider the negligence of plaintiff.

The instruction did not purport to contain all the elements necessary to recovery. The jury was fully instructed elsewhere on the subjects of proximate cause and contributory negligence, and the instruction was consequently within the rule declared in Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237.

Excessive speed at the intersection did not under the statute constitute negligence as a matter of law (California Vehicle Act, § 113, subd. (d), and it has been held that the fact that plaintiff under conditions similar to those in the present case was traveling three miles an hour in excess of the speed limit did not, in view of the excessive speed of the defendant, necessarily bar a recovery, and the question whether plaintiff's negligence was a proximate cause of his injury was one for the jury, which could reasonably have concluded that the sole proximate cause thereof was the negligence of the defendant and that the plaintiff would not have escaped had he been traveling within the speed limit. Skaggs v. Wiley, 108 Cal. App. 429, 292 P. 132. See, also, Godeau v. Levy, 72 Cal. App. 13, 236 P. 354.

[4] The circumstances disclosed by the evidence were sufficient to support the inference that plaintiff's negligence, if any, was not the proximate cause of his injuries, and an appellate court will not review such a finding, although in its judgment the opposite inference was equally justifiable, nor will it pass upon the weight or preponderance of the evidence. 2 Cal. Jur. Appeal and Error, §§ 549, 550, p. 935; Packer v. Wagner, 109 Cal. App. 26, 292 P. 523.

[5, 6] Complaint is made of an instruction quoting the provisions of the California Vehicle Act respecting the right of way at intersections and the requirement that the driver of a vehicle drive the same at a careful and prudent speed, having due regard to the traffic, surface, and width of the highway (California Vehicle Act, §§ 113, 131), and which concluded with the statement that a violation of either of these provisions would constitute negligence which, if it proximately caused injury to another, who was not also guilty of negligence proximately contributing to the injury, would give the latter a right to recover. Defendant claims that the instruction is erroneous, in that subdivision (d) of section 113 of the California Vehicle Act provides that the operation of a vehicle at a speed in excess of the miles per hour set forth in subdivision (b) of the same section shall not constitute negligence as a matter of law.

It is the rule that the driver is not relieved from liability merely because he is not exceeding the specific speed limit (Benjamin v. Noonan, supra; Bush v. Southern Pacific Co., 106 Cal. App. 101, 289 P. 190); and subdivision (b) of section 113 of the act, which provides that it shall be lawful for the driver of a vehicle to drive the same at a speed not exceeding that permitted by the paragraphs of said subdivision, also provides that the same shall be "subject to the provisions of subdivision (a) of this section" which requires that a vehicle shall be driven "at a careful and prudent speed * * * having due regard to the traffic, surface and width of the highway, * * *" and that "no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." Subdivision (d) of the section refers only to speed in excess of that permitted by subdivision (b) of this section, and not to cases where, in violation of subdivision (a) of the section, a vehicle has not been driven in a careful and prudent manner, or has been driven at such a speed as to endanger the life, limb, or property of another. The latter facts, if found, would constitute negligence (Benjamin v. Noonan, supra), and the jury was properly instructed accordingly. The other elements necessary to recovery, viz., proximate cause and lack of contributory negligence, were, as stated, fully covered elsewhere.

The portion of the instruction as to the right of way at intersections properly stated the provisions of subdivision (a) of section 131 of the act; and the legal effect of violations of this section is in no way limited by subdivision (d) of section 113 of the act. The instruction was substantially correct.

[7, 8] This was followed by an instruction that the act provides that "it is lawful for the driver of a motor vehicle to drive at a speed not exceeding fifteen miles per hour in traversing an intersection of highways where the driver's view is obstructed"; further, that it was conceded that the view was obstructed at the intersection and that "the lawful speed * * * for this intersection is fifteen miles an hour." An instruction in the language of the statute is not error (Garrison v. Pearlstein, 68 Cal. App. 334, 229 P. 351); and while, as above stated, the provision quoted does not

give a motorist the right under all conditions to travel at that speed, the instruction was correct so far as it went; and, if it failed to state a proper qualification or limitation, it was the defendant's duty to request a more specific instruction. O'Connor v. United Railroads, 168 Cal. 43, 141 P. 809; Western States Gas, etc., Co. v. Bayside Lumber Co., 182 Cal. 140, 187 P. 735.

[9, 10] The jury was also instructed "that at the time of the accident involved in this case the Vehicle Act * * * made it unlawful for any person to operate a motor vehicle upon any public highway unless such motor vehicle was in such safe condition mechanically that its operation would not endanger the life of the driver or the lives of occupants of the vehicle or of other persons upon the highway." The instruction was stated in the language of section 93½ of the California Vehicle Act (St. 1923, p. 517, § 93½, as added by St. 1931, p. 2115), and it has been held that it is the duty of one operating a motor vehicle to see that it is so equipped in order that it may at all times be under control and not become a menace to other traffic on the highway. Rath v. Bankston, 101 Cal. App. 274, 281 P. 1081; Silvey v. Harm, 120 Cal. App. 561, 8 P.(2d) 570. Negligence is always relative to some circumstance of time, place, or person, and what would be due care under one set of circumstances would be negligence in changed circumstances. Smith v. Whittier, 95 Cal. 279, 30 P. 529; McGraw v. Friend & Terry Lumber Co., 120 Cal. 574, 52 P. 1004. The evidence of the condition of the tires, the speed of the truck, and the surface of the pavement justified the instruction; and the jury might reasonably have concluded that the operation of the truck on a wet and slippery pavement in the manner shown constituted negligence.

The jury was further told that they might award damages for permanent injuries if they found that such was the fact, and that, if they found for plaintiff, "such sum should be awarded as in your best judgment will fairly and fully compensate him for any injuries received * * * not exceeding the sum claimed in the complaint."

Defendant claims that there was no evidence of permanent injuries. One of the injuries complained of was a sacroiliac strain or sprain. This, physicians testified, might last for months or years and be a source of constant pain, which would affect the plaintiff's ability to attend to business.

[11] The further objection is made that the instruction omitted the requirement that the award should be limited to an amount which would compensate for the detriment proximately caused, and permitted the jury to make an award based upon sympathy.

They were elsewhere charged that they were not to be in any way swayed by sympathy, but that their verdict should be controlled wholly by the evidence and the law; further, that damages for permanent injury must be based upon evidence showing with reasonable certainty that such consequences will ensue from the original injury. This, we think, was sufficient. See Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

[12] Plaintiff alleged, and was permitted over objection to testify, that he had suffered special damages in the sum of approximately $1,200, due to his inability during a period following his injury to carry on his business; and the jury were instructed that they might consider this as an element of damage in case they found for the plaintiff.

He testified that he was a salesman working on commissions, which were lost while he was disabled; further that, due to his inability to visit his customers, he received fewer orders for goods, and on that account his earnings were less than he had averaged during corresponding periods in previous years in the same territory. Defendant relies in part on cases where damages to businesses involving investments of capital were denied in actions for personal injuries. Here, however, while plaintiff kept a business office in which was a storeroom, and employed a stenographer, unlike the cases referred to, no capital investment was shown. He testified to his sales during corresponding periods in 1928, 1929, and 1930 as compared with those of 1931, and the difference in his earnings based upon commissions, the rate being the same each year. The right to recover such losses as special damages is well settled (Bonneau v. North Shore R. Co., 152 Cal. 406, 93 P. 106, 125 Am. St. Rep. 68; Shaw v. Southern Pacific R. Co., 157 Cal. 240, 242, 107 P. 108; Hollander v. Wilson Estate Co., 214 Cal. 582, 7 P.(2d) 177; Shurtleff v. Wynns, 114 Cal. App. 653, 300 P. 890); and a defendant is not to be relieved from liability merely because the circumstances are such that an exact computation cannot be made (Hanlon Drydock & Shipbuilding Co. v. Southern Pacific Co., 92 Cal. App. 230, 268 P. 385). Here the evidence showed with a reasonable degree of certainty

the loss which plaintiff suffered in this respect.

The conclusions of the jury were fairly supported by the evidence, and no error has been shown which would justify a reversal.

The judgment is affirmed.



3 Cal.App.2d 59

PEOPLE v. HAYES.

Cr. 2608.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1934.

1. Criminal law ⇐576(5)

Where information was filed on April 18, 1934, and second amended information was filed on May 23, 1934, when case was called for trial, at which time defendant was arraigned on second amended information, continuance of case to June 25, 1934, on which date trial was had, *held* not to entitle defendant to dismissal on ground that he was not tried within statutory time, where defendant made no objection to continuance nor to his attorney's waiver of statutory time (Pen. Code, § 1382, subd. 2).

2. Criminal law ⇐1202(1)

Assault and battery to commit robbery is felony, but prior conviction thereof cannot be counted as part of foundation for adjudging that offender is habitual criminal (Pen. Code, §§ 644, 664, subd. 1).

3. Criminal law ⇐1202(3)

In view of fact that larceny in Illinois is grand larceny, if property stolen exceeds value of $15, while in California property must be of value to exceed $200, mere proof that person in Illinois was convicted of larceny is insufficient to permit consideration of such conviction in determining whether offender is habitual criminal (Pen. Code, §§ 487, 644, 668).

4. Criminal law ⇐1202(7)

Where judgment of conviction recited that defendant had been convicted and imprisoned for four prior felonies which, if enforced, would have deprived defendant of right to parole, whereas defendant had suffered only two prior convictions and therefore had right to apply for parole after serving 12 years of life sentence, judgment was affirmed, except as to portion regarding prior convictions which was reversed, with instructions for resentence (Pen. Code, § 644).

Appeal from Superior Court, Los Angeles County; J. Marion Wright, Judge pro tem.

George E. Hayes was convicted of grand theft from the person, prior convictions being charged, and he appeals.

Judgment affirmed in part, and reversed in part, and case remanded, with instructions.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

YORK, Justice.

In a second amended information, the defendant was charged with grand theft from the person, together with four prior convictions of felonies. Defendant admitted the prior convictions and by verdict of the jury was found guilty as charged in the information. He now appeals from the judgment of conviction and from the order denying his motion for a new trial. Apparently the main points involved in this appeal are: (1) Whether or not defendant as a matter of right was entitled to have the proceedings against him dismissed under Penal Code, § 1382, subd. 2; and (2) whether the judgment sentencing him to life imprisonment was proper.

Penal Code, § 1382, subd. 2, reads as follows:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * *

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

It appears from the record that an information was filed on April 18, 1934, charging defendant with grand theft from the person, and on April 25, 1934, an "amended information" was filed charging defendant with the same crime as set out in the original information, and in addition four prior convictions of felonies. On April 27 a plea of not guilty to the amended information and not guilty of the prior convictions was entered and the case was set for trial for May 23,

1934. On the latter date, when the case was called for trial, a "second amended information" was filed. This amended information differs from the first amended information in that the dates of the convictions of two of the prior felonies were changed and an allegation as to one felony was added to the effect that defendant had served a term of imprisonment therefor. The defendant was arraigned on the day the second amended information was filed and entered a plea of not guilty and denied the prior convictions, whereupon the trial of the case was continued to June 25, 1934, "for the reason that the defendant's counsel is actually engaged in trial of another case." On June 25, 1934, when the case was called for trial and the jury sworn, the defendant moved to dismiss the case on the ground he had not been brought to trial within sixty days of the filing of the information, which motion was denied.

When the trial was continued from May 23d to June 25th, the following took place:

"The Court: (Reading) 'The Court: Well, Mr. Sanson says he can't, obviously, try the case that day, and asks that it go over for trial.' Then there is a discussion as to how long, and the court says: 'We can set it on the 15th unless that is the day you are actually leaving. Mr. Sanson: There is the Perry Gonzales trial that day in Department 43. The Court: When will you return? Mr. Sanson: June 15th. Under the circumstances I will leave it to you to put it where you think best to everyone's satisfaction. I will take care of it myself or have someone else do it. The Court: How long will you be gone? Mr. Sanson: One week, to June 25th. The Court: June 25th, is that satisfactory? Mr. Broker: Yes, your Honor. The Court: Do you waive the statutory time? Mr. Sanson: I do. Are you satisfied to have your trial June 25th?'—apparently referring to the defendant—'The Defendant: I would prefer to have the trial as soon as possible. Mr. Sanson: Are you satisfied, however, to have it tried on that day? The Defendant: If I can't save time, I would like to finish it up. The Court: Let's see whether it passes the statutory period. Mr. Sanson: April 4th he was held to answer. The Court: He pleaded on the 27th. Mr. Sanson: He pleaded on the 27th of April.' Of course, at that time this amended information had not been filed. 'The Court: I take it, so long as we bring it to trial prior to June 27th we are within the statute? Mr. Sanson: I think that is true. The Court: In any event, the record shows the continuance is at the request of the defendant, to suit his convenience and necessity. June 25th; all witnesses in the case'—and so forth."

[1] It seems to us that the continuance was a reasonable one under the circumstances as outlined. The defendant was being defended by a deputy public defender, who was actually engaged in the trial of a case; the second amended information was filed on the day of arraignment and the day upon which the court granted the continuance. It is true that the defendant stated, at the time the case was continued to June 25th, that he preferred to have the trial as soon as possible, and that, if he could not save time, he would like to finish it up, but he made no direct objection to the continuance to June 25th, and no objection when his attorney waived the statutory time within which he should be tried. We believe this amounted to an acquiescence by the defendant, and that there was no error on the part of the trial judge in denying the motion to dismiss.

The appellant contends that the court erred in sentencing him to prison "for the term of his natural life" and adjudging him "to be an habitual criminal," and urges that the verdict fixes the punishment, and the number of prior convictions also fixes the definite punishment and sentence, but that the court is without power to fix the punishment definitely in the judgment.

The complaint charged defendant with four prior convictions and imprisonments in state prisons as follows: (Indiana) assault and battery to commit robbery; (Tennessee) robbery from the person; (Louisiana) larceny from the person; (Illinois) larceny. Appellant admits that "larceny from the person" is grand larceny both in Louisiana and in California. Appellant contends that "robbery from the person" is not a crime in California. It is "robbery" both in Tennessee and in California.

[2] "Assault and battery to commmit robbery" is a felony in Indiana. In California it is a felony, because necessarily it is an attempt to commit robbery, punishable as provided in Penal Code, § 664, subd. 1. But it is not one of the list of crimes specified in Penal Code, § 644, whereof prior conviction may be counted as part of the foundation for adjudging that the offender is an habitual criminal.

[3] Larceny in Illinois is grand larceny, if the property stolen exceeds the value of $15, or if the property is stolen from the person of another. But the California law is dif-

ferent in this, that in California the value test is that the property, in order to make the offense grand theft, must be of a value to exceed $200. Penal Code, § 487. The mere proof that a person in the state of Illinois was convicted of larceny is not proof that the value of the property stolen was more than $200, nor is it proof that there was any larceny by taking from the person of another. Therefore in this case there is no evidence that there was any conviction of the defendant of the crime of grand theft committed in Illinois, so as to bring the present case within the provisions of sections 668 and 644 of the Penal Code of California.

[4] From the foregoing we conclude that the defendant herein was shown to have been formerly convicted of only two offenses coming within the provisions of section 644 of the Penal Code, viz., grand larceny in the state of Louisiana and robbery in the state of Tennessee. It follows that, although the Illinois offense and the Indiana offense may not be counted against the defendant, the court did not err in its judgment that the defendant is an habitual criminal. But he is punishable only as such criminal who has been only twice previously convicted of the offenses mentioned in Penal Code, § 644—that is to say, one conviction of grand larceny and one conviction of robbery.

While the actual sentence pronounced against the defendant is verbally correct, its interpretation is dependent upon the recitals contained therein concerning the prior convictions. In People v. Shaw, 137 Cal. App. 533, 30 P.(2d) 1031, in dealing with a somewhat similar situation, the Fourth District Court of Appeal took note of the fact that, where the defendant has suffered but two prior convictions of these crimes, with resulting terms served in a state prison, the term of imprisonment is for his natural life with no right of parole for twelve years; whereas, with three such prior convictions the punishment is for "not less than life," without any right of parole. It appearing that the judgment recited that the defendant had suffered three prior convictions, whereas he had in fact suffered only two prior convictions and imprisonment which could be considered in determining the right of parole under section 644 of the Penal Code, the court held that the portion of the judgment finding the defendant an habitual criminal with three prior convictions should be reversed and the balance of the judgment should be affirmed. Following the practice indicated in that decision the following order is now made:

That portion of the judgment which rests upon the verdict convicting the defendant of grand theft from the person, a felony, as charged in the second amended information is affirmed. That portion of the judgment finding or reciting that the defendant had suffered the four prior convictions of felonies with terms served in a state prison for each of said prior convictions is reversed, with instructions to the trial court to cause defendant to be returned into that court, and thereupon pronounce judgment upon him in accordance with the views herein expressed. The order denying defendant's motion for a new trial is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



3 Cal.App.2d 31

PEOPLE v. CURRIE.

Cr. 1794.

District Court of Appeal, First District, Division 1, California.

Dec. 12, 1934.

Rehearing Denied Dec. 27, 1934.

Hearing Denied by Supreme Court Jan. 10, 1935.

1. Criminal law ⇐1174(5)

In prosecution for sale of stock on alleged false representations in which witness who had purchased stock privately told some of jurors that she was widow, had lost her money, and hoped that jury would give stockholders a square deal, refusal to admonish jurors to disregard statements *held* not prejudicial.

2. Criminal law ⇐928

In prosecution for sale of stock on alleged misrepresentations in which witness, who had purchased stock, privately told some of jurors that she was widow, had lost her money, and hoped that jury would give stockholders a square deal, trial court did not abuse discretion in denying new trial where jurors were not influenced by remarks.

3. False pretenses ⇐45

In prosecution arising out of alleged misrepresentations in sale of gold-mining stock, admission of testimony of mining engineers

as to results of assays of ore from mine and amount of ore which had been blocked out *held* not error, although engineers' examination was made subsequent to alleged misrepresentations, since ore body remained unchanged in character and one of misrepresentations claimed was that certain ore had been blocked out.

Appeal from Superior Court, San Francisco County; Lile T. Jacks, Judge.

Harry Currie was convicted of an offense, and he appeals.

Affirmed.

Anthony S. Devoto, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

PER CURIAM.

The defendant was charged in an indictment containing several counts with grand theft and violations of the Corporate Securities Act. Two of the counts charging grand theft were dismissed and he was found guilty on the remaining charges. He has appealed from the judgment of conviction and the order of the trial court denying his motion for a new trial on seven of the counts charging grand theft.

Four grounds for reversal are urged, namely: The misconduct of a witness for the prosecution and of the trial court; error in the admission of certain testimony; and that the evidence is insufficient to sustain the verdict.

[1, 2] It appears from testimony taken upon the hearing of defendant's motion for a new trial that during the pendency of the trial, on an occasion when the jurors were leaving the courtroom following an adjournment, two or more of them were accosted by a person who as a witness for the prosecution had testified that she purchased stock in the company respecting which it was alleged that defendant had made false representations. This person stated to said jurors that she hoped the jury "would be good to them" and would "give us a square deal," and that she was a widow "and had lost her money." None of the jurors replied. There was testimony that the trial judge was advised of the incident previous to the submission of the cause to the jury, and also that counsel for the defendant did not learn of it until after the verdict had been returned and the jury discharged.

Defendant claims that the trial court erred in not admonishing the jury to disregard these remarks, and that this with the fact that the same were made entitled him to a new trial. It is not contended that any juror was guilty of misconduct; and it is clear from the testimony of those accosted that they were not influenced by the statements.

The facts are similar to those in People v. Pyle, 44 Cal. App. 130, 185 P. 1019, wherein it was held that the refusal of a new trial was not erroneous. While the trial court might properly have admonished the jurors to disregard the statements, we cannot say that the error, if any, was prejudicial or that the refusal of a new trial was in the circumstances an abuse of discretion. To the same effect as the case mentioned are the following decisions: State v. Allen, 89 Iowa, 49, 56 N. W. 261; State v. Johnson, 141 La. 775, 75 So. 678; State v. Crane, 110 N. C. 530, 15 S. E. 231. In Downer v. State, 10 Ga. App. 827, 74 S. E. 301, cited by defendant, it appears that the juror approached actively participated in a discussion of the merits of the cause, which was not the fact in the case at bar.

[3] The transaction which led to the accusations against the defendant involved the sale of stock in a gold-mining company, it being alleged that he misrepresented the condition of the mine. Two mining engineers were permitted to testify, over objection by defendant, as to certain physical conditions, namely, the results of assays of ore from the mine, and the amount of ore which had been blocked out. The engineers' examination was made subsequent to the alleged misrepresentations, and it is urged that such testimony was for that reason incompetent. It clearly appears that the ore body remained unchanged in character. Furthermore, one of the misrepresentations claimed was that certain ore had been blocked out. According to the testimony of the engineers this statement was untrue, as was the representation as to the assay value of the ore. There was no error in the admission of the testimony objected to.

People v. Raplee, 75 Cal. App. 38, 241 P. 892, relied upon by defendant, is not a holding to the contrary as the facts were not similar to those in the present case; and the same is true of People v. Hines, 5 Cal. App. 122, 89 P. 858, San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604, also cited by defendant.

The evidence shows that the defendant on numerous occasions misrepresented the condition of the mining property as to its development, the value of its ore, and the amount thereof which was being produced. While conflicting, the evidence sufficiently shows

that these representations were untrue, and that persons who purchased stock relied upon them and were thereby deceived to their injury.

Other points made by the defendant are without merit and require no discussion.

Evidence which the jury believed amply supports their verdict, and the record discloses no error which would justify the conclusion that there was a miscarriage of justice.

The order and judgment appealed from are affirmed.



2 Cal.App.2d 734

CRAWFORD v. ROSE.*

Civ. 9272.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1934.

Rehearing Denied Jan. 9, 1935.

Hearing Denied by Supreme Court Feb. 7, 1935.

1. Trial ⇐127

In automobile collision case, admission of statement of witness that she had been told defendant was covered by insurance company that should make good settlement *held* not prejudicial, where statement, which was not objected to, was made on redirect examination into circumstances under which witness signed statement introduced to impeach her testimony.

2. Trial ⇐127

In automobile collision case, statement in argument to jury that opposing litigant's witness was connected with insurance companies and was insurance investigator *held* not error under evidence.

3. Automobiles ⇐224(4)

Guest in automobile is not required under all circumstances to watch road and driver and hold himself in readiness to give directions to driver concerning dangers of road.

4. Automobiles ⇐224(4)

Guest riding in automobile rumble seat on cold foggy night with head covered with blanket *held* not contributorily negligent for failure to keep lookout and to warn driver concerning dangers of road.

5. Appeal and error ⇐1068(3)

Possible errors in instructions on contributory negligence *held* not prejudicial, where plaintiff was not contributorily negligent.

On Petition for Rehearing.

6. New trial ⇐99

Refusal of motion for new trial on ground of newly discovered witnesses *held* proper, where testimony of new witnesses was cumulative, and appellant knew of existence and identity of new witnesses at time of trial, but had not been able to locate them.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Action by June Crawford against Carmen Rose. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Harry D. Parker and Horace W. Danforth, both of Los Angeles, for appellant.

Charles W. Gorham, of Wilmington, and Marion P. Betty, of Los Angeles, for respondent.

PER CURIAM.

The instant appeal by defendant is from a judgment that was rendered in favor of plaintiff in an action for damages for personal injuries which were caused by a collision that occurred between an automobile in which at the time of the accident plaintiff was riding as a guest of the owner thereof and another automobile which at said time was owned and operated by defendant.

The first point urged by appellant as a sufficient reason for the reversal of the judgment is that, in the course of the redirect examination of one of the witnesses produced by plaintiff, said witness stated that "she had been told that defendant was 'covered by one of the largest insurance companies that should make a good settlement.' "

[1] It appears that during the cross-examination of the witness, over the objection of counsel for plaintiff, a statement that had been signed by the witness prior to the time of trial was introduced in evidence for the purpose of impeaching certain testimony that had been given by the witness on her direct examination. On her redirect examination, it was developed that the statement then in question had been written by an agent for an insurance company in which plaintiff was protected from any liability that might arise from an automobile accident; and in the course of such redirect examination, after

*Rehearing denied 40 P.(2d) 277.

the witness had testified regarding the conversation that preceded the signing of the written statement, she was asked: "Did you have any further conversation?" To which she replied: "After he got the statement he stood up and spoke to Mrs. Crawford and told her he hoped she didn't feel—she would feel better and it was obvious our driver was not to blame. He said: 'The people who hit you are covered by one of the largest insurance companies that should make a good settlement' and we asked him if he would see our lawyer Mr. Gorham, and he asked for Mr. Gorham's address at the time and I said I didn't know it, that he could go and see him and he said, 'I will go and see him this afternoon.'"

No objection was made by defendant to the question asked the witness; no motion was made to strike the objectionable statement from the record; nor was any request made by defendant to the trial court to instruct the jury to disregard such statement. To the contrary, in at least two separate statements defendant's counsel clearly admitted the right of plaintiff to cross-examine the witness with reference to the circumstances in which the witness had made such written statement. He said: "The cross-examination on this statement which was offered in evidence by the defendant entitled the plaintiff to make inquiry as to the statement. * * * if we produced a statement that is inconsistent with any statements that she makes on the witness stand they have the privilege of going into the circumstances of that statement, they have that right. * * *" More than that, in the absence of the jury, the defendant made the following statement: "I will ask the court not to give any instruction on this question unless it is an instruction tendered by the defendant. In other words, I don't want any instruction to be given by the court on the question of insurance, unless it is in the form as tendered by defendant and I shall base that instruction on a case I will cite."

Without reference to the authorities that bear upon the question of what prejudice may result to an aggrieved party in circumstances similar to those here presented, it is the judgment of this court that, the entire situation in the instant case considered, defendant has no just cause for complaint.

[2] Along similar line, appellant also complains that in the course of his argument to the jury the attorney who represented plaintiff referred to one of the witnesses produced by defendant as "just an insurance investigator" and "a man connected with insurance companies." In that regard, an examination of the record, as shown by the reporter's transcript of the proceedings, reveals the fact that evidence was adduced from which plaintiff was justified in assuming that the witness to whom reference was had in fact was "connected with insurance companies" and that to some extent his time was occupied as an "investigator." It therefore becomes apparent that the complaint here made is without substantial foundation.

[3-5] Effort is also made by appellant to convince this court that she was prejudicially affected in her defense to the action by the giving of certain instructions to the jury. These objections of appellant are directed to plaintiff's Nos. 20–A, 7–A, 8–A, 9–A, 12–A, and 4, which are set out on pages 522 et seq., to supplement of appellant's opening brief. The criticisms presented by appellant deal principally with claimed errors in some (not all) of the court's instructions touching the defense of contributory negligence of the plaintiff and with claimed conflicts between the rules stated in these instructions and those found in other instructions given to the jury. While these criticisms are well argued by appellant and have enough merit to require close examination of the case in relation to such instructions, we are not convinced that such defects as might be found in these instructions were not remedied by other instructions given to the jury, without the creation thereby of any harmful inconsistency or result prejudicial to the substantial rights of the defendant in the premises. Prior to the instant of collision between the defendant's automobile and the automobile in which plaintiff was riding as a guest, and down to that moment, the plaintiff had been riding in the "rumble seat" behind the driver. It was a cold and foggy night. The plaintiff had covered herself with a blanket, and at no time prior to the accident was her head uncovered. It is not the law that under all possible circumstances one who is riding as a guest in such a vehicle must watch the road and the driver, and hold himself in readiness to give directions to the driver concerning the dangers of the road. On the facts of this case we think that the defense of contributory negligence, or any negligence, on the part of the plaintiff, is so completely without merit that even if the instructions on that subject were in some particulars not precisely correct, such errors were not prejudicial to the substantial rights of the defendant, and it cannot be said that they produced any miscarriage of justice.

Finally, appellant complains that the amount of the verdict was excessive. The evidence and the law with reference thereto considered, this court is of the opinion that the jury was authorized to find the damages suffered by plaintiff in the amount indicated in the verdict.

The judgment is affirmed.

On Petition for Rehearing.

[6] The petition for rehearing of this appeal is denied. Complaint is made that this court's opinion filed in our decision of the case did not discuss appellant's assignment of error of the trial court in denying the motion for a new trial, with reference to the proposed testimony of newly discovered witnesses. We think that the testimony in question is in substance only cumulative to that of other witnesses who testified at the trial. Appellant at that time knew of the existence and identity of these additional witnesses, but had not been able to locate them. It may well be that a continuance, if a motion therefor had been made, would have been granted. But no such motion was made. We think that the court was not guilty of any abuse of discretion in denying the motion for a new trial.

HAGUE v. CLEARY et al. *

Civ. 9614.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1934.

Hearing Granted by Supreme Court Feb. 14, 1935.

1. Master and servant ⇐69

Ordinance fixing definite scale of wages for work on public building *held* not inconsistent with charter provisions relating to same subject-matter because charter related to "every contract for any public work or improvement" and ordinance related to "every contract for any public work or improvement to be performed within the state of California."

2. Master and servant ⇐69

Ordinance providing that labor on public contracts shall be paid not less than highest general prevailing rate of wages in private employment for similar work "in City and County of San Francisco" *held* not conflicting with charter provisions requiring prevailing rate of wages in private employment for similar work where contract was to be performed in city and county of San Francisco.

3. Injunction ⇐123

In suit to restrain execution of contract for construction of public building, question whether ordinance requiring that labor under public contracts should be paid not less than highest general prevailing rate, which should be determined semiannually, was invalid because of changed economic conditions *held* not presented in absence of allegation that such conditions existed or were apt to exist in execution of contract involved.

4. Statutes ⇐206

Force must be given to every expression used in interpretation of statute.

5. Master and servant ⇐69

San Francisco charter providing that public contract shall require that labor thereunder be paid not less than highest general prevailing rate *held* to manifest intention to prohibit payment of wages on contract less than prevailing rate and no more.

6. Master and servant ⇐69

San Francisco charter providing for payment of not less than highest general prevailing rate of wages on every contract for any public work or improvement, exclusive of purchases, *held* not to require payment of highest prevailing rate of wages either on contracts for purchase of standard articles or for materials specially manufactured for use under the contract.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by William E. Hague against Alfred J. Cleary, as chief administrative officer of the city and county of San Francisco, and another. From the portion of a judgment dismissing plaintiff's first and second causes of action, plaintiff appeals.

Judgment affirmed as to first cause of action, and reversed as to second cause of action.

Charles J. Wiseman, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (John J. Dailey, of San Francisco, of counsel), for respondents.

George O. Bahrs, of San Francisco, for California Metal Trades Ass'n, amicus curiæ.

Brobeck, Phleger & Harrison, of San Francisco, for Industrial Ass'n of San Francisco, amici curiæ.

Allen G. Wright and Wright & Wright & Larson, all of San Francisco, for San Francisco Chamber of Commerce, amici curiæ.

NOURSE, Presiding Justice.

The plaintiff sued to restrain the defendants from executing a contract for the construction of a public building in the city and county of San Francisco to be known as the Psychopathic building. Three causes of action were pleaded. The defendants' demurrers to the first and second causes were sustained without leave to amend and their demurrer to the third cause was overruled. They declined to answer to the third cause of action and judgment was thereupon entered dismissing the action as to the first and second causes and granting an injunction restraining the defendants from including in the contract the matters complained of in the third cause of action. The plaintiff has appealed from that portion of the judgment dismissing the first and second causes of action.

The controversy involves the construction of Ordinances No. 8995 and No. 9092 as applied to the provisions of section 98 of the municipal charter. This section is a portion of the new charter which became effective January 8, 1932. Ordinance 8995 was enacted May 22, 1931, after the charter was adopted and in contemplation of section 98. Ordinance 9092 was enacted after the effective date of the charter and became effective January 7, 1933.

The pertinent provisions of section 98 of the charter are: "Every contract for any public work or improvement, exclusive of purchases, to be performed at the expense of the city and county, * * * must provide: * * * That any person performing labor thereunder shall be paid not less than the highest general prevailing rate of wages in private employment for similar work; * * *

"The board of supervisors shall have power and authority to make and enforce regulations in the premises not in conflict with the provisions hereof."

The pertinent provisions of ordinance 8995 are: "Every contract for any public work or improvement to be performed within the State of California at the expense of the City and County * * * must provide, * * * that any person performing labor in the State of California, in the execution of such contract, * * * shall be paid not less than the highest general prevailing rate of wages in private employment for similar work in the City and County of San Francisco." Provision is then made for the assembling of data by the civil service commission upon which the board of supervisors shall semiannually fix and determine the highest prevailing rate of wages, which scale of wages shall be included in every public contract covered by the ordinance. Pursuant to this ordinance, resolutions were duly passed by the board of supervisors fixing the scale of wages for the purposes of the ordinance. Resolution No. 574 was passed January 5, 1933. Notice inviting sealed proposals for the contemplated building was first published January 12, 1933. An addenda to the invitation for proposals recited that the contract should include the stipulation that wages for labor performed thereunder should be in accord with the scale thus approved.

[1] The basis of the first cause of action is that the ordinance under which a definite scale of wages was fixed is in conflict with the terms of section 98 of the charter and that for this reason it was repealed by the provisions of section 2 of the charter which declared that all ordinances or resolutions "not inconsistent therewith shall continue in force until amended or repealed." The point is not sound because the ordinance is not inconsistent with the provisions of the charter as will hereafter appear. The appellant professes to find an inconsistency in this: The charter provides, "Every contract for any public work or improvement, * * *" whereas the ordinance provides, "Every contract for any public work or improvement to be performed within the State of California. * * *" The board of supervisors is expressly authorized to make and enforce regulations to carry out the provisions of the section. There can be no objection to any one ordinance that it does not provide everything necessary to carry out every provision of the section of the charter. It was competent and consistent with the provisions of the charter for the board to provide by ordinance regulations covering city contracts to be performed within the state. As the contract which is the subject of this litigation is one to be performed within the state and within the city and county, the appellant is not concerned with what might occur if some other contract to be performed outside the state should be contemplated.

[2] A similar attack is made upon the language of the ordinance declaring that labor under such contracts shall be paid not less

than the highest prevailing rate of wages in private employment for similar work "in the City and County of San Francisco." It is argued that this is in conflict with the terms of the charter which require the prevailing rate of wages in private employment for similar work. Since the contract is to be performed in the city and county of San Francisco, the prevailing rate of wages in that locality would be the rate applicable under the charter and this would be true under the ordinance as well if the words "in the City and County of San Francisco" were omitted. Thus, what interpretation may be placed on these provisions of the ordinance, if a contract were to be performed by the city and county wholly outside its boundaries, is a question not before us in this litigation.

[3] A general attack is made upon the purposes of the ordinance which calls for semi-annual fixing of the wage scale. It is said in argument that because of the changed conditions in the economic world, prevailing wages may change from the scale fixed by the board of supervisors so that in some cases a contract executed in the terms of the ordinance might not reflect the prevailing wage at the time of its execution. Academically, the argument has merit, but the point does not arise here because the complaint does not allege that such conditions existed or were apt to exist in the execution of the contract in litigation.

[4-5] The brief of the industrial association of San Francisco and of the San Francisco chamber of commerce, appearing as amici curiæ in support of the appellant, is confined to the attack made in the first cause of action. The whole argument in this brief is based upon the untenable theory that because the charter provides that these public contracts shall require that labor thereunder shall be paid "not less than" the highest general prevailing rate, therefore any ordinance or any contract executed thereunder which provides for payment of labor more than the highest prevailing rate is in violation of the charter section. On this premise it is argued that the charter section was enacted for the benefit of the taxpayers and that they were thereby guaranteed that no such public contract would call for the payment of labor upon a scale higher than that prevailing in private employment. In the interpretation of a statute, we must give force to every expression used. If it had been the intention of the charter framers to prohibit the payment of wages on public work above the prevailing rate paid in private employment, they would have either used some expression to convey that intention or would have omitted the words "not less than." As the charter reads, these words clearly convey the intention to prohibit payment less than the prevailing rate and no more. To adopt the view of amici curiæ, we would have to disregard these words altogether.

[6] The debatable question arises under the allegations of the second cause of action. These allegations attack the provisions of the contract which would require that all materials specially made for use under the contract shall be manufactured and delivered to the contractor by such concerns only as shall, in the manufacture and delivery thereof, pay their employees wages in accord with the scale fixed under the ordinances. The California Metal Trades Association, appearing as amicus curiæ, attacks these provisions of the proposed contract as repugnant to the express provisions of section 98 of the charter which exclude purchases from the wage scale regulations. The respondent replies that, as the materials are to be specially fabricated for the purpose of the contract, it is a matter of work and labor rather than one of purchase and sale. It is this difference that distinguishes the questions raised in the second and third causes of action. In the latter, the attack was confined to the wage requirements covering the manufacture of "standard" articles to be used under the contract. As to them, the trial court held that the scale of wages was not applicable. The respondents conceded the correctness of this ruling and suffered an injunction restraining them from including in the proposed contract any demand relating to the scale of wages to be paid in the manufacture of such articles.

In this contention, we are again faced with a simple rule of statutory construction. The charter reads: "Every contract for any public work or improvement, exclusive of purchases." There is no uncertainty in this language. The words "exclusive of purchases" are clear and explicit. They must be given the force of their ordinary meaning. To follow respondent's view, we would either have to disregard the expression entirely or add after the word "purchases" the words "of standard articles, but not of articles specially made." There is nothing in the charter section which would justify a distinction between the purchase of standard articles and materials specially manufactured. In both cases the transaction is a purchase and sale as was held in Neal Publishing Co. v. Rolph, 169 Cal. 190, 146 P. 659, a case which involved

the identical question and one which is controlling here.

The portion of the judgment relating to the first cause of action is affirmed. The portion relating to the second cause of action is reversed. The appellant should have his costs.

We concur: STURTEVANT, J.; SPENCE, J.



3 Cal.App.2d 151

LOOP BLDG. CO. v. FREDENHAGEN et al. (HAMMOND LUMBER CO., Intervener).

Civ. 5249.

District Court of Appeal, Third District, California.

Dec. 18, 1934.

Hearing Denied by Supreme Court Feb. 14, 1935.

Witnesses ⇐379(8)

Refusal to permit plaintiff's attorney in judgment creditor's action for recovery of debtor's interest in realty to impeach debtor by reading transcript of his testimony before referee at hearing on order for debtor's examination that he conveyed property in trust for another in consideration of indebtedness to latter *held* prejudicial error (Code Civ. Proc. §§ 2052, 2055).

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by the Loop Building Company, a corporation, against Franz Fredenhagen and others, in which the Hammond Lumber Company, a corporation, intervened.

Judgment for plaintiff, and intervener appeals.

Reversed, and remanded for a new trial.

Ray Howard, of Los Angeles, for appellant.

John F. Poole and Robert E. Abbott, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This action, in the nature of a creditor's bill, was brought by plaintiff to have it decreed that the real property involved was the property of defendant C. A. De Coo, and also prayed that the registrar of titles of the county of Los Angeles make the necessary and appropriate entries; the property in question having been recorded under the Torrens system.

At a time prior to the institution of this action, C. A. De Coo was the owner of certain parcels of real property. In June, 1930, in the case of Loop Building Co. v. De Coo, a money judgment was recovered against De Coo, and execution thereon was returned unsatisfied. Thereafter, upon an order of examination of the judgment debtor, Mr. De Coo appeared before a referee and was interrogated, at which hearing it was developed that in June, 1930, De Coo conveyed the property in question to Franz Fredenhagen as trustee for Margaret Fawell, a sister of De Coo, in consideration of an indebtedness he owed her.

Thereafter, the superior court made an order on supplemental proceedings granting leave to plaintiff herein to maintain an action for the recovery of any interest of the judgment debtor in the real property in question, and accordingly the present action was brought. By a complaint in intervention it was also made to appear that De Coo was indebted to Hammond Lumber Company in the sum of $1,100, which also remained unsatisfied. Upon the trial of these actions judgment was rendered in favor of plaintiff, from which judgment this appeal is prosecuted.

Many exceptions were taken to rulings of the trial court, but the most important, and the one we believe requires a new trial, was the refusal of the trial court to permit plaintiff's attorney to attempt to impeach defendant De Coo by reading the transcript of the testimony given by him before the referee. The refusal of the court to permit such cross-examination was based upon the ground the transcript was not certified by the reporter.

De Coo had been called under section 2055 of the Code of Civil Procedure and testified he recalled being examined on supplemental proceedings on July 31, 1930, before Hon. Arthur P. Will, referee in the case of Loop Building Co. v. De Coo. The attorney for plaintiff then offered to read from a purported transcript of the proceedings then had and to ask the witness if he had not so testified as therein set forth, to which defendant objected upon the ground the same was not certified, and the objection was sustained.

Section 2052 of the Code of Civil Procedure provides: "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the state-

ments must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

It appears that the witness was informed as to the circumstances of time, place, and persons present, and the statements of the witness were clearly proper for the purpose of impeachment. In view of the fact that the outcome of the case depended largely upon the acts and good faith of De Coo, plaintiff should have been permitted to examine him as to statements alleged to have been made by him before the referee in regard to his property and creditors.

Believing, as we do, the ruling restricting the cross-examination of Mr. De Coo was prejudicial to the rights of plaintiff in a material matter, a new trial should be had and plaintiff given the opportunity of inquiring into the previous statements of defendants.

Numerous other objections are raised, but we believe sufficient has been said, as many of the objections urged are based upon the foregoing circumstances and will not arise in a subsequent trial.

The judgment is reversed, and the cause remanded for a new trial.

We concur: PLUMMER, J.; THOMPSON, J.



2 Cal.App.2d 572

PEOPLE v. DE VAUGHN.

Cr. 1815.

District Court of Appeal, First District, Division 2, California.

Dec. 4, 1934.

1. Perjury ⇐33(8)

State's witness' uncontradicted testimony in trial for subornation of perjury as to falsity of her testimony in defendant's trial for murder *held* sufficient to support conviction.

2. Criminal law ⇐507(9)

One suborned to commit perjury is not suborner's "accomplice," within rule that accomplice's testimony against defendant must be corroborated (Pen. Code, § 1111, as amended by St. 1915, p. 760).

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

3. Criminal law ⇐1169(1)

Admission of portion of defendant's counsel's opening statement in murder trial as evidence in defendant's subsequent trial for subornation of perjury to show undisputed fact, provable by offering whole record in murder trial, that perjurer's testimony therein was material, *held* not prejudicial to defendant.

4. Perjury ⇐32(9)

Portion of hospital report, reciting patient's statement to physician that a doctor performed abortion operation on patient, *held* properly excluded from evidence as immaterial in trial for subornation of perjury committed by witness in defendant's trial for murder in performing abortion.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Oscar W. De Vaughn was convicted of subornation of perjury, and he appeals.

Affirmed.

H. L. Richardson and John C. Henderson, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was convicted upon an indictment charging the offense of subornation of perjury. He has appealed from the judgment and from the order denying his motion for a new trial.

[1] In the course of a previous trial of this defendant on a charge of murder occurring during the performance of an abortion, this defendant produced as a witness Mrs. May Perati, who testified that a short time before her death the deceased had appeared at her home and, in her presence, had attempted to produce an abortion upon herself with the use of a stick of slippery elm. The materiality of this testimony is not questioned and its falsity is not denied. In the present trial the witness Perati testified that this testimony was false and that it had been given at the request and upon the advice and suggestion of the defendant. She testified further that, for several years prior to the trial, she and her husband had been obtaining nar-

cotic prescriptions from the defendant, a practicing physician, and that he had promised her, in return for her false testimony, that he would procure for her and for her husband a permanent narcotic order. In the murder trial the defendant was convicted. The witness Perati has pleaded guilty to an indictment charging her with perjury.

The first point raised is that the evidence is insufficient to support the verdict. The foregoing statement should be sufficient answer; but to this it may be added that the witness Perati also testified in this trial that she had not known the deceased; that the deceased had not been to her home at any time; that her testimony in the murder trial that she had not known the defendant, had never been in his office, and had never been treated by him, was false and was directed by the defendant; that all the testimony which she gave in the murder trial was prepared and suggested by the defendant; and that he had also directed her to attend the preliminary examination to learn what she could about the appearance and habits of the deceased. The defendant did not take the stand and offered no evidence contradicting the story of this witness.

[2] The appellant then argues that the verdict must be set aside because the evidence of Mrs. Perati was not corroborated. The same question was raised in People v. Layman, 117 Cal. App. 476, 4 P.(2d) 244, 246. That case arose after the 1915 amendment (St. 1915, p. 760) to section 1111 of the Penal Code, which added to the definition of an accomplice the following: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." In construing the section the court held that one who has been suborned to commit perjury is not an accomplice of the suborner because he is not "liable to prosecution for the identical offense." The decision is supported by many authorities; it adopts an accurate interpretation of the statute; and it is in accord with sound principles and reason.

[3] Error is assigned in the admission in evidence over appellant's objection of a portion of the opening statement of appellant's counsel in the murder trial. The offer was made for the sole purpose of showing that one of the defenses raised in the murder trial was that the abortion had been self-inflicted, and that the Perati testimony was therefore material and related to a material issue of that trial. Proper practice would have brought a stipulation conceding that fact because it was a matter that was never in dispute. The same fact could have been proved by offering the whole record in the murder trial. The appellant suffered no prejudice by the offer objected to.

[4] Criticism is made of the ruling denying admission of certain portions of the hospital report showing the history of the deceased. In the murder trial the appellant was convicted of having performed an abortion. His defense was that the act had been self-administered in the manner detailed by the witness Perati. In this trial the prosecution offered evidence to show that the appellant knew that the evidence of this witness was false. To counteract this evidence the appellant offered the hospital report which contained a recital of a statement purported to have been made by the deceased to the attending physician. This portion was not admitted, and the appellant assigns the ruling as error, but for what reason we cannot understand. The rejected statement was to the effect that the patient, accompanied by another woman, went into an alleyway to a doctor's office where a doctor performed the operation. In the murder trial this story was corroborated by identification of time, place, and parties. But, in the trial for subornation of perjury, neither the statement of the deceased nor that portion of the report of the physician had any possible bearing on the issue of the falsity of the Perati testimony, or of the appellant's knowledge that it was false.

The judgment and order are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

3 Cal.App.2d 206

J. S. MORGAN & SONS v. BRADNER et al.

Civ. 8920.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1934.

1. Appeal and error ⇐713(1)

Stipulation of facts appearing in clerk's transcript cannot be considered on appeal (Code Civ. Proc. § 670).

2. Appeal and error ⇐907(3)

Questions predicated on alleged insufficiency of evidence cannot be considered on appeal on judgment roll, where no bill of exceptions or reporter's transcript is presented; presumption being that evidence sustains findings.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by J. S. Morgan & Sons, a corporation, against B. J. Bradner and Elizabeth P. Morgan, executors of the last will and testament of Walter H. Morgan, deceased. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. W. Middlecoff, of Los Angeles, and L. J. Difani, of Riverside, for appellant.

Jerold E. Weil, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Plaintiff sued defendants, as executors of the estate of Walter H. Morgan, deceased, on a complaint which set out its claim in count 1 as based on certain promissory notes, in count 2 on an open book account, and in counts 3 and 4 on an account stated. The trial court found that the indebtedness had been incurred by deceased as set out in count 1, but that it was barred by the statute of limitations, and that no such indebtedness had been incurred as to the remaining counts. Judgment was rendered for defendants.

[1, 2] This appeal is on the judgment roll, no bill of exceptions or reporter's transcript being presented. In the clerk's transcript is a "stipulation of facts," which is not part of the judgment roll (Code Civ. Proc. § 670; San Francisco Savings Union v. Myers, 76 Cal. 624, 18 P. 686), and cannot be considered on appeal (Jeffords v. Young, 197 Cal. 224, 239 P. 1054). The findings support the judgment. We must assume that the evidence was sufficient to sustain the findings (Porter v. Hilton, 214 Cal. 705, 298 P. 501, 7 P.(2d) 301), and therefore the questions raised by appellant predicated on the alleged insufficiency of the evidence cannot be considered on this appeal.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 284

STANLEY v. LANDER.

Civ. 5076.

District Court of Appeal, Third District, California.

Dec. 22, 1934.

Rehearing Denied Jan. 21, 1935.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Landlord and tenant ⇐164(7)

While principle of caveat emptor applies to leasing of defective premises, lessor is liable for defects known to him and unknown to lessee, because arising from some cause not extraneous, if he allows lessee to occupy premises in ignorance of risk.

2. Landlord and tenant ⇐164(7)

Rule requiring tenant to conduct such investigation as ordinarily prudent man would make preceding leasing of premises did not require entry above ceiling, as regards landlord's liability for injuries to tenant coming in contact with electric wires above ceiling while inserting stovepipe in hole in ceiling.

3. Landlord and tenant ⇐164(1)

Rule requiring electric companies erecting wires to consider inherent dangers connected with such use and to use all reasonable precautions to prevent human beings coming in contact therewith applies when owner installs electric wires on his own premises.

4. Landlord and tenant ⇐164(3)

Landlord placing electric wires above ceiling near hole therein *held* liable for injuries to tenant coming in contact with wire while inserting stovepipe in hole, since landlord failed to use ordinary care in installing wires in place where they would not be readily observable close to hole in ceiling where one desiring to heat premises might reasonably be expected to insert metal stovepipe.

5. Electricity ⇐16(2)

Every one must be held to common knowledge that exposed electric wires not in-

closed with protective tube or casing are liable to have insulation impaired, which knowledge requires every one installing such electric wires to place them at reasonable distance from place where any one is liable to come in contact with them.

6. Landlord and tenant ⇐164(1)

Rule relieving landlord from liability for defects in building does not relieve landlord, where his own act creates dangerous condition not readily observable.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Kent R. Stanley against Frank R. Lander. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hawkins & Hawkins, of Modesto, for appellant.

David F. Bush, of Oakdale, and L. A. Cleary, of Modesto, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

Plaintiff in this action had judgment for the sum of $500 on account of an injury alleged to have been received by coming in contact with an electric wire in a building owned by the defendant. From this judgment, the defendant appeals.

The record shows the appellant, at the time of the injury received by the plaintiff, was the owner of a certain store building in the city of Ceres, in Stanislaus county, and had been the owner of the premises for a number of years. In November, 1930, the appellant caused the building to be wired for electricity; that is, it was wired so that it might be electrically lighted. The wires installed in the building were intended to carry 110 volts. A permit was taken out for the wiring of the building, and, after the wiring had been completed, it appears that it was approved by the building inspector of the town of Ceres. The storeroom in question had been used as a restaurant by successive tenants. Prior to the wiring and prior to the occupancy of the premises by the plaintiff in this action, a former tenant had obtained permission from the defendant to cut a hole in the ceiling, and also in the roof of the building, for the purpose of running a pipe from a canopy over a gas stove up to the ceiling to carry away heat and fumes. In pursuance of this permission, a hole sufficient to accommodate a five-inch pipe was cut in the ceiling and a corresponding hole in the roof, which at this place appears to have been about three feet above the ceiling. A tin plate was inserted in the roof and a short pipe attached to the tin plate so as to permit the heat and fumes escaping into the outer air. The pipe from the canopy over the gas stove appears to have extended only to the ceiling, and between the ceiling and the opening in the roof, which we have said was a space of about three feet, no pipe appears to have been placed above the ceiling connecting with the opening in the roof by the one who obtained permission to cut the hole in the ceiling.

After the hole had been cut in the ceiling, as we have stated, and the vent pipe placed in the roof, the tenant who had performed this work vacated the premises. Subsequent to the vacating of the premises, the defendant, assisted by an electrician named R. L. Gill, strung wires in the ceiling for the purpose of lighting the room by electricity. The live side of the wire strung along in the ceiling was placed a trifle above, and slightly to the side of, the hole which we have described as having been cut in the ceiling. These wires were strung or placed in position by the defendant, Lander. The record would indicate that the wires were run along through the joists or stringers to which the ceiling was attached. Apparently the wires were properly safeguarded where they were passed through the joists or stringers. When placed in position, the wires were insulated.

We find nothing in the record as to the condition of the wires at the time of the injury suffered by the plaintiff as hereinafter mentioned. After the tenant named Lander cut the hole in the ceiling and in the roof as just mentioned, he vacated the premises, and for a short while a tenant by the name of Brown occupied the same. The premises in question consisted of a long, narrow room. No written lease was entered into between the plaintiff and the defendant; no particular conversation is shown to have taken place, according to the record, between the plaintiff and the defendant at the time the room was leased by the plaintiff, and all that appears in the record concerning the same is that the plaintiff was given a key to the premises and the defendant accompanied the plaintiff thereto and showed him the room. There is nothing in the record which would indicate that the room could be heated other than by the utilization of either a coal or a wood stove. The plaintiff took possession of the premises some time in December, 1930, after

the electric wiring had been completed as herein stated. The location of the wires does not appear to have been called to the attention of the plaintiff, and, so far as he was concerned, the record shows him to have been ignorant of their presence.

A short time after the occupation of the premises by the plaintiff, he installed a wood stove, and had a stovepipe leading from the stove up through the ceiling to the hole in the roof to which we have referred, installed by two workmen. Later on, in examining the condition of the pipe so leading from the stove up through the ceiling to the hole in the roof, it appears that the plaintiff became convinced that the wiring holding the pipe was not securely fastened. In view of this, it appears that the plaintiff took down the pipe for the purpose of reinstalling the same. In order to reinstall the stovepipe, the plaintiff stood upon the stove and endeavored to replace the pipe by inserting it through the hole in the ceiling. In so doing, after he had inserted the pipe about three inches in the ceiling, it came in contact with something which obstructed his efforts to replace the pipe. Having no knowledge of its nature, the plaintiff, standing on the metal stove, reached up through the ceiling to remove the obstruction, came in contact with the electric wire, and received a shock sufficient to throw him from the stove. In falling, the plaintiff received a broken arm and shoulder.

The court found that at the time of the installation of the electric wire by the defendant he knew of the dangerous character of electricity, and also the dangers of placing an electric wire in such close proximity to the hole. The record shows that the defendant had been in the room where the stove had been installed by the plaintiff, and had an opportunity to observe the stovepipe running up through the ceiling. The defendant denied that he observed the position of the pipe going through the ceiling. The defendant also denied that he knew of the existence of the hole in the ceiling. As against this denial, the trial court had for its consideration the fact that the defendant had given permission for the cutting of the hole in the ceiling, and had actually drawn the wires along in the ceiling in such close proximity to the hole. The record shows that access to the ceiling is had by entering through a small door in the gable at the rear end of the building; that the entrance could be made only from the outside. Whether by stairway or by ladder this door in the gable could be reached does not appear in the record. It is shown, however, that there is no entrance to the ceiling from the room occupied by the appellant. The record is not exactly clear as to whether the position of the wire adjacent to the hole in the ceiling could be seen from one occupying the position the plaintiff occupied at the time he received the shock. The plaintiff's testimony is that he did not see the wire and did not know that there were any wires in close proximity to the hole in the ceiling. As a matter of experience, the trial court knew that the space above the ceiling would ordinarily be a darkened room. There is no testimony in the record showing that it was sufficiently lighted to readily disclose the presence of the wires.

Upon this appeal the defendant relies upon the general statement of the nonliability of a landlord as to the condition of leased premises, the rule concerning which is stated in 15 California Jurisprudence, p. 704, as follows: "In the absence of fraud, concealment or covenant in the lease, a landlord is not liable to a tenant for injuries due to the defective condition or faulty construction of the demised premises." In support of his contention that the landlord is not liable, the appellant places his chief reliance upon two cases, to wit, De Motte v. Arkell, 77 Cal. App. 610, 247 P. 254, and Ayres v. Wright, 103 Cal. App. 610, 284 P. 1077. In those cases, and others involving the same principle, it is held that the landlord is not liable for defects in construction, which defects could be discovered by the exercise of reasonable diligence, and also where the defects were unknown to the landlord, and as readily ascertained by the lessee as by the landlord.

[1] While accepting the principles stated in the cases referred to by the appellant as absolutely correct, we are of the opinion that the circumstances involved in the cases referred to render them distinguishable from the circumstances involved in the instant case, and therefore call for the application of a different principle, and that the rule stated in 15 California Jurisprudence, 705, is applicable here. It is there stated: "While the principle of caveat emptor applies to the leasing of defective premises, a lessor is liable for defects in the premises, known to him and unknown to the lessee, because arising from some cause not extraneous, if he allows the lessee to occupy the premises in ignorance of the risk. But whenever the defect is inherent and unknown to the lessor, he is not accountable where he has done all that a reasonably prudent man would have done towards fitting the property for occupancy."

[2, 3] In volume 1, Tiffany on Landlord and Tenant, p. 562, the rule as to liability for concealed defects is thus stated: "The rule above stated that the lessor is under no obligation to the lessee as regards the condition of the premises at the time of the demise, is subject to an exception to the effect that if there is some hidden defect in the premises, or danger thereon which is known to the lessor at the time of making the lease, but which is not apparent to the intending lessee, the lessor is bound to inform the latter thereof, and failing to do so, he is liable for injuries to the tenant arising therefrom." And as further stated on page 568 of the same volume: "The view that the lessor's liability, as for negligence, exists when he has reason to suspect the existence of the dangerous conditions as well as when he actually knows of them, is asserted or indicated in other cases, and accords with the rule, ordinarily applied, in determining questions of negligence, when this is dependent on knowledge of physical conditions, that one has knowledge of that which he ought to know." It is true that, if the plaintiff in this action had obtained access to the ceiling through the door in the gable, or opening in the gable to the rear of the building, and entered the space between the ceiling and the roof and investigated the location of the electric wires, he would have discovered their close proximity to the hole already cut in the ceiling. However, we think that the rule requiring such an investigation as an ordinarily prudent man would make preceding the leasing of premises does not go so far as to require here entry above the ceiling. A wire used for the purposes of conveying an electric current is a dangerous instrument. The law is clearly set forth that, where electric companies erect wires for the purpose of conveying electricity, they must take into consideration the inherent dangers connected with such use of wires, and use all reasonable precautions to prevent human beings coming in contact therewith. We think the same rule applies when an owner engages in installing electric wires on his own premises.

[4, 5] Applied to the instant case, the owner must be held not to have used reasonable precautions in installing electric wires in such a position that they were so close to the hole in the ceiling that any one, in the reasonable use of the premises, would be liable to come in contact therewith. The testimony in the record shows very clearly that electric wires should not be placed so close to a heated stovepipe, as the heat from the pipe causes the insulation to degenerate. While the wires in the instant case were not concealed defects in the premises such as we find described in many of the cases, we are of the opinion that the presence of the wires so close to the hole in the ceiling constituted a trap not readily observable by any one making ordinary and usual use of the premises. The record discloses no means of heating the premises other than by the use of either a wood-burning or a coal-burning stove. There was just one hole in the ceiling, and just one hole in the roof immediately above the ceiling, so arranged as to induce in an ordinarily prudent person the thought that the arrangement in the ceiling and the roof was there for the purpose of accommodating a stovepipe. From which follows the conclusion that the landlord observing the same conditions must be reasonably held to have anticipated that such use would be made of the arrangement apparently provided for the use that was made thereof by the plaintiff.

What constitutes ordinary precautions or care in the installation of electric wires must correspond with the dangers attendant upon the installation of such a dangerous element; in other words, the degree of care is measured by the degree of the danger. Measured by this standard, we conclude that the appellant did not use ordinary care in installing the electric wires. Whether he did or did not observe the hole in the ceiling and the appliance in the roof, he must be held to a knowledge of such conditions, because by his own testimony he individually placed the wires in the location which we have heretofore stated. It may be possible that the appellant did not realize that heat would cause the installation to degenerate, but every one must be held to a common knowledge that exposed electric wires not inclosed with a protective tube or casing are liable to have the insulation impaired, and this knowledge we hold requires every one installing such electric wires to place them at a reasonable distance from a place where any one is liable to come in contact with them. This was not done in the instant case.

The exceptional circumstances which we think take this case out of the ordinary rule relieving a landlord from liability consists in the dangerous character of electric wires; the fact that they were installed in a place where they would not be readily observable, and so close to a hole in the ceiling, where one desiring to heat the premises might reasonably be expected to insert a metal stovepipe.

[6] The rule relieving a landlord from liability for defects in the building is not so elastic as to relieve a landlord where his own act creates a dangerous condition not readily observable.

No complaint is made that the damages awarded are excessive, and therefore the extent of the plaintiff's injuries need not be considered.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



3 Cal.App.2d 87

FARRAR v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 1507.

District Court of Appeal, Fourth District, California.

Dec. 14, 1934.

Hearing Denied by Supreme Court Feb. 11, 1935.

1. Insurance ⇐291(3)

Applicant's answer that he knew of no disease in his system could not invalidate life policy, unless applicant knew he had disease.

2. Insurance ⇐665(3)

Evidence supported finding that insured was suffering from serious heart ailment at and before date upon which he applied for life insurance and knew thereof, and that he concealed it from insurer and was knowingly untruthful in answering questions in application, so as to furnish sufficient grounds to avoid recovery on policy (Civ. Code, §§ 2561–2563).

3. Appeal and error ⇐1011(1)

Trial court's finding, on conflicting evidence, as to whether life insured had diseased heart and knew it when he signed application, *held* binding on reviewing court.

4. Appeal and error ⇐197(1)

Variance between pleadings and proof and pleadings and fact findings could not be first urged on appeal, where evidence was not objected to in trial court on ground of alleged variance.

5. Insurance ⇐378(1)

Knowledge of officers of insurer that life insured was drawing disability pension as Spanish-American War veteran charged officers with notice that insured was suffering from physical ailment which reduced his earning capacity, since federal laws made such disability prerequisite to pension.

6. Appeal and error ⇐1056(1)

In action on pensioned Spanish-American War veteran's life policy, exclusion of testimony that insurer assured another Spanish-American War veteran policyholder that his disability pension did not affect policy *held* reversible error, in view of materiality of excluded evidence on issue whether insurer, by insuring many pensioned Spanish-American War veterans and by failure to cancel policy sued on, upon learning that insured drew disability pension, waived false answers concealing disability which federal laws made prerequisite to grant of pension (Civ. Code, § 2564).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Josephine Farrar against the Policy Holders' Life Insurance Association. Judgment for defendant, and plaintiff appeals.

Reversed.

Chas. D. Swanner, of Santa Ana, for appellant.

Charles D. Warner, Thomas W. Hughes, and Lawrence E. Drumm, all of Los Angeles, and Milburn Harvey, of Santa Ana, for respondent.

MARKS, Justice.

Plaintiff is the widow of Joseph Carter Farrar, who died on January 30, 1933. He carried an insurance policy on his life, dated February 20, 1929. It was issued by defendant with plaintiff named as beneficiary. She furnished the necessary proofs of death, but payment was refused because of statements made in the application for the insurance which defendant maintained were false and knowingly and fraudulently made by deceased.

The defendant did not require any physical examination of its policyholders; the insurance being issued upon the statements made in the application signed by the insured.

In the application made by deceased we find the following: "From what illness have you suffered in the past two years? None. Are you now in good health? Yes. * * * Have you knowledge that any physical or mental disease exists in your system? No. * * * I am of the Caucasian race, in good health, and so far as I know have no disease

or other conditions which would prevent me from obtaining life insurance. I agree to the terms, conditions and provisions of the Certificate of Membership, that this application becomes a part of such Certificate and that any false statement, misrepresentation or concealment of any material fact on my part shall make void my membership."

The policy contained the following paragraph: "A false statement, misrepresentation or concealment of any material fact in the application for membership, shall make void this certificate and shall bar the right of any beneficiary to collect any sum hereunder. In the absence of fraud, this certificate shall be incontestable and free from all conditions as to residence, travel, place or manner of death, except that suicide while either sane or insane, within one year from date of issue, shall limit the amount payable hereunder to the total amount paid hereon by the member, and no more."

On the issue of fraud, the trial court found as follows: "That it is true that the answers so made by the said Joseph Carter Farrar to the above-mentioned questions propounded to him at the time of his application for membership in the defendant association were false and wilfully false when made and were known to be false by the said Joseph Carter Farrar in that the said Joseph Carter Farrar at the precise time of making said application and during the two-year period immediately preceding the date of making said application, to-wit: February 20, 1929, was suffering and had suffered from certain heart diseases prior thereto during the two-year period immediately preceding the date of the application and that it is true that at that precise date of making said application, to-wit: February 20, 1929, the said Joseph Carter Farrar was not in good health and knew that he was not in good health; and that it is true that said Joseph Carter Farrar had then existing in his system and knew that he had existing in his system certain physical diseases, to-wit: myocarditis and heart disease, and at that time was suffering from the following diseases, to-wit: myocarditis, heart disease, impairment of the vision, rheumatism and arteriosclerosis." It was further found that defendant relied upon these false representations in issuing its policy and had no notice or knowledge of their falsity until after the death of the insured.

[1] It should be observed that the only ailment which the trial court found to be known to deceased at the time he made his application was "myocarditis and heart disease." The other diseases mentioned in the quoted finding become entirely immaterial if they were not known to the insured at the time he signed the application, as it had been held that similar statements made in an application for insurance to the same defendant company were not warranties because of the limited or qualified expressions contained in the application as to the knowledge of the insured concerning the condition of health. Adams v. Policy Holders Life Ins. Ass'n, 126 Cal. App. 535, 14 P.(2d) 775. See, also, National Bank of D. O. Mills & Co. v. Union Ins. Co., 88 Cal. 497, 26 P. 509, 22 Am. St. Rep. 324; O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 P. 688; Chase v. Sunset Mutual Life Ass'n, 101 Cal. App. 625, 281 P. 1054.

The evidence before us shows that Joseph Carter Farrar was a veteran of the Spanish-American War. On April 20, 1923, he made his first application for a pension because of physical disabilities, among which he specified that his heart was affected. His physical examination occurred on June 13, 1923; the examiners reporting they found him suffering from myocarditis and mitral regurgitation. His application was disallowed in Washington. This was followed by another which was allowed. This application and his applications for increases of pension were made on the following dates: May 21, 1924; November 24, 1925; October 28, 1927; and February 11, 1930. In each application deceased stated, as one of the reasons for the pension or its increase, that he had heart trouble or that his heart was affected. Medical examinations were had on the following dates with the pertinent findings of the examining board set out after each date: February 27, 1924, heart normal; October 24, 1924, myocarditis, no murmurs; June 27, 1926, myocarditis; November 23, 1927, "Cardio-Vascular System: Normal? No. Man has a systolic murmur heard loudest at apex, but not transmitted, area of dullness, 20 per cent increased. * * * Man has a bad heart." The physician who examined him on March 13 or 14, 1930, testified in part as follows: "I examined him and rated him 'total disability.' * * * He had a heart enlarged three quarters of an inch beyond the right side of the sternum." Deceased was allowed a pension and increases of pension and was finally given a three-fourths disability rating. This was prior to his application for insurance.

Deceased died following an operation for the removal of a tumor from his brain. Physicians testifying for the defendant were of

the opinion that the heart trouble hastened the growth of the tumor.

[2] The evidence which we have referred to supports the finding that deceased was suffering from a serious heart ailment at and before the date upon which he made his application for insurance; that he knew of this trouble; that he concealed it from the insurance company and was knowingly untruthful in answering some of the questions in the application. Such concealment and misrepresentation furnishes sufficient grounds to void the policy. Sections 2561–2563, Civ. Code; 14 Cal. Jur. 486 et seq.

[3] Plaintiff produced numerous witnesses the effect of whose testimony was to rebut the defendant's evidence that deceased had a diseased heart and knew it when he signed the application for insurance. This merely created a conflict in the evidence which the trial court resolved against her. This becomes binding on us under the facts here presented.

Plaintiff has cited numerous cases where the defense of willful concealment of a material fact by the insured was urged as a defense by the insurer and judgments for the plaintiffs were affirmed. In each of these cases the trial court found the facts in favor of the beneficiary and against the insurance company. As we have here the reverse of such a situation, the cited cases furnish us with no authority for disturbing this finding and the judgment of the trial court.

[4] Plaintiff maintains that the trial court found deceased was suffering from a heart affliction at the time of the application for insurance, while the diseases alleged in the answer were those pertaining to the brain and other organs distinct from the heart. This amounts to a claim that there was a variance between the pleadings and the proof and the pleadings and the findings of fact. No objection to any evidence on the ground of such variance was made in the trial court. This objection cannot be urged here for the first time. Furthermore, we believe that the allegations of paragraph 2 of the separate and second affirmative defense are sufficiently broad to permit the introduction of the evidence had such an objection been made in the trial court.

Plaintiff contends that defendant waived the falsity of the answers in the application; also that it is estopped from relying upon the fact of the untrue statements having been made because of not having promptly rescinded the contract after having gained knowledge of the true facts. Section 2564, Civ. Code.

Plaintiff testified that in a conversation had with the president and secretary of defendant on the day the application was signed she informed them that her husband was a disabled Spanish-American War veteran and was receiving a disability pension from the government. The president of the company denied that any such conversation took place. This again brings us back to the familiar rule that conflicts in the evidence are settled in the trial court.

There is also evidence in the record that deceased was appointed a soliciting agent of defendant; that he with another such agent solicited disabled members of a camp of Spanish-American War veterans for insurance; that several were insured; that prior to the death of deceased plaintiff and a disabled veteran policyholder interviewed the president of defendant and informed him that the policyholder was a disabled veteran drawing a disability pension and asked if such fact would invalidate an insurance policy; that the president replied: "I told them that we didn't ask the question in our application whether they received a pension; that any policyholder with us that answered the questions propounded in our application, and that if they answered those questions truthfully, they had nothing to worry about. That was my answer to Mrs. Farrar and the gentleman accompanying her, and my answer to everyone making a similar inquiry." The president also testified that numerous other questions similar in form were asked of him by other policyholders and like answers given by him.

The law imposes upon the insured the duty of dealing honestly with the insurer. It is equally emphatic in requiring like honesty on the part of the insurer in its dealings with the insured and the beneficiary. Dishonesty on the part of either is frowned upon and appropriate penalties provided.

In 14 Ruling Case Law, at pages 1166 and 1181, it is said: "The law is charitable enough to assume, in the absence of any showing to the contrary, that an insurance company intends to execute a valid contract in return for the premiums received; and when the policy contains a condition which renders it void at its inception, and this result is known to the insurer, it will be presumed to have intended to waive the condition, and to execute a binding contract, rather than to have deceived the insured * * *, and to have taken his money without consideration. * * *

Waiver of a forfeiture though in the nature of an estoppel may be created by acts, conduct, or declarations insufficient to create a technical estoppel, and the courts, not favoring forfeitures, are inclined to grasp any circumstances which indicate an election to waive a forfeiture. Any acts, declarations, or course of dealing by an insurer, with knowledge of facts constituting a breach of a condition in a policy, leading the person insured honestly to think if conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting on the forfeiture."

In West Coast Lumber Co. v. State, etc., Co., 98 Cal. 502, 33 P. 258, 260, it is said: "If, as was the case here, a building is insured against loss by fire under a policy containing a proviso that it shall be or become void in case the building is or shall become vacant or unoccupied, when, as was well known to the insurer at the date of the policy, and subsequently, it was and remained unoccupied, the insurer will be presumed to have waived the clause as to occupancy. May on Insurance states it in this wise: 'To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternative is to find this or to find that, in accordance with honesty, there was an intent to waive the known ground of avoidance, they will choose the latter.' May, Ins. § 497; Commercial Ins. Co. v. Ives, 56 Ill. 402."

In Steil v. Sun Insurance Office, 171 Cal. 795, 155 P. 72, 75, it is said: "It is stated in the briefs that the instructions were based on a passage from Cooley's Briefs on Insurance (vol. 3, p. 2665) regarding 'the effect of an insurer's failure to act on obtaining knowledge of facts which either avoid or forfeit a policy,' and saying: 'The weight of authority supports the proposition that an insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, on being notified of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time. This rule is, no doubt, in most cases based on the theory that it is a breach of good faith on the part of an insurance company to remain silent and inactive on notice of a breach, and to retain the unearned premiums, and so lead the insured to believe that his insurance contract is regarded as valid notwithstanding the breach.' This rule is doubtless applicable in all cases where the facts brought to the insurer's knowledge show some violation of the terms of the policy which, either by law or because of some provision of the policy itself, operates to avoid or forfeit the policy." See, also, Murray v. Home Benefit Life Association, 90 Cal. 402, 27 P. 309, 25 Am. St. Rep. 133; Bayley v. Employers' Liability Assurance Corp., 125 Cal. 345, 58 P. 7; J. Frank & Co. v. New Amsterdam Casualty Co., 175 Cal. 293, 165 P. 927; MacGruer v. Fidelity & Casualty Co., 89 Cal.App. 227, 264 P. 501.

[5] It appears in the record in this case that, at the time deceased applied for his insurance and the policy was written and delivered, the federal laws required as a prerequisite to granting a pension to a Spanish-American War veteran that such veteran be suffering from some physical disability to such an extent that it reduced his earning capacity and interfered with his ability to earn a living. Of course the loss of a leg or an arm would produce such a result, but such disability would be plainly visible. There is no suggestion that deceased had any visible disability. The conclusion must follow that a person knowing of the physical disability of deceased must have known that it resulted from the impairment of functions of some invisible organ or portion of the body. Such impairments result from disease or the ravages of time. Deceased was nearly 50 years of age when he applied for insurance. The officers of defendant knew before he died that he was drawing a disability pension. They had seen deceased and had personally taken his application. They were charged with the knowledge that he was suffering from some physical ailment which reduced his earning capacity. They did not act promptly and did not cancel his policy upon receipt of the knowledge of his disability, but reserved this defense until after he had died and his widow brought suit to recover the value of the policy.

A study of the record leaves us with the conclusion that the results shown in this case might easily have been the product of a deliberate plan on the part of the officers of the defendant company to enrich the company and defraud the class of insured to which deceased belonged. They sought to insure veterans of the Spanish-American War who were drawing disability pensions. These men had all passed well into, and some of them beyond, middle age. They were all suffering from physical disabilities to some extent. The evidence shows that these disabilities, including those from which deceased suffered at the date of his application, were often the results of age alone. Defendant required no

medical examinations even though it officers knew that these insured were physically disabled. Defendant required the insured to certify that they were in good health when its officers knew they were not. When, on account of a certain happening, a number of the insured became alarmed about the validity of their policies and sought information on this question, the president of defendant gave the questionable, equivocal, and misleading answer we have quoted. If the answer had been deliberately planned for the specific purpose of lulling the fears of the unwary and at the same time attempting to save to the defendant the specific defenses it is urging in this action, it is difficult to see how it could have been more cleverly worded.

A study of the record before us leaves us with the definite conclusion that, while the deceased was knowingly untruthful in answering the quoted questions in his application for insurance, the defendant was also culpable in permitting the policy to remain in force and in not rescinding the policy promptly after it had knowledge that deceased was disabled.

[6] J. M. Pearson, a disabled Spanish-American War veteran, testified that he was drawing a disability pension from the government; that he was insured by defendant; that another pensioner, a disabled Spanish-American War veteran, insured by defendant, died; that payment on the policy was refused by defendant; that this happening alarmed the witness and his wife about the insurance and that they went to the general offices of the defendant in November, 1931, and interviewed its secretary; that the witness informed the secretary that he was a disabled Spanish-American War veteran drawing a disability pension and inquired about the effect of such disability on his insurance; that an answer was given by the secretary in effect somewhat similar to the quoted answer of the president. This testimony was corroborated by Mrs. Pearson, except that she testified that the secretary told her husband that the fact of the penson would have absolutely no effect on the policy of insurance; that the secretary was also a Spanish-American War veteran drawing a pension and was a policy holder in defendant; that the company had insured hundreds of Spanish-American War veterans. An offer was made to prove that the substance of this conversation had been communicated to Mr. and Mrs. Farrar.

The evidence of these two witnesses was erroneously stricken from the record. It had an important bearing on the policy of defendant in insuring disabled Spanish-American War veterans who were pensioners and the waiver of their disabilities. It should have remained in the record and should have been considered by the trial judge in deciding the question of the waiver by defendant of the falsity of the statements in the application for the insurance signed by deceased.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.



3 Cal.App.2d 65

HEMET HOME BUILDERS ASS'N v. WELLS et al.

Civ. 1482.

District Court of Appeal, Fourth District, California.

Dec. 14, 1934.

Hearing Denied by Supreme Court Feb. 11, 1935.

1. Notaries ⇐11

Notary's official delinquency in making false certificates of acknowledgment of trust deeds by fictitious persons as part of scheme to defraud payee of notes secured by such deeds *held* proximate cause of payee's loss of sum loaned in reliance on certificates.

2. Negligence ⇐56(1)

Negligence, to be actionable, must be shown to have been a proximate cause of damage sustained.

3. Notaries ⇐11

Surety on notary's bond is liable for damages resulting from notary's fraudulent acts in performance of his duties and negligence in taking acknowledgment or making false certificate thereof (Pol. Code, § 801).

4. Notaries ⇐11

Surety on notary's bond is liable for damages proximately caused by notary's official misconduct in making false certificates of acknowledgment, though acknowledged instruments were valueless (Pol. Code, § 801).

5. Notaries ⇐11

Surety refusing demand for principal sum claimed as damages for notary's official misconduct, unsuccessfully defending action

on notary's bond for such amount, prosecuting unsuccessful appeal from judgment for sum claimed, with interest and costs, and paying amount of judgment, with interest accruing pending appeal, *held* not entitled to reduction of judgment by amount of costs and interest paid (Pol. Code, § 801).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the Hemet Home Builders' Association, a corporation, against Frank H. Wells, the Indemnity Insurance Company of North America, and others. Judgment for plaintiff, and defendant insurance company appeals.

Modified, and affirmed as modified.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for appellant.

Albert Ford, of Riverside, for respondent.

JENNINGS, Justice.

This is an appeal by the defendant Indemnity Insurance Company of North America, surety on the official bond of the defendant Frank H. Wells, as notary public, from a judgment rendered in plaintiff's favor in an action brought by plaintiff to recover damages alleged to have been sustained by plaintiff by reason of the official misconduct of Wells as a notary. This misconduct consisted in the making of false certificates of acknowledgment which were attached to three trust deeds that were received by plaintiff as security for the payment of three promissory notes drawn in plaintiff's favor as payee. The judgment in plaintiff's favor was in the sum of $5,000, which was the full penal amount of the bond.

The undisputed facts established by the evidence produced during the trial showed that the defendant Wells was not only a notary public, but was also a licensed real estate broker and the president of the defendant Riverside County Title Guaranty Company and that he acted in the capacities of real estate broker and president of the title company in carrying out the transaction whereby plaintiff suffered a loss of $11,000.

The details of this transaction are as follows: On or about October 6, 1930, Wells, acting in the capacity of real estate broker, submitted to plaintiff three applications for loans to be secured by trust deeds on three different parcels of land. These applications were accepted and acted upon and were formally approved by plaintiff's board of directors on November 14, 1930. In consummating the loans, the defendant title company was used as the depositary for the trust deeds that were to be executed as security for the repayment of the loans and of the money which was to be advanced by plaintiff on such security. The title company was employed to furnish a certificate of title as to each parcel of land, and the plaintiff instructed the title company that each of the trust deeds which it proposed to take must be a first lien on the real property described therein. In accordance with these instructions plaintiff received three certificates of title executed by the title company which showed title in each parcel supporting each trust deed. Plaintiff had no actual notice of the condition of the title of any of the property mentioned in the trust deeds and relied entirely on the certificate of title thus furnished. The defendant Wells personally dictated, prepared, and signed the three certificates of title which were furnished to plaintiff. In advancing the loans, the plaintiff issued three checks, each of which was made payable to the order of the defendant title company. For convenience the three trust deeds which were furnished to plaintiff will be denominated the Williams trust deed, the Shaw trust deed, and the Crawford trust deed. The certificate of title as to the land described in the Williams trust deed showed that title to the land was vested in Herbert P. Williams and Mary A. Williams. The title certificate as to the land described in the Shaw trust deed showed that title to the land was vested in Henry J. Shaw. The title certificate as to the land described in the Crawford trust deed showed that the title to this land was vested in James M. Crawford. As a matter of fact, at no time was the legal title or any title of any kind in any of the land vested in any of the parties stated in the certificates and the names "Williams," "Shaw," and "Crawford" were purely fictitious names adopted by the defendant Wells. In furtherance of his fraudulent scheme, Wells prepared three trust deeds which purported to be signed by the parties in whom the title to the land described therein was shown to be vested by the aforesaid title certificates and to each of said trust deeds he attached a certificate of acknowledgment wherein he stated that the persons whose signatures were affixed to the trust deed and who were known to him to be the persons whose names were subscribed to the instrument had personally appeared before him and had acknowledged that they had executed the instrument. To each of such certificates Wells affixed his signature

as a notary, and upon each certificate he impressed his notarial seal. It appeared, however, that Wells not only prepared the trust deeds, but that he also himself signed the instruments using the names of the aforesaid fictitious persons and himself acknowledged the execution of the trust deeds in the names of such fictitious persons before himself as notary. When the three trust deeds were delivered to plaintiff as the final step in the consummation of the loan transaction, each instrument bore the stamp of the county recorder purporting to show that the instrument had been duly recorded. The fact was, however, that none of the trust deeds had been recorded and the recorder's stamp in each instance had been severed from a document which had been recorded and was pasted on the outer cover of the trust deed in which plaintiff was designated as the beneficiary.

[1] The chief contention advanced by appellant as a ground for reversal of the judgment in respondent's favor is that the abovementioned facts show that the misconduct of its principal, the notary Wells, was not the proximate cause of the loss suffered by respondent. It is pointed out that Wells acted in the transaction not only as a notary, but also in the capacity of a real estate broker and as the president and controlling officer of the title company, and it is urged that it was his action in the two latter capacities, particularly his action in receiving the money which was not done in his capacity as notary public, that was the efficient cause of respondent's loss. The contention is devoid of merit. The trial court specifically found that the certificates of acknowledgment executed by appellant's principal were each and all false, were known by the notary to be false, and were made by the notary for the purpose of deceiving and defrauding respondent, that respondent relied upon the certificates and was thereby defrauded of the sum of $11,000, and that respondent would not have parted with said sum but for the certificates of acknowledgment. Examination of the record demonstrates that the evidence was ample to support this finding. It is idle, therefore, to argue that the delinquency of appellant's principal in making the false certificates was not an efficient cause of the loss which respondent sustained. No burden rested upon respondent to show that this delinquency was the sole cause of its loss. It is apparent that the making of the false certificates was an integral part of the plan and scheme which the defendant Wells had evolved for the purpose of defrauding respondent, and that, under the circumstances disclosed by the record, it operated directly to cause the damage which respondent suffered. This was entirely sufficient to demonstrate that the conceded official delinquency of appellant's principal was a proximate cause of respondent's loss. Kleinpeter v. Castro, 11 Cal. App. 83, 103 P. 1090; Luttrell v. Columbia Casualty Co., 136 Cal. App. 513, 516, 28 P.(2d) 1067.

Appellant also contends that the trial court erred in permitting respondent to recover substantial damages because it is said that, even if the signatures of the persons whose names appear in the certificates of acknowledgment had been genuine, respondent would nevertheless have suffered exactly the same damage, since it appeared that none of these persons owned any interest in any of the land described in the trust deeds. In other words, it is contended that the trust deeds were valueless and that consequently the notary's certificate contributed nothing to this condition.

It is not easy to differentiate this second contention from the first. In the final analysis, although it is offered as an attack upon the measure of damages applied by the trial court, it resolves itself into a contention that it was the action of the defendant Wells in his capacity as real estate broker and not his official misconduct as a notary public which was the proximate cause of respondent's loss. Viewed in this aspect, appellant's second contention would merit no further consideration since, as heretofore indicated, we entertain a definite opinion that the official delinquency of appellant's principal was a proximate cause of respondent's loss.

There are, however, certain authorities which appear to lend support to the second contention advanced as an attack upon the measure of damages applied by the trial court. These authorities must therefore be examined for the purpose of determining their applicability to the problem which is here presented.

[2] The first of the cases upon which appellant relies as sustaining its second contention is McAllister v. Clement, 75 Cal. 182, 16 P. 775, 776. In this case the delinquency of the notary, for which it was sought to impose a liability upon his sureties, consisted in the failure to state in the certificate the year in which the acknowledgment was taken and to insert in the body of the certificate "the name and quality of the officer" who made it. The negligence of the notary in these respects was alleged to have destroyed

the efficacy of the lien of the mortgage to which the notary's certificate was attached and thus to have caused the loss which the plaintiff sustained. The mortgage to which the notary's certificate was attached was a chattel mortgage upon a certain crop. Unfortunately for the plaintiff in that case the trial court specifically found that the crop which was the subject of the mortgage "was not valuable, and was and is wholly valueless" and drew the legal conclusion therefrom "that plaintiff has not suffered any damage or loss by reason of the act or acts of defendants." Judgment was therefore rendered in favor of the defendants. On appeal therefrom the judgment was affirmed, the court remarking that "it is clear that no action will lie to recover damages if no damages have been sustained." This declaration of an abstract legal principle is unassailable, and there can be no doubt that it was correctly applied to the facts which were disclosed by the record. Although the court's language emphasizes the impossibility of recovering damages when the facts show that no damage occurred and would thus appear to be apropos to the subject of damages, it may with equal propriety be considered as authority in support of the recognized principle that negligence to be actionable must be shown to have been a proximate cause of the damage. In the cited case the notary was concededly negligent, but his negligence was not a proximate cause of loss for the simple reason that the subject of the mortgage to which the defective certificate was attached was wholly valueless. The fact that the crop had no value was therefore the proximate cause of the plaintiff's loss, and it did not appear that the notary's negligence contributed in any way thereto. In the instant case, the fraud of the notary was a proximate cause of the loss which the respondent suffered.

The second authority upon which appellant relies is Heidt v. Minor, 89 Cal. 115, 26 P. 627. The facts of this case are strikingly similar to those which are present in the instant case. One Cordell, who was a notary public, also acted as a real estate agent and broker. The plaintiff had often employed Cordell to make loans for her. In several of the loans which she made through Cordell the latter produced a note and mortgage which had been prepared by him and having attached to the mortgage his certificate as a notary stating that the signers of the mortgage had acknowledged before him as notary that they had executed the instrument. On two occasions Cordell exhibited to plaintiff what purported to be notes and mortgages of certain persons whose names were attached thereto as signers. Each mortgage bore a certificate wherein Cordell as notary stated that the person who had signed the instrument had duly acknowledged its execution. It developed that these particular notes and mortgages were forged, and that by means of such forged instruments and the false certificates of acknowledgment attached thereto the plaintiff was induced to receive them and to pay to Cordell, for the persons who had apparently executed the mortgages, certain sums of money which Cordell appropriated to his own use. The plaintiff sought to recover from the sureties on Cordell's bond as notary the amount of her loss. Judgment was rendered in plaintiff's favor by the trial court. On appeal by defendants the judgment was reversed. The ground of the court's decision was that the trial court had failed to find that the mortgages which the plaintiff received would have had any value if they had been valid, and that by reason of this failure the proper basis for determining the liability of the defendants was wanting. That this was the sole ground of the decision is made clear by the Supreme Court in its opinion in Heidt v. Minor, 113 Cal. 385, 45 P. 700, 701. This was the same case as that in which the former decision was rendered. Upon reversal of the judgment in plaintiff's favor, the case was retried and judgment in plaintiff's favor was again rendered. The defendants again appealed and contended that it had been decided on the first appeal that the value of the mortgage, if it had been valid in every respect, would have depended on the value of the mortgaged property and that this proposition became the law of the case. In response to this contention the Supreme Court conceded that the former opinion contained language which afforded justification for the position taken by appellants. The court then proceeded as follows: "But the 'law of the case' consists, not in the reasoning of the court, or the illustrations given, but in the propositions of law actually decided, and applicable to the facts in judgment. The only propositions of law decided on that appeal (so far as this matter is concerned), and the only ones which, on the facts then before the court, could have been decided, were that the defendant is liable only for what would be the value of the mortgage if valid; that the court had not found that it would be of any value, if valid; and that, therefore, the proper basis for determining the liability of the defendant was wanting. See [Heidt v. Minor] 89 Cal. 122, 26 P. 627. All beyond this was mere reasoning and illustration."

The above analysis of the opinion rendered on the first appeal of Heidt v. Minor is warranted because of the fact that this opinion contains language which indicates that the surety on the official bond of a notary public cannot be held liable when the notary also acts as a real estate broker and receives money in such capacity from a person whom he defrauds by means of forged mortgages having attached thereto false certificates of acknowledgment taken by the notary. The court, after adverting to the familiar principle of the law of suretyship that the obligation of sureties on an official bond is strictissimi juris, declared that it is no part of the duty of a notary public to receive money from or for anybody, and that, although the receipt of the money by the notary was misconduct, it was not official misconduct to have obtained the money fraudulently, and that it was only against official misconduct that the sureties on the notary's bond had consented to indemnify persons injured thereby. This situation so strikingly parallels that which is presented in the instant case that the language used in connection therewith would appear to be peculiarly apropos. However, although the court's language indicated an opinion that the sureties on the notary's bond would not be liable for the misconduct of the notary in fraudulently obtaining and misappropriating the money intrusted to him, since it was not official misconduct for which alone the sureties were bound, it must nevertheless be observed that the judgment rendered in plaintiff's favor was reversed solely because the trial court had failed to find that the mortgages would have had any value if they had been valid. The later decision in Heidt v. Minor, affirmed a judgment in favor of the plaintiff, since it appeared that, upon the going down of the remittitur on the first appeal, plaintiff had amended her complaint to allege that the supposed mortgagor did not own any of the land embraced by the mortgage but that he was solvent and able to pay the note set out in the mortgage and would have paid it if the mortgage had been genuine. It was then held in the later opinion that the presence in the case of the new facts alleged in plaintiff's amendment made the case substantially different from that presented on the first appeal and that these new facts supplied the defect in the findings which had caused the reversal of the former judgment. The later decision is therefore authority in support of the judgment herein and because of the striking factual similarity to the instant case is directly in point.

The third authority cited by appellant and the one on which it places particular reliance is Ross v. New Amsterdam Casualty Co., 56 Cal. App. 254, 205 P. 43. In this case the trial court sustained a general demurrer to the plaintiff's complaint without leave to amend. Plaintiff appealed, and the judgment which had been rendered in favor of the defendants was affirmed. The action was instituted by plaintiff to recover damages from a notary public and the surety on his official bond. The allegations of the complaint showed that on a specified date the plaintiff had paid to one Gladys Steele the sum of $650 as the purchase price of an automobile which she represented as being her property and which she had purchased from one John Reed. As an inducement to the purchase of the automobile, she presented to plaintiff a bill of sale of the automobile which purported to be signed by Reed and which she represented she had received from him. The bill of sale was in the usual form of such an instrument, but there was attached to it a certificate of acknowledgment executed by the notary wherein it was certified that John Reed, known to the notary to be the person described in the instrument and whose name was subscribed thereto, had appeared before the notary and had acknowledged that he had executed the bill of sale. It was further alleged that plaintiff relied on the bill of sale and particularly on the notary's certificate of acknowledgment and paid to Gladys Steele the sum demanded by her as the purchase price of the automobile and that it then developed that John Reed was a fictitious person who had never appeared before the notary or acknowledged the execution of the instrument and that the notary's certificate was false and fraudulent and was made by the notary for the purpose of enabling Gladys Steele to represent that she owned the automobile and had purchased it from John Reed. It was further alleged that the automobile was in fact stolen property and that it was subsequently reclaimed by the true owner, whereby plaintiff was damaged in the amount which he had paid as the purchase price of the automobile.

In affirming the judgment, the appellate court observed, first, that a notary does not, by a certificate of acknowledgment, certify to the ownership of the property in the person who executes the instrument to which the notary's certificate is attached, and that, assuming the fact to be as alleged in the complaint that the notary committed a breach of duty as such officer in falsely identifying by his certificate John Reed as an actual person who

had executed the bill of sale for which breach the notary and his surety would be liable to any person injured thereby, the question still remained as to what injury the plaintiff had suffered by the notary's wrongful act. The court then stated that this question might be answered by inquiring as to what advantage it would have been to plaintiff if the notary's certificate had been true in all respects. The complaint alleged that neither John Reed nor Gladys Steele had ever owned the automobile, so that a bill of sale to plaintiff from either or both could not have operated to transfer any title in the property to plaintiff, and therefore plaintiff could have received no title to the property if John Reed had actually existed and had in fact executed the bill of sale and acknowledged its execution. The court then propounded the inquiry as to how plaintiff could be said to have sustained any damage from the alleged fact that John Reed was a purely fictitious person and that his purported bill of sale was falsely acknowledged and certified to by the notary. It was then declared that the precise situation disclosed by the complaint was covered by the case of Heidt v. Minor, 89 Cal. 115, 26 P. 627, and by the principle applied in McAllister v. Clement, 75 Cal. 182, 16 P. 775.

The foregoing analysis of the cited case demonstrates that at least the language of the opinion is favorable to appellant's contention that the trial court erred in permitting recovery of substantial damages. It remains to discover whether the cited case is fairly distinguishable from the facts presented on this appeal. It is our opinion, based on careful analysis of the Ross Case, that there is at least one point of differentiation which clearly distinguishes it from the instant case.

This point of distinction has to do with the legal effect of a notary's certificate of acknowledgment. In the Ross Case the notary's certificate was attached to a bill of sale, an instrument which is not required to be acknowledged and to whose validity nothing was added by reason of the presence of the acknowledgment. Since the acknowledgment of the instrument was immaterial, the notary's action in attaching to the document a false certificate contributed nothing to the defectiveness of the bill of sale and could not of itself be the cause of the loss which the plaintiff sustained. In the instant case the certificates of acknowledgment were attached to trust deeds covering real property. These instruments were not entitled to recordation unless the makers had first acknowledged that they had executed them. When, therefore, the notary, appellant's principal, falsely certified that the persons whose names were signed to the trust deeds had appeared before him and being known to him had acknowledged that they had executed the instruments, he was guilty of a palpable fraud which was committed by him in his capacity as notary with respect to a matter that bore directly upon the efficacy of the trust deeds. The instruments were thus made to appear as valid trust deeds executed by the persons who owned the land and properly recorded so that they constituted valid liens upon the real property described therein.

[3] In the final analysis the problem here resolves itself into a question of whether or not the notary's action in attaching false certificates of acknowledgment was a proximate cause of respondent's loss. The trial court found that it was, and we have heretofore indicated our opinion that this finding is not lacking in evidentiary support. Since this is true, the liability of appellant is determined by section 801, Political Code, which provides that "For the official misconduct or neglect of a notary public, he and the sureties on his official bond are liable to the parties injured thereby for *all the damages* sustained." (Italics ours.) In Hungate v. Wells, 129 Cal. App. 133, 18 P.(2d) 64, 65, it is correctly said that "It has been repeatedly held in California that, when a notary public assumes his office, he is required to perform his duties with honesty, integrity, diligence, and skill. His bond is executed for the purpose of protecting those who may suffer by his dishonesty and the bondsman is liable for damages resulting from the fraudulent acts of the notary committed in the performance of his duties. The notary and his surety are liable for the negligence of the notary in taking an acknowledgment or for making a false certificate of acknowledgment. Joost v. Craig, 131 Cal. 504, 63 P. 840, 82 Am. St. Rep. 374; Anderson v. Aronsohn, 181 Cal. 294, 184 P. 12, 10 A. L. R. 866." The same principle was declared in this state in 1858 in the case of Fogarty v. Finlay, 10 Cal. 239, 245, 70 Am. Dec. 714, and it was further there held that the measure of damages to be applied in the case of a notary who has failed in the performance of the duty imposed by law upon him and whose failure has resulted in loss to one who has relied upon the notary's proper and skillful performance of such duty is "the amount of the debt and interest intended to be secured by the mortgage."

The case of Homan v. Wayer, 9 Cal. App. 123, 98 P. 80, is enlightening upon the general problem which is presented when liability is sought to be fastened upon the surety

of a notary who has failed properly to perform the duty imposed upon him by law. In that case one Overholtzer had introduced to the notary an imposter who falsely represented herself to be the person who owned the land described in a deed. The notary carelessly attached to the deed a certificate wherein he certified that the person who falsely assumed the name of the true owner was known to him to be the person whom she represented herself to be. Overholtzer, who had assumed the name of Anderson and who was named as grantee in the deed, then sold the land to the plaintiff, who paid the purchase price, relying upon the correctness of the notary's certificate. The trial court rendered judgment against the surety on the notary's official bond. On appeal it was contended that Overholtzer and the person who had impersonated the true owner of the land had aided in the fraudulent transaction and had materially contributed to plaintiff's loss. The contention did not prevail; the appellate court remarking that the liability of the notary and his surety could not be thus relieved if it appeared that the plaintiff had relied upon the false certificate when paying out his money. It was pointed out that no *official* act of the notary in certifying an acknowledgment to a deed can ever alone result in injury to any one, but that the interposition of fraudulent action on the part of others does not operate to relieve the notary and his surety when it is made to appear that the defrauded person has relied upon the notary's certificate. Certainly, if the liability of the notary's surety is not relieved by the fact that others who planned and carried into execution the fraudulent scheme have imposed upon the notary, who is unaware of the fraud, to procure a false certificate which is attached to the deed, there is slight reason to contend that it is relieved when it appears that the notary was himself the sole actor in the fraudulent scheme whereby respondent suffered the loss of which complaint is made. The very recent decision of Division 2 of the First Appellate District in the case of California Pacific Title & Trust Co. v. MacArthur, reported in 36 P. (2d) 413, is directly in point with respect to appellant's contention that the notary's misconduct was not the proximate cause of respondent's loss. Factually similar to the instant case and an authority frequently cited in actions in which liability for a notary's misconduct is sought to be fastened upon the surety on the notary's official bond is the case of State ex rel. Matter v. Ogden, 187 Mo. App. 39, 172 S. W. 1172, 1174. In this case one Ogden, who was a notary public, was also engaged in the real estate insurance and loan business and represented to the plaintiff that he had a customer who owned land in a certain locality and that this customer wished to secure the loan of a certain amount of money on the security of the land. Subsequently Ogden came to plaintiff and exhibited to him a note made payable to plaintiff purporting to be signed by the customer and his wife, also a deed of trust which appeared to be signed by the same persons and which had attached to it a certificate of acknowledgment made by Ogden as notary. It developed that the persons whose names were signed to the note and trust deed were purely fictitious and that the signatures of such persons appearing on the instruments had been forged by Ogden and that Ogden's certificate of acknowledgment was false. In a suit by the plaintiff against Ogden as notary and the surety on his official bond, judgment was rendered against the surety for merely nominal damages. On appeal the judgment was reversed. In support of the judgment it was urged by the surety on the appeal that no loss had resulted to the plaintiff by reason of any official misconduct of the notary, since even if the notary's certificate had been true plaintiff's loss would have been the same due to the fact that the persons whose names were signed to the trust deed did not own any interest in the land described therein. The court's opinion disposes of this contention in the following language: "We think that this is putting the cart before the horse, and that, under the undisputed evidence, the proposition should be reversed; and the true statement is that, if it had not been for the notary's fraudulent certificate, no money would have been lent upon the deed, and consequently none would have been lost. Even if the Harveys had existed and had owned the land, and relator had personally known those facts, still he would not have loaned the money without the certificate of acknowledgment. And if the certificate were untrue, then the Harveys, even if they had owned the land, would not have been bound by the deed, and relator would have lost his money the same as he has now when the Harveys are mythical and do not own the land. The notary's duty under the law, as we have seen, is to certify to acknowledgments with integrity. If he had acted with integrity, he could not have made this certificate at all, because there were no such persons to appear before him and make the acknowledgment, and, had it not been for the false certificate, the money would not have been lent, and in that event there would have been no loss."

[4] It must be conceded that authorities are not lacking to support appellant's contention that in an action of this character where the notary has himself forged the names of fictitious persons to trust deeds or similar instruments and has attached to such instruments a false certificate of acknowledgment, no liability may be imposed upon the surety on the notary's official bond for the reason that no loss occurred by reason of the notary's official misconduct. It is our opinion, however, that the rule which is supported by the weight of authority and the rule which undoubtedly prevails in California is that in accordance with section 801, Political Code, the surety is liable for all damages sustained by reason of the official misconduct of the notary, and that, when it is made to appear that such misconduct was the proximate cause of the damage which has resulted, it may not successfully be urged that no damages are recoverable because the instruments were valueless irrespective of the presence of the false certificates of acknowledgment.

[5] Appellant's final contention is that the judgment herein, which was for the full penal amount specified in the notary's official bond executed by appellant as surety, is excessive because it was shown that, prior to the entry of the judgment from which this appeal has been prosecuted, appellant had been compelled to pay the sum of $500 in satisfaction of one judgment obtained on the same bond which forms the basis for the instant action and a further sum of $1,274.30 in satisfaction of another judgment obtained upon the same bond. Respondent concedes that in accordance with the opinion in Wiggins v. Pacific Indemnity Co., 134 Cal. App. 328, 25 P.(2d) 898, the judgment is excessive and must be reduced by subtracting therefrom the sum of $1,500 which represents the principal amount of the two obligations which were imposed upon appellant in the former suits. Respondent does not, however, concede and objects to the further reduction of the judgment in the additional amount of $274.30. This last-mentioned amount is shown to have been made up of the sum of $103.24, which was allowed as interest in the case of Hungate v. Wells, and the further sum of $52.65 allowed as costs of the action and the additional sum of $118.41 which was presumably additional interest that accrued pending the appeal taken by the surety from the judgment in Hungate v. Wells.

It is our opinion that respondent's objection to further reduction of the judgment in the amount last specified is proper. Appellant makes no contention that the allowance of interest and costs in the prior action of Hungate v. Wells was incorrect. Having unsuccessfully defended that action in the trial court and having thereafter unsuccessfully prosecuted an appeal from a judgment which properly included interest and costs, it paid the amount of the judgment, together with the interest which had accrued pending the appeal and now seeks to charge the amount which it paid as costs of suit and interest on its obligation to the plaintiff in said action against this respondent. We know of no legal or equitable principle which would permit respondent thus to be penalized. Obviously, it was determined in the prior action that appellant was bound by the terms of its contract of suretyship to respond in damages to a plaintiff who had sustained loss through the official misconduct of appellant's principal. Appellant could have avoided the payment of costs and interest by paying the principal sum of $1,000 on demand of the plaintiff in the former action. It chose instead to refuse the demand and to defend the suit which was brought to enforce payment of the amount demanded. Having taken this chance and having been compelled to pay an additional amount due to its action in making necessary the prosecution of a suit to enforce collection of the sum demanded, it may not now charge against another innocent party who has suffered damage through the official misconduct of its principal the amount properly assessed against it by way of costs and interest in the former action.

The judgment herein is therefore modified by subtracting from the sum of $5,000, the principal amount thereof, the sum of $1,500, and, from the sum of $521 allowed as interest on the above-mentioned principal, the sum of $156.63, representing interest on said above-mentioned sum of $1,500 at the rate of 7 per cent. per annum from the date specified by the trial court in its conclusions of law up to the date on which the judgment was rendered.

As thus modified, the judgment from which this appeal has been taken is affirmed. Each party will pay its costs of appeal.

We concur: BARNARD, P. J.; MARKS, J.

3 Cal.App.2d 45

WELLS FARGO BANK & UNION TRUST CO. v. BROAD.

Civ. 9174.

District Court of Appeal, First District, Division 1, California.

Dec. 13, 1934.

1. Courts ⇐122

In action in unlawful detainer, jurisdiction depends upon amount claimed in ad damnum clause of complaint, and does not depend upon amount found to be due upon trial (Code Civ. Proc. § 1174, and § 112, subd. 2).

2. Courts ⇐121(2)

Under statute vesting justice's courts with original jurisdiction of actions in unlawful detainer where whole amount of damages claimed is $300 or less, damages include amount of trebled damages claimed for unlawful detention of premises, and, if such whole amount exceeds $300, jurisdiction is in superior court and not in justice's court (Code Civ. Proc. § 1174, and § 112, subd. 2).

3. Courts ⇐121(2)

Superior court, not justice's court, *held* to have jurisdiction of action in unlawful detainer, where plaintiff claimed $135 for rentals and asked that amount be trebled (Code Civ. Proc. § 1174, and § 112, subd. 2).

4. Appeal and error ⇐870(3)

Where trial court entered order of dismissal of action and subsequently entered order vacating order of dismissal whereupon action proceeded to judgment from which alone defendant appealed, appellate court *held* without authority to review order vacating order of dismissal since defendant could have appealed therefrom (Code Civ. Proc. § 956, and § 963, subd. 2).

5. Landlord and tenant ⇐291(16)

Where trial court discharged jury and entered order dismissing action in unlawful detainer and subsequently vacated order and continued cause for further hearing at which no additional testimony was introduced whereupon court entered judgment for plaintiff for trebled damages, defendant was not thereby deprived of right to have jury decide whether landlord-tenant relationship existed, rental value of premises, and amount of damages, since relationship of parties was question of law for court, and rental was fixed by contract and allowance of triple rents rested in discretion of court (Code Civ. Proc. § 1174, and § 112, subd. 2).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by the Wells Fargo Bank & Union Trust Company, executor of the last will and testament of Alfred Fry Broad, deceased, against Louise M. Broad. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

See, also, 129 Cal. App. 657, 19 P.(2d) 258.

L. C. Pistolesi, of San Francisco; G. H. Van Harvey, of San Francisco, substituted in place of L. C. Pistolesi, deceased (Arthur G. Shoup, of San Jose, of counsel), for appellant.

Francis V. Keesling and Garton D. Keyston, both of San Francisco, for respondent.

KNIGHT, Justice.

Defendant appeals from an adverse judgment in an action in unlawful detainer.

It is contended, first, that the superior court was without jurisdiction to hear and determine the action; that on account of the amount of rental claimed, the justice's court had exclusive jurisdiction thereof. We find no merit in the contention.

[1, 2] The determination of the question of jurisdiction depends upon the amount claimed in the ad damnum clause of the complaint (Pratt v. Welcome, 6 Cal. App. 475, 92 P. 500; Harris v. Seidell (Cal. App.) 36 P.(2d) 1104; 7 Cal. Jur. 692) at the time of the commencement of the action (Gardiner v. Royer, 167 Cal. 238, 139 P. 75), and does not depend in any way upon the amount found upon trial to be due (Todhunter v. Smith, 219 Cal. 690, 28 P.(2d) 916; Becker v. Superior Court, 151 Cal. 313, 90 P. 689). At the time these transactions took place section 1174 of the Code of Civil Procedure provided that in actions in unlawful detainer the jury or the court, if the action be tried without a jury, shall assess the damages alleged and proved, occasioned to plaintiff by the unlawful detention of the premises, and shall find the amount of any rent due; and that judgment against the defendant guilty of unlawful detainer "may be entered in the discretion of the court either for the amount of the damages and rent found due, or for three times the amount so found." And subdivision 2 of section 112 of the Code of Civil Procedure provided that justice's courts (in judicial townships having less than 30,000 population) shall have original jurisdiction of actions in unlawful detainer "where the rental value is seventy-five dollars or less per month, *and where the whole amount of damages claimed* is three hundred dollars or less" (italics ours). Fur-

thermore, it has been expressly held that the clause "the whole amount of damages claimed * * *" as used in the foregoing Code section was intended to and does include the amount of trebled damages claimed for the unlawful detention of the premises; and that therefore if the "whole amount to be adjudged" exceeds the limitation of the amount fixed by said Code section, jurisdiction of the action is in the superior court and not in the justice's court. Hoban v. Ryan, 130 Cal. 96, 62 P. 296.

[3] In the present case, besides demanding restitution of the premises, plaintiff asked judgment for $135 claimed to be due for rentals and that said amount be trebled. In other words, the total amount of money judgment prayed for was $405; and judgment was rendered for that amount. It is evident, therefore, that the action was rightly instituted, tried, and determined in the superior court.

[4] The action came on for trial before a jury, demanded by the defendant, and at the conclusion of the evidence plaintiff moved for a directed verdict upon the ground that under the admitted facts plaintiff was entitled to judgment as prayed in the complaint. During the argument on said motion the court raised the point of the legal sufficiency of the written notice given by plaintiff to defendant fixing the amount of rental; and finally the court discharged the jury, held said notice to be insufficient, and entered a minute order dismissing the action. Approximately three months afterwards the order of dismissal was vacated on motion of plaintiff, upon the ground that it "was and is a nullity," and the cause was continued for further hearing, at which time no additional testimony was introduced, and the court ordered judgment in favor of plaintiff as prayed in the complaint. Judgment was entered accordingly.

Defendant now contends that the trial court was without jurisdiction to vacate the order of dismissal for the reason that said order in effect was a final judgment. But conceding, as defendant argues, that said order did constitute a final judgment, it would follow necessarily that the order vacating the same was a special order made after final judgment and appealable by defendant (subdivision 2, § 963, Code Civ. Proc.; 2 Cal. Jur. 163); and admittedly no such appeal was taken. The appeal is from the judgment on the merits, and section 956 of the Code of Civil Procedure provides in substance that an appeal from such a judgment does "not authorize the court to review any decision or order from which an appeal might have been taken." It will be seen, therefore, that the question of the legality of the order of dismissal is a matter into which inquiry may not here be made.

[5] Defendant further contends that in entering judgment for plaintiff on the merits, after vacating the order of dismissal, the trial court deprived defendant of the right to have the jury decide: (1) Whether the relation of landlord and tenant existed between the parties; (2) the rental value of the premises; and (3) the amount of damages, if any, to which plaintiff was entitled. The admitted facts of the case show, however, that when the order of dismissal was made there was nothing left for the jury to decide. Manifestly, the question of the legal relationship of the parties was one of law for the court to determine; and the rental due plaintiff for the use and occupation of the premises was fixed by contract of the parties, evidenced by a written notice to that effect given by plaintiff to defendant, which defendant admittedly received. True, at the trial defendant introduced certain testimony as to the reasonable value of the premises; but in view of the existing contract between the parties such testimony presented nothing more than a fictitious issue. And the only damages claimed or allowed consisted of triple rents, which under the provisions of said section 1174 the court was given the discretion to allow or disallow at the time of the entry of judgment. It is apparent from the foregoing that the situation presented by the action of the trial court in ordering the entry of judgment for plaintiff, after discharging the jury, was the same as if it had granted plaintiff's motion for a directed verdict; and clearly under the admitted facts of the case it would have been justified in so doing.

Defendant also challenges the sufficiency of the complaint and the evidence, but makes no effort to substantiate the challenge by argument or citation of authorities. Nevertheless, we have examined into the matter and find both the complaint and the evidence legally sufficient to support the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

3 Cal.App.2d 325

BETTENCOURT et al. v. OLIVERIA et al.

Civ. No. 5181.

District Court of Appeal, Third District, California.

Dec. 24, 1934.

Automobiles ⇐244(20)

Evidence that motorist stopped 35 to 40 feet from main-traveled highway, that he was operating truck from closed cab which obstructed view, and that he started to cross highway without thereafter attempting to look for approaching vehicles, *held* to support finding of gross negligence entitling passenger to recover for injuries received in collision at intersection.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by John C. Bettencourt and Virgil Bettencourt, a minor, by John C. Bettencourt, his guardian ad litem, against M. E. Oliveria and another. Judgment for plaintiffs, and named defendant appeals.

Affirmed.

J. Hampton Hoge, of San Francisco, for appellant.

Whitehurst & Logan, of Patterson, and E. H. Zion, of Modesto, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant Oliveria has appealed from a judgment of $2,163.50 which was rendered in an automobile casualty case jointly against him and his codefendant John Carvalho for personal injuries sustained by Virgil Bettencourt, a minor, while riding with the appellant in his truck. A collision of the respective machines which were operated by the two defendants occurred at the intersection of the Crows Landing road and the River road in Stanislaus county. The cause was tried by the court sitting without a jury. Both defendants were held to be guilty of gross concurrent negligence. Carvalho has not appealed. The appellant contends the evidence does not support the findings and judgment to the effect that he was guilty of gross negligence.

We are of the opinion the evidence sufficiently supports the findings and judgment that the appellant was guilty of gross negligence which proximately contributed to the injuries sustained by the minor child, Virgil Bettencourt. We may assume he was riding with the appellant as his guest. The evidence is conflicting, but there is substantial proof of the following facts: Crows Landing road is a main traveled paved highway extending approximately east and west at the point of the accident. The River road, which was surfaced with gravel, crossed the Crows Landing highway at a right angle at the point where the accident occurred. The appellant lived on the River road some distance north of its intersection with Crows Landing highway. At 7:30 o'clock p. m. of June 11, 1931, he was driving his Dodge truck southerly along the River road toward the intersection of that road with the Crows Landing highway. Some time before he reached the intersection of these roads, he picked up his young daughter and the plaintiff, Virgil Bettencourt, a seven year old boy. All three of the occupants of the truck sat in the seat inclosed with a cab which obscured their view to the right or to the left without leaning forward to escape that obstruction. Oliveria was familiar with that intersection of the roadways, and knew the approach to Crows Landing highway was dangerous because there was a "great deal of traffic" thereon. Crows Landing highway is 66 feet in width, with a 17-foot paved strip along the center thereof. It was practically straight for a long distance on either side of the River road crossing. There was a 4-foot fence and a line of tall weeds paralleling the fence within 2 feet therefrom, extending along the northerly side of Crows Landing highway on the east side of the River road.

The defendant Carvalho was driving his Dodge coupé along Crows Landing highway from the east toward the intersection of the River road at the rate of approximately 45 miles an hour. He did not see the truck which was driven by Oliveria until it reached a point about 35 feet from the paved portion of Crows Landing highway. Carvalho testified that Oliveria was then driving his truck at the rate of "about 35 miles (an hour), more or less." Carvalho was then unable to avert the collision which occurred at the northerly edge of the paved portion of Crows Landing highway.

The appellant testified that he stopped his truck "10 or 12 feet from the highway, * * * the pavement, concrete." He said that he looked both to his right and to his left but saw no approaching machine. He claimed that he could then see a distance of about 140 feet down Crows Landing highway to his right, but his evidence is conflicting

in that regard. When he was asked why he had not seen the approaching machine, he replied: "By the time that I could get a clear view of the highway, * * * my front wheels would almost have to be on the pavement, and then that truck I had, had the doors up high, and on the side here, there is a partition there, which, as you drove onto the highway, it would keep cutting off the view." The engineer who took the measurements for the drawing of the diagram which was received in evidence testified that from a point on the River road situated 10 feet from the pavement where Oliveria said that he stopped his machine there is an unobstructed view easterly along Crows Landing highway for a distance of 913 feet, and from a point 15 feet from the pavement there is a clear view of 315 feet in the same direction. It was broad daylight. There were no other vehicles to obstruct a clear view of the highway at that time. It is therefore a reasonable conclusion for the court to have reached that Oliveria did not stop his truck and look to his right at the point where he said that he did so, or he would have seen the approaching car of Carvalho, which must have been within the radius of his vision.

In conflict with this testimony of Oliveria respecting the point where he said that he stopped his truck, Mr. Delnero testified that he observed the appellant stop his truck 35 or 40 feet "from the north edge of the highway." Oliveria admits that he did not again look for approaching vehicles after he stopped his truck. He says that he did not see the automobile of Carvalho until it struck his machine and hurled it off the highway. He said that he placed his clutch in low, and that he was traveling only about 5 miles an hour when his truck was struck. Both machines were demolished.

Owing to the conflict of evidence, in support of the judgment we must assume that the appellant stopped his truck at a point 35 or 40 feet north of the intersection of the River road with Crows Landing highway; that he knew this was a dangerous crossing; that he was operating his truck from an inclosed cab which obscured his view; that it was useless for him to look for approaching vehicles along Crows Landing highway, from the point where he stopped his truck 35 or 40 feet from the pavement, for the reason which he himself furnished, that the fence and line of tall weeds adjacent thereto obstructed his view of the Crows Landing highway; and that he deliberately drove upon the intersection of those roadways without even attempting to thereafter look for approaching vehicles. This is sufficient evidence of gross negligence on the part of the appellant to support the findings and judgment of the court.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 11

BROWN v. BUTLER et al.

Civ. 5259.

District Court of Appeal, Third District, California.

Dec. 11, 1934.

Hearing Denied by Supreme Court Feb. 7, 1935.

1. Pleading ⇐214(1)

On demurrer, allegations of complaint are taken to be true.

2. Divorce ⇐322

Husband and wife ⇐272(1)

Complaint in divorced wife's action for further division of property accumulated during existence of marriage, which alleged that property accumulated in Minnesota exceeded $15,000,000 and in California exceeded $3,000,000, but that settlement had been made with wife for only $220,000, whereas she was entitled to one-third of property in Minnesota and one-half in California, *held* not demurrable as being without merit on its face or because instituted for purpose of harassing former husband, nor as constituting imposition or fraud upon court, nor as instituted in bad faith.

3. Limitation of actions ⇐179(2)

Complaint in divorced wife's action for further division of property accumulated during marriage on ground that settlement made over eight years prior to institution of action had been induced by fraudulent concealment of extent and value of property *held* deficient in not alleging facts to explain tardy discovery of fraud (Code Civ. Proc. § 338, subd. 4).

4. Pleading ⇐8(15)

Facts from which conclusion that pleader did not discover facts constituting fraud until less than three years before action was commenced must be affirmatively pleaded (Code Civ. Proc. § 338, subd. 4).

5. Appeal and error ⇐236(2)

Where plaintiff made no request for permission to file amended complaint but elect-

ed to stand upon complaint as filed, appellate court could not order reversal simply because demurrer was sustained without leave to amend.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Rozellia O. Brown against Cooley Butler and others. From a judgment of dismissal entered after granting motions to dismiss and sustaining demurrers interposed by defendants to plaintiff's complaint without leave to amend, plaintiff appeals.

Affirmed.

C. C. Mishler and F. P. Harrington, both of Los Angeles, for appellant.

Dryer, Castle & Richards, of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon the plaintiff's appeal from a judgment of dismissal entered after granting motions to dismiss and sustaining demurrers interposed by the defendants to the plaintiff's complaint without leave to amend.

The record shows that the plaintiff and Cooley Butler intermarried in the state of Minnesota, on or about the 12th day of August, 1900, and thereafter continued to be husband and wife until on or about the 19th day of May, 1923, when a decree of divorce was entered in the Second judicial district court of the state of Nevada, purporting to dissolve the marriage relation then and theretofore existing between the plaintiff and the said Cooley Butler. Preceding the entry of this decree, an agreement was entered into between the plaintiff and the defendant Cooley Butler, purporting to settle, all and singular, their property rights, making provision for the appellant by setting over to her, together with advances theretofore previously made, property of the value of approximately $220,000. The agreement also provides for the dismissal of a certain action for the sum of $80,000, begun by the plaintiff against the defendant Cooley Butler. The agreement also contained, among other things, a stipulation to the effect that the second party to the agreement (being the plaintiff in this action) promised and agreed on behalf of herself, her heirs, executors, administrators, etc., that neither she, nor they, nor any of them, would ever at any time whatsoever commence, bring, maintain, prosecute, or defend any suit, action, proceeding, or otherwise, against the first party (being the said Cooley Butler, defendant in this action), his executors, personal representatives, etc., or any other person, for the purpose of establishing, or attempting to establish, that she, her executors, etc., had, from and after the execution of this agreement, any right, title, interest, or estate in and to any of the property, through or by reason of any alleged fraud, misrepresentation, deceit, undue influence, or duress, or otherwise, practised on her by the first party (being the defendant Cooley Butler), or any person acting in his behalf, in obtaining her consent to the execution of the agreement.

The agreement further sets forth and details the character of the property turned over to the appellant in this action in the settlement as therein agreed upon. This agreement appears to have been referred to and made a part of the decree of divorce.

Subsequent to the execution of this agreement, and sometime during the year 1924, the plaintiff began an action in the superior court of the county of Los Angeles, praying for a divorce from the defendant Cooley Butler, alleging, among other causes of actions, that the Second judicial district court of the state of Nevada had no jurisdiction of the action, by reason of the fact that the plaintiff Cooley Butler, who began the action, was not a resident of the state of Nevada, and had not been a resident thereof for the statutory time required to give the district court of Nevada jurisdiction of the cause. Upon motion of the defendant Cooley Butler, in the action for divorce so begun by the plaintiff in the superior court of the county of Los Angeles, judgment of dismissal was entered therein.

In May, 1932, the present action was instituted by the plaintiff, in the superior court of the county of Los Angeles. In addition to interposing a demurrer raising the statute of limitations, and a number of other grounds which we need not specify, the defendants interposed motions to dismiss the action, setting forth thirteen separate grounds upon which the motions were based, four of which we may mention, to wit:

(1) That the action is without merit.

(2) That said action is brought for the purposes of harassing and vexing the defendants, and each of them.

(3) That the filing of said action is an imposition and fraud upon the above-entitled court.

(4) That said action was not instituted in good faith.

It appears that the trial court, upon the hearing of the demurrers and motions interposed by the defendants, permitted the intro-

duction of a number of affidavits, together with certified copies of all the proceedings had in the divorce action prosecuted to judgment in the Second judicial district court of the state of Nevada, and likewise all the proceedings had in the action praying for a divorce, instituted by the plaintiff against the defendant Cooley Butler, in the superior court of the county of Los Angeles. The complaint in the action for divorce filed in the superior court of Los Angeles county contains an allegation to the effect that the plaintiff is informed and believes that the defendant Cooley Butler and the plaintiff had accumulated property of a value in excess of $10,000,000 during the time of the continuance of their marriage relation.

[1, 2] The present action prays for a division of property alleged to have been accumulated during the existence of the marriage relation of the plaintiff and the defendant Cooley Butler, alleging that prior to and on the 19th day of May, 1923, said property was of a value in excess of $18,000,000, $15,179,000 thereof having been accumulated in the state of Minnesota, and then and there being in the state of Minnesota, and $3,477,537.60 having been accumulated in the state of California, and then and there being, on the 19th day of May, 1933.

While the briefs of counsel have been both learned and exhaustive in considering the objections raised by the defendants on their motions to dismiss the action, which briefs have been given careful consideration, by reason of views hereinafter expressed upon the subject of the statute of limitations, it is unnecessary to consider the merits of the motions, or the alleged errors of the trial court in relation thereto, further than to state that for the purposes of considering questions raised by demurrer, the allegations of the complaint are taken to be true, which would lead to the conclusion that, where a wife's interest being a one-third interest in the property accumulated in the state of Minnesota, and a one-half interest in the property accumulated in the state of California, the total property being valued in excess of $18,000,000, and a settlement had with the wife by which she receives only the sum of $220,000, an action prosecuted to secure a further portion of the property so accumulated would not on the face of it appear to be prosecuted either without merit or for the purposes of harassing the defendant, or an imposition or fraud upon any court, or that such an action could not be considered as instituted in good faith. We may also add that the actions to which our attention has been called and the certified copies of the pleadings and judgments therein show that there has never been an adjudication of the issues tendered in this action.

As to the agreement, a portion of which we have set forth herein, it is sufficient to call attention to the case of Normile v. Denison, 109 Wash. 205, 186 P. 305, 308, where the court, in considering an agreement having a like provision, used the following language: "No exactly parallel case is called to our attention, but it is generally held that a stipulation in a contract that false or fraudulent representations, by which one party has induced the other to enter into it, shall not affect its validity, is itself invalid and cannot operate by estoppel or otherwise. Berrendo Irrigated Farms Co. v. Jacobs, 23 N. M. 290, 168 P. 483; Hofflin v. Moss, 67 F. 440, 14 C. C. A. 459." The same case is again reported in 116 Wash. 452, 199 P. 995. By reason of the fact, however, that our views concerning the bar of the statute are conclusive, we need make no ruling upon the alleged error of the court in relation to the motions interposed by the defendants.

[3] Subdivision 4 of section 338 of the Code of Civil Procedure, limiting causes of action which may be brought within three years, specifies that a cause of action based upon fraud or mistake is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

The complaint in the present action sets forth that long prior to, and on or about the 19th day of May, 1923, the plaintiff inquired and investigated and employed attorneys at law to make, and they did make, inquiries and investigations, with all reasonable diligence, in efforts to ascertain the quantity, nature, extent, location, and value, or values of the community properties of the plaintiff and the defendant Cooley Butler, and that neither the plaintiff herein, nor her attorneys, were able to ascertain the nature, location, or extent thereof, save and except of properties of the value of about $3,000,000. It is further alleged that the defendant Cooley Butler and his attorneys fraudulently and falsely, and with intent to deceive the plaintiff, stated and represented to the plaintiff and her counsel that said properties and said values constituted all of said community properties of plaintiff and defendant, and that the plaintiff and defendant Cooley Butler, did not own or have any other properties whatsoever.

The complaint further alleges that she is informed and believes that such statements and representations were, and each of them were false, fraudulent, and untrue, and were

made for the purpose and with the intent of depriving the plaintiff of her share of the community property.

It is further alleged that the plaintiff relied thereon, and would not have otherwise signed the agreement to which we have referred. It is further alleged that the plaintiff was not, prior to, on, or after the 19th day of May, 1923, informed or advised, nor was she permitted to know, and the plaintiff did not at any time know of what properties said community property of said parties consisted, or where the same, or any part thereof, was situate, other than the personal property mentioned and described in that certain trust declaration dated the 18th day of May, 1922. The property set forth in the trust agreement is then listed in the complaint. Following this allegation we find paragraphs VI and VII, which are identical in language, as follows: "That within one year next preceding the commencement of this action, but not prior thereto, plaintiff first learned that the plaintiff and the defendant Cooley Butler had, prior to the 19th day of May, 1923, accumulated, and that on and prior thereto they were the owners of the community properties herein described." The complaint then described six tracts of land situate in the county of Los Angeles, of the value of $223,800, and buildings in the county of Los Angeles of the value of $42,450. Following this the plaintiff sets forth in her complaint a long list of stocks, bonds, and interest in different corporations in which the defendant Cooley Butler was alleged to be an owner, amounting in value, as we have stated, to $15,179,000 on the 19th day of May, 1923.

The complaint is absolutely silent as to any investigation made, or attempted to be made, by the plaintiff, to ascertain the properties owned by the community and controlled by the defendant Cooley Butler, on and after the 19th day of May, 1923. So far as the defendant Cooley Butler is concerned, there is no allegation in the complaint of any act, either overt or otherwise, at any time after May 19, 1923, tending to prevent the plaintiff from making full discovery of the existence of all of the properties set forth in the complaint which is alleged to have been discovered within one year prior to the beginning of this action. Nor are there any allegations in the complaint, or any facts set forth therein showing, or tending to show, the circumstances of the discovery of the alleged fraudulent concealments and misrepresentations of the defendants, or when and how the plaintiff made the discovery of the existence of certain properties alleged to have been the accumulation by the community prior to May 19, 1923. Nor do we find any allegations in the complaint which tend to show that the existence of the property, and therefore of the alleged deceit and fraudulent concealment, might not have been discovered many years before the institution of this action. The complaint does show real estate of the alleged value of $264,250, situate in the county of Los Angeles, owned by the community on the 18th day of May, 1923, which, of course, shows that any diligence in searching the record would have disclosed both ownership and location.

The portion of the agreement to which we have referred, executed between the plaintiff and the defendant Cooley Butler on the 19th day of May, 1923, contained, we think, a sufficient badge of fraud to put any reasonable person upon inquiry as to the existence of other properties than those mentioned in the trust agreement, notwithstanding which nine years have been allowed to intervene between the signing of the agreement and the institution of this action, and, according to the complaint, between eight and nine years elapsed before the plaintiff discovered the existence of the additional property alleged to have belonged to the community prior to the 19th day of May, 1923.

We find nothing in the complaint accounting for such an unreasonable lapse of time before the discovery of the alleged fraud or the institution of this action. Alleged concealment prior to May 19, 1923, is not sufficient.

Irrespective of whether the complaint otherwise states a good cause of action for fraud, the defects which we have pointed out bring this case clearly within the rule laid down in the case of Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. This case has been followed and reaffirmed innumerable times.

[4] The Supreme Court, in the case of Consolidated Reservoir & Power Co., a corporation, v. Robert R. Scarborough et al., 216 Cal. 698, 16 P.(2d) 268, 269, quotes therefrom as follows:

" 'The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plain-

tiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. "Discovery" and "knowledge" are not convertible terms, and whether there has been a "discovery" of the facts "constituting the fraud," within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret, or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged, and, as the means of knowledge are equivalent to knowledge, if it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.'

"The following appears in Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807: 'In this class of cases, the plaintiff is held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." * * * A general allegation of ignorance at one time and of knowledge at another (is) of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. * * * There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.' The foregoing is quoted with approval in Phelps v. Grady, 168 Cal. 73, 141 P. 926. Other cases recognizing the above principles are: Original M. & M. Co. v. Casad, 210 Cal. 71, 74, 75, 290 P. 456; Newport v. Hatton, 195 Cal. 132, 146, 231 P. 987; Victor Oil Co. v. Drum, 184 Cal. 226, 239–242, 193 P. 243, 250; Nichols v. Moore, 181 Cal. 131, 132, 183 P. 531; Galusha v. Fraser, 178 Cal. 653, 657, 174 P. 311, 312.

"The case last above cited clearly and concisely states the law. It is there declared: 'Where the plaintiff sues for relief on the ground of fraud, and seeks exemption from the three-year period of limitation for the reason that he did not discover the fraud until after it was perpetrated, he must not only show (1) that he did not discover the fraud until within the three years next before the action was begun, and (2) that the fraud was committed under such circumstances that he would not be presumed to have had knowledge of it at the time, but (3) he must also set forth the times and circumstances under which the facts constituting the fraud came to his knowledge, so that the court may determine from the allegations of the complaint whether the discovery was within that period.'"

The law as set forth in the foregoing quotation establishes beyond controversy the insufficiency of the complaint in this action, and the correctness of the trial court in sustaining the defendant's demurrers thereto.

While a large number of other cases might be cited supporting the rule laid down in the Lady Washington Case, supra, to do so would only unnecessarily lengthen this opinion.

[5] Conceding it is possible that the plaintiff, had she so elected, could have amended her complaint so as to establish her right to proceed notwithstanding the staleness of her alleged cause of action, it does not appear that any request was made for permission to file an amended complaint, but that the plaintiff elected to stand upon the complaint just as filed. Under such circumstances this court cannot order a reversal simply because the demurrer was sustained without leave to amend. Allen v. Stellar, 106 Cal. App. 67, 288 P. 855; Smith v. Bentson, 127 Cal. App. (Supp.) 789, 15 P.(2d) 910; Hansen v. Carr, 73 Cal. App. 511, 238 P. 1048.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

FORMAN et al. v. HANCOCK et al.

Civ. 5251.

District Court of Appeal, Third District, California.

Dec. 22, 1934.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Trial ⇐395(5)

Findings stating probative and evidentiary facts in detail are unnecessary, and only findings necessary are ultimate facts necessary to support judgment on essential issues presented by pleadings.

2. Trial ⇐396(1)

In action for declaratory judgment construing restrictive clauses in deeds, findings *held* to cover essential issues presented by pleadings and supported judgment relieving grantees from restrictions (Code Civ. Proc. § 1060).

3. Action ⇐6

Grantee may be relieved of restrictive provisions of deed limiting use of property to residential purposes before breach thereof, where change of conditions affecting property since purchase renders property unsuitable or useless for residential purposes, and grantee may obtain such relief by declaratory judgment (Code Civ. Proc. § 1060).

4. Action ⇐6

Where declaratory judgment construing clauses in deeds restricting use of lots to residential purposes, adjudged clauses to be invalid, failure to quiet title in grantees with respect to residential restrictions *held* not error, since judgment in effect removed cloud from title (Code Civ. Proc. § 1060).

5. Injunction ⇐62(3)

Where declaratory judgment construing clauses in deeds restricting use of lots to residential purposes declared restrictions invalid, refusal to issue permanent injunction against enforcement of restrictions was not error, where there was no reason to anticipate that grantor would attempt to enforce restrictions (Code Civ. Proc. § 1060).

6. Action ⇐6

In action for declaratory judgment construing clauses in deeds restricting use of lots to residential purposes, where plaintiffs did not attack other restrictions in deeds, finding that grantees were bound by such restrictions *held* not error (Code Civ. Proc. § 1060).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Paul G. Forman and others against G. Allan Hancock and another. From the judgment rendered, the plaintiffs and the named defendant appeal.

Affirmed.

Leonard Comegys and Clare Woolwine, both of Los Angeles, for plaintiffs-appellants.

Stephens & Stephens, of Los Angeles, for defendant-appellant.

Mr. Justice THOMPSON delivered the opinion of the court.

The grantor and grantees named in deeds to certain Los Angeles lots have appealed from a judgment which was rendered in a suit for declaratory relief brought under the provisions of section 1060 of the Code of Civil Procedure to construe a clause in those instruments which restricts the use of the lots, among other limitations, to residential purposes. The deeds provide for a forfeiture of title and the right of repossession by the grantor in the event of a violation of any of these prohibited uses of the land. The court found that the conditions surrounding the premises changed since the execution of the deeds, rendering it inequitable to enforce the restriction limiting the use of the lots to residential purposes. All other restrictions were held to be valid and enforceable. The Security-First National Bank was merely the trustee through which the title to the lots was passed. It had no real interest in the litigation.

The grantor claims that the judgment is contrary to law and that it is not supported by the evidence. The grantees assert that the court failed to determine all of the necessary issues which are involved in the case.

The complaint alleges that the appellant Hancock was the owner of a tract of land adjacent to Wilshire boulevard in the city of Los Angeles, including group two, tract 5049, consisting of five lots, according to the map of that subdivision of Los Angeles on file in the records of that county; that these lots were sold and conveyed separately in 1922 to the plaintiffs or their predecessors in title; that the deeds contain restrictions and conditions subsequent running with the land which confine the use thereof to residential purposes and prohibiting the sinking of oil wells, the building or maintenance of hospitals, sanatoriums, places of amusement, commercial enterprises, billboards, or the occupancy of the property by persons other than those of the Caucasian race, and fixing the minimum cost and the location of structures to be erected thereon, together with a rever-

sionary clause for the violation of any of these restrictions. It is then alleged that the rapid development of that tract since the execution of these deeds has converted it into commercial property which is valuable chiefly for business enterprises and has so increased the taxes and maintenance of the property that it has become inequitable and unprofitable to use it solely for residential purposes. It is alleged that a controversy exists between the grantor and the grantees regarding the enforcement of these restrictions. The prayer asks the court to declare that "the plaintiffs hold their property free of any reversionary interest," and that they be permitted to erect and maintain thereon buildings which may be devoted to business enterprises and for any further relief which may be just and equitable.

The answer of the defendant Hancock admits the sale of the lots in group two, tract 5049, according to the map of that subdivision of Los Angeles as alleged in the complaint subject to the restrictions above mentioned, and asserts that the deeds provide that "before any forfeiture may be declared or enforced, the grantor, his heirs, successors or assigns shall post in a conspicuous place on the premises, a written notice declaring his intention so to do, and if within thirty days thereafter the grantee shall cure the breach, then no forfeiture shall be declared or enforced therefor." The answer admits the changes which were alleged to have occurred since the sales of the lots respecting the conditions surrounding them, but affirmatively denies that the defendant has threatened to "enjoin the violation of any of the said respective conditions or restrictions."

At the trial the court adopted findings favorable to the plaintiffs on all the essential issues of the case which are supported by the evidence. These findings recite in elaborate detail and adopt as true all the facts and circumstances appearing in the evidence indicating the change of conditions surrounding the property in question since the execution of the deeds, and concludes that such changes render it inequitable to enforce the restrictive clause of the deeds confining the use of the lots to a residential purpose. All other restrictions were held to be valid and enforceable. In regard to the residential restriction, the court found that:

"Because of the changed conditions * * * the rights and remedies of the defendant Hancock in respect thereto, or by reason of a breach thereof, should a breach occur, have become and are now abridged and limited in the following particulars but none others, to-wit:

"That should said conditions, covenants and restrictions be breached by the use of any of said group two lots for business purposes, or by the erection or maintenance thereon of a structure designed for business uses;

"(a) no court will grant or issue an injunction restraining such breach or requiring the abatement of such structure; nor,

"(b) will any court make a decree requiring specific performance of any covenant imposed by the express provisions of the Hancock-Security deed upon or in respect to any such lot; nor

"(c) will any court in any action in equity decree a forfeiture or a reversion to defendant Hancock, of the title thereto; nor

"(d) will any court declare, or lend its aid to defendant Hancock in the declaration of a forfeiture as a condition precedent to the exercise by the defendant Hancock of his rights to forfeit and/or to reenter and/or to cause a reversion to him of the title to any such lot for condition broken."

A decree of declaratory relief was thereupon rendered in exactly the preceding language. The plaintiffs are relieved from the effect of the restrictive clauses of their deeds with respect to the residential use of the property. All other restrictions were held to be valid and binding. From this decree, both the grantor and the grantees have appealed.

[1, 2] We are of the opinion the findings and judgment cover all the essential issues which were presented by the pleadings. It was unnecessary for the court to adopt findings stating in detail the probative and evidentiary facts of the case. All that is necessary for a court to find are the ultimate facts necessary to support the judgment upon the essential issues which are presented by the pleadings. 24 Cal. Jur. 968, § 203. The findings are, however, harmless in that regard. The evidence adequately supports the findings and judgment to the effect that the changed conditions surrounding the premises in question which have occurred since the purchase of the lots render it inequitable and unreasonable to enforce the restrictive clauses of the deeds limiting the use of the lots to residential purposes, relieving the grantees therefrom, and authorizing the plaintiffs to construct structures thereon and use the same for business purposes.

[3] It is the established law of this state that a grantee of real property is entitled to

be relieved of the restrictive provisions of his deed of conveyance before the breach thereof which limits the use of his property to residential purposes and prohibits the erection or use of buildings thereon for business or commercial purposes when it appears that conditions affecting the property which have occurred since the purchase thereof have changed so as to render the property unsuitable or useless for the purpose to which it was originally confined. Hess v. Country Club Park, 213 Cal. 613, 2 P.(2d) 782; Hurd v. Albert, 214 Cal. 15, 3 P.(2d) 545, 76 A. L. R. 1348; Downs v. Kroeger, 200 Cal. 743, 254 P. 1101; Childs v. Newfield, 136 Cal. App. 217, 28 P. (2d) 924; Letteau v. Ellis, 122 Cal. App. 584, 10 P.(2d) 496; Moe v. Gier, 116 Cal. App. 403, 2 P.(2d) 852; Strong v. Hancock, 201 Cal. 530, 258 P. 60. This remedy is properly afforded in a suit for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure. Hess v. Country Club Park, 213 Cal. 613, 2 P.(2d) 782.

The court therefore properly held that the grantees of the lots in group two, tract 5049, according to the map of that subdivision of Los Angeles, should be relieved of the restrictions in their deeds limiting their use of the property to residential purposes and authorizing them to construct and maintain thereon buildings for the conducting of lawful business enterprises.

The plaintiffs, however, contend that the court erred in failing to quiet title to their respective lots as against the defendants with respect to the residential restrictions which are contained in their deeds; that the court also erred in failing to permanently enjoin the defendant Hancock from attempting to enforce the residential restrictions or to recover possession of the property or otherwise interfere with the grantees' title thereto in the event they should undertake to construct or maintain thereon buildings for commercial purposes, and that finding number VI which was adopted by the court is not supported by the evidence. That finding reads: "Except as indicated in the conclusions of law following these findings, the ownership and tenure as aforesaid of each of said plaintiffs, and the title to each of said lots, is subject, however, to those of the conditions, reservations, covenants and restrictions imposed upon and made applicable by the Hancock-Security deed to each of the group two lots."

[4] We are of the opinion there is no merit in the preceding assignments of error for the reasons that the judgment which was rendered in this case affords the plaintiffs substantially all of the relief claimed by them and because this suit was neither an action to quiet title nor a suit for injunctive relief, but, on the contrary, it is a proceeding under section 1060 of the Code of Civil Procedure to construe and declare the effect of specific reservations of deeds of conveyance limiting the use of the property to residential purposes. Assuming, without so deciding, that the court might have properly quieted title to the lots in the plaintiffs in so far as the reversionary clauses of the deeds with respect to the use thereof for residential purposes is concerned, it was not necessary to do so. The invalidity of those provisions of the deeds is specifically adjudicated in unambiguous language. The cloud which might affect the title to these lots by the future construction of business buildings thereon is effectually removed by the decree which was rendered. It has been held that it is not reversible error to fail to set aside a conveyance which the court has actually held to be void since that determination in effect removes any cloud which may have been cast on the title. Gibbons v. Peralta, 21 Cal. 629; 22 Cal. Jur. 192, § 59. So in the present case the court specifically holds that the residential limitation clause of the deeds is "abridged and limited" so that it may not be deemed to be a breach thereof for the grantees to erect or maintain thereon "structures designed for business uses."

[5] The court was justified in refusing to issue a permanent injunction in this case. The complaint does not ask for an injunction. It does not specifically allege that the grantor ever threatened to interfere with the plaintiffs' title or right of possession on account of a future violation of the provision of the deeds limiting the use of the property to residential purposes. The defendant Hancock in his answer specifically "denies that he has threatened or does threaten that he will enjoin the violation of any of the said respective conditions or restrictions." There is no evidence in the record to indicate that the defendant Hancock ever threatened to interfere with plaintiffs' right of possession or title to their respective lots. Since the court has held, in effect, that the provisions of the deeds with respect to the limitation of the use of the property to residential purposes is void and unenforceable, we may not assume that the grantor will nevertheless attempt to enforce that clause or interfere with the title of the plaintiffs in that regard. It has been held that a court is not warranted in issuing

a permanent injunction to prohibit an attempt to enforce a contract which has been held to be illegal or void when there is no reason to anticipate such conduct. O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861.

[6] Finding number VI, to the effect that the plaintiffs are bound by the restrictions of their deeds, other than the one respecting the use of the property for residential purposes, is adequately supported by the evidence. The terms of these restrictions as they are contained in duly executed deeds of conveyances were received in evidence. The burden was on the plaintiffs to show any legal or equitable cause entitling them to be relieved therefrom. These restrictions prohibit the sinking of oil wells, the renting of the property to persons other than those of the Caucasian race, and a number of other limitations. The evidence was addressed solely to the limitation of the use of the property for residential purposes. There is not a particle of evidence impairing the validity or equity of the other restrictions. The plaintiffs may not complain of a finding supporting the clear and unambiguous terms of their deeds which they did not attack at the trial and regarding which they offer no testimony.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.



3 Cal.App.2d 49

ZELLERBACH et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9665.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1934.

Hearing Denied by Supreme Court Feb. 11, 1935.

1. Mandamus ⇨40

Mandamus *held* proper remedy to compel court to order plaintiff to testify upon taking of deposition (Code Civ. Proc. § 2021).

2. Depositions ⇨57

Subpœna to appear for taking of deposition, obtained from county clerk upon proper showing by affidavit made by associate of counsel of record, *held* properly issued (Code Civ. Proc. § 1986, subd. 3).

3. Depositions ⇨57

Where separate affidavits were used for subpœna to appear for taking of deposition and for notice thereof, only affidavit supporting notice need have been served upon opposing parties, and affidavit supporting subpœna need not have been served (Code Civ. Proc. §§ 2021, 2031, and § 1986, subd. 3).

4. Depositions ⇨57

That defendant, who did not appear in action, was not served with notice by other defendants of taking of deposition of plaintiff, *held* no defense to plaintiff for his refusal to testify (Code Civ. Proc. §§ 17, 2031).

5. Depositions ⇨2

Statutes relating to taking of depositions must be liberally construed (Code Civ. Proc. §§ 2021, 2031, and § 1986, subd. 3).

Petition for a writ of mandate by Harold L. Zellerbach and others against the Superior Court of the State of California, in and for the City and County of San Francisco, and Edmund P. Mogan, Judge of the court.

Peremptory writ of mandate issued.

Pillsbury, Madison & Sutro and Eugene D. Bennett, all of San Francisco, for petitioners.

Harry I. Stafford and Dean Cunha, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioners seek by writ of mandate to compel the respondent court to set aside its order discharging an order to show cause directed to Arthur Zellerbach and further to compel said court to order said Arthur Zellerbach to testify as a witness upon the taking of a deposition.

In an action brought by said Arthur Zellerbach as plaintiff against the petitioners and others as defendants, petitioners sought to take the deposition of said plaintiff. On June 1, 1934, petitioners obtained a subpœna from the county clerk upon the affidavit of Hugh R. Bolander, Jr., which subpœna directed said plaintiff to appear for the taking of said deposition on June 6, 1934. On the same day, June 1, 1934, notice of the taking of said deposition together with the affidavit of Eugene D. Bennett in support thereof were served upon counsel for plaintiff. Said notice was directed to plaintiff only. On June 5, 1934, an amended notice supported by the affidavit of Eugene D. Bennett was served upon counsel for plaintiff. Said amended notice was di-

rected to plaintiff and also to the defendants other than petitioners, namely, Dorothy Johnson Zellerbach and Dorothy Ryan Zellerbach. An order shortening time for the service of the amended notice was obtained and said amended notice and the supporting affidavit were also served upon the defendant Dorothy Johnson Zellerbach on June 5, 1934. The defendant Dorothy Ryan Zellerbach had not appeared in said action and was not served with any of the papers. At the appointed time, plaintiff appeared before the notary public, but he refused to be sworn or to testify on advice of his counsel. Thereafter the notary filed his return and report of the disobedience to the subpœna. The respondent court issued an order to show cause, but upon the hearing thereof, discharged the same and refused to order said plaintiff to testify.

[1] We are of the opinion that petitioners complied with the statutory requirements for the taking of said deposition and that the trial court should have ordered the witness to testify. We are further of the opinion that mandamus is the proper remedy. Christ v. Superior Court, 211 Cal. 593, 296 P. 612; Crocker v. Conrey, 140 Cal. 213, 73 P. 1006; Wissman v. Cabaniss, 34 Cal. App. 487, 168 P. 150; Scott v. Shields, 8 Cal. App. 12, 96 P. 385.

[2] The first contention made by respondents is "that the subpœna was not issued in accordance with the law." We find no merit in said contention as the subpœna was issued "upon proper showing by affidavit" as required by section 1986, subdivision 3, of the Code of Civil Procedure. Said contention is closely related to the other contentions of respondents, one of which is "that the affidavit upon which the subpœna was issued was itself insufficient in that it was not made by a party, or counsel of record, but was made by an associate of counsel of record." Respondents concede that they have found no authority to sustain their contention that it must be "an affidavit of someone directly connected with the case," and we believe that respondents seek to read into the code sections something which is not to be found therein or to be implied therefrom.

[3] Respondents further contend "that the law required that a copy of the affidavit *upon which the subpœna was issued* be served upon all the opposing parties." This contention appears to be without merit. None of the Code sections require that the affidavit upon which the subpœna is issued be served upon any of the parties. In fact, said affidavit must be filed with the county clerk in order to obtain the issuance of the subpœna. Code Civ. Proc. § 1986, subd. 3. In giving notice of the taking of a deposition under section 2031 of the Code of Civil Procedure, it is only required that "an affidavit" be served showing that the case falls within the provisions of section 2021 of the Code of Civil Procedure. While in practice the same affidavit may ordinarily be used to serve both purposes, the use of separate affidavits is not prohibited. If separate affidavits are used we are of the opinion that only the affidavit supporting the notice of the taking of the deposition need be served. We cannot agree with respondents' claim that where said section 2031 refers to "an affidavit," it must be construed to mean "the affidavit mentioned section 1986 upon which the subpœna is issued." In the present case, both affidavits were sufficient and it is immaterial that the affidavit filed to obtain the issuance of the subpœna was the affidavit of Hugh R. Bolander, Jr., while the affidavit served with the notice was the affidavit of Eugene D. Bennett.

[4] Respondents make the further point that defendant Dorothy Ryan Zellerbach was not served with notice of the taking of the deposition or with any affidavit. Our attention is called to section 2031 of the Code of Civil Procedure requiring service upon the "adverse party" and to section 17 of the Code of Civil Procedure providing that "the singular number includes the plural." From these sections respondents argue that service was required upon all parties other than upon whose behalf the deposition was to be taken. We do not believe it necessary to pass upon the question of whether the plaintiff was entitled to raise such an objection. It is clear that in the event the deposition had proceeded, such deposition would not have been binding in any way upon any party not served with notice. Assuming, without deciding, that plaintiff could have raised the objection in the event that petitioners had failed to serve a party who had appeared in the action, we are of the opinion that no such objection was available to plaintiff where the unserved party had not appeared in the action. It is an admitted fact here that defendant Dorothy Ryan Zellerbach had not so appeared.

[5] While we do not believe that it is necessary to invoke the rule of liberal construction in order to support the view that petitioners had complied with the statutory requirements, it may be noted that it has been held that the Code sections relating to the taking of depositions should be liberally con-

strued. Pollak v. Superior Court, 197 Cal. 389, 393, 240 P. 1006.

Let a peremptory writ of mandate issue as prayed.

I concur: NOURSE, P. J.

UNION SUGAR CO. v. HOLLISTER ESTATE CO.*

Civ. 8963.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1934.

Rehearing Denied Jan. 4, 1935.

Hearing Granted by Supreme Court Feb. 4, 1935.

1. Limitation of actions ⇐173, 175, 182(5)

Statute of limitations is special defense, personal in its nature, which may be waived, and party relying on it must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived.

2. Limitation of actions ⇐182(7)

Where answer to complaint sets up new matter constituting affirmative cause of action, new matter is deemed controverted so as to permit adverse party to show that defense is barred by limitations without formal plea (Code Civ. Proc. § 462).

3. Limitation of actions ⇐202(2)

Unless party adverse to defendant pleading new matter as counterclaim invokes plea of statute of limitations at trial and brings to attention of trial court his purpose to offer evidence in support of plea, court cannot assume that he desires to invoke plea, and he cannot invoke plea for first time on appeal (Code Civ. Proc. § 462).

4. Limitation of actions ⇐182(7)

Where plea of statute of limitations was invoked at trial as defense to new matter pleaded as counterclaim and trial court made finding on plea thus presented, statute was sufficiently pleaded and properly entertained by trial court (Code Civ. Proc. § 462).

5. Limitation of actions ⇐46(1)

As respects limitations, where parties did not mutually abandon or rescind executory contract upon breach or successive breaches, injured party could wait until time arrived for complete performance and then bring action for damages.

6. Limitation of actions ⇐46(1)

Party to executory farming contract was not bound to treat contract as abandoned on first breach or on any particular breach, but had election to rely on contract, and statute of limitations could not begin to run until he made election (Code Civ. Proc. § 337, subd. 1).

7. Limitation of actions ⇐129

Where executory farming contract could not be performed before October, 1925, commencing of action thereon in June, 1929, operated to suspend running of statute of limitations as to counterclaim existing at that date in favor of defendant, and hence counterclaim filed in December, 1929, was not barred though filed more than four years after completion of contract (Code Civ. Proc. § 337, subd. 1).

8. Limitation of actions ⇐129

Statute providing that counterclaim must tend to diminish or defeat plaintiff's recovery and must exist in favor of defendant and against plaintiff between whom several judgment might be had did not affect rule that filing of complaint operated to suspend running of statute of limitations as to any counterclaim existing at that date (Code Civ. Proc. § 438).

9. Set-off and counterclaim ⇐59

Statute providing that counterclaim must tend to diminish or defeat plaintiff's recovery and must exist in favor of defendant and against plaintiff between whom several judgments might be had did not reduce former statutory counterclaim to common law counterclaim, which could be employed only to diminish or defeat plaintiff's claim by way of set-off to extent of such claim, but permitted award of affirmative relief (Code Civ. Proc. §§ 438, 666).

10. Appeal and error ⇐717

Memorandum opinion of trial court could not be considered by District Court of Appeal to impeach findings, since findings of fact and conclusions of law constituted decision and final expression of court below.

11. Evidence ⇐354(19), 355(2)

Where it was doubtful whether provision for interest in farming contract applied to items in monthly statement of charges other than money advanced, books of account and monthly statements rendered could be resorted to, to determine that provision for interest was limited to money advanced (Civ. Code, § 3535).

12. Interest ⇐19(2)

Where there is no contract to pay interest, law awards interest upon money from

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 47 P.2d 273.

time it becomes due and payable, if such time is certain and sum is certain or can be made certain by calculation (Civ. Code, §§ 3287, 3302).

13. Interest ⇐19(3)

Where credit due on farming contract at time it was completed was subject to reduction because of unliquidated claim of other party to contract, which when liquidated exceeded amount of credit, claim for credit was "unliquidated claim" on which interest was not recoverable, since claimant was only entitled to interest on amount found due after deduction of other party's claim (Civ. Code, §§ 3287, 3302).

[Ed. Note.—For other definitions of "Unliquidated Claim," see Words & Phrases.]

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by the Union Sugar Company against the Hollister Estate Company, in which the defendant filed a counterclaim. From an adverse judgment, the plaintiff appeals.

Affirmed.

Preisker, Goble & Twitchell, of Santa Maria, for appellant.

Heaney, Price & Postel, of Santa Barbara (Margaret Dunn Kamper, of Santa Barbara, of counsel), for respondent.

WILLIS, Justice pro tem.

On October 1, 1924, appellant and respondent contemporaneously executed a farming contract and a beet sale contract, the latter being expressly made a part of the former, by the terms of which appellant agreed to farm certain lands of respondent in a good and husbandlike manner and in accordance with the standards and customs in the vicinity, and plant and raise thereon a crop of beets during the 1925 season, at the expense of respondent, and to buy all the beets so raised and delivered at a price to be fixed by averaging prices of sugar over a period of twelve months beginning July 1, 1925, according to a certain table set forth therein. On June 25, 1929, appellant brought suit against respondent to recover the alleged balance of $12,071.83, with interest at 7 per cent. from October 31, 1925, unpaid on the advances and expenses of farming the lands and raising the crop of beets, after crediting the agreed price of beets produced and delivered. On December 2, 1929, respondent filed its answer and counterclaim, joining issue on the allegation of balance unpaid and pleading damages for specified breaches of the farming contract in respect to good husbandry in the sum of $31,067.31, as "a counterclaim and set-off against plaintiff's demand to the extent thereof," and also praying for judgment for said amount "or so much thereof as it may be entitled to over and above plaintiff's claim." Trial was had, and in the lower court, prior to submission, appellant's counsel orally urged as a defense against the counterclaim the bar of the statute of limitations under section 337, subdivision 1, of the Code of Civil Procedure. Findings and conclusions were filed and judgment entered thereon in favor of respondent for the sum of $16,162.19, the excess of damages found to be suffered by respondent over the balance of expenses found to be due and unpaid to appellant. In its findings the court expressly found that the counterclaim was not barred by any statute of limitations.

From the judgment this appeal is taken on the so-called alternative method, appellant setting up four main points relating to (1) the bar of the statute of limitations to the counterclaim, (2) the measure of damage adopted by the court, (3) the matter of interest on the unpaid balance found, and (4) errors in ruling on evidence.

[1-4] Appellant contends that the counterclaim was barred by the provisions of section 337, subdivision 1, of the Code of Civil Procedure. Respondent meets this contention with the claim that appellant waived the bar of the statute by failing to plead the same. Unquestionably there is a general rule, long established in this state, that the statute of limitations is a special defense, personal in its nature, which may be waived or asserted, and that the party relying on it must affirmatively set it up in his pleading either by demurrer or answer, or it will be deemed to have been waived. Grattan v. Wiggins, 23 Cal. 16; California Safe, etc., Co. v. Sierra, etc., Co., 158 Cal. 690, 112 P. 274, Ann. Cas. 1912A, 729; Miller v. Parker, 128 Cal. App. 775, 18 P.(2d) 89. There is, however, another rule which has developed in respect to the plea of the bar to counterclaims because of the provision in section 462 of the Code of Civil Procedure, which may be stated as follows: Where the answer to a complaint sets up new matter constituting an affirmative cause of action or counterclaim, such new matter is deemed controverted under the provisions of section 462 of the Code of Civil Procedure, and the adverse party may, without formal plea, show that the attempted defense is bar-

red by the statute of limitations, that statute being deemed pleaded by operation of law. Curtiss v. Sprague, 49 Cal. 301; Granger's, etc., v. Clark, 84 Cal. 201, 23 P. 1081; In re Garcelon's Estate, 104 Cal. 570, 38 P. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; Moore v. Copp, 119 Cal. 429, 51 P. 630; Brooks v. Johnson, 122 Cal. 569, 55 P. 423; Peck v. Noee, 154 Cal. 351, 97 P. 865; Hermosa Beach, etc., Co. v. Law Credit Co., 175 Cal. 493, 166 P. 22; Pacific Improvement Co. v. Maxwell, 26 Cal. App. 265, 146 P. 900; Jones v. Peck, 63 Cal. App. 397, 218 P. 1030. However, it has been held that unless the adverse party invokes the plea of the statute at the trial, and brings to the attention of the trial court his purpose to offer evidence in support of such plea, the court cannot assume that he desires to make any such defense, and he cannot invoke the plea for the first time on appeal. In re Garcelon's Estate, supra; Bliss v. Sneath, 119 Cal. 526, 51 P. 848. Herein appellant invoked the plea at the trial and the trial court made a finding on the plea thus presented. We must therefore hold that the statute was sufficiently pleaded and that it was properly entertained by the trial court.

[5, 6] The counterclaim was not barred at the date of commencement of the action on June 25, 1929. The farming contract was an executory contract, continuing over the beet season of 1925, and could not be completed or fully performed by appellant until the end of that season, the date of which is established by evidence as the month of October, 1925. In such a contract, where the parties did not mutually abandon or rescind it upon a breach or successive breaches, the injured party could wait until the time arrived for a complete performance by the other party and then bring an action for damages for such breaches. Ross v. Tabor, 53 Cal. App. 605, 200 P. 971. Respondent was not bound to treat the contract as abandoned on the first breach of it, or on any particular breach, but had his election to still rely on it, and the statute of limitations could not begin to run until he had made his election. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39; Coulter v. Sausalito Bay Water Co., 122 Cal. App. 480, 10 P.(2d) 780.

[7-9] The filing of the complaint on June 25, 1929, operated to suspend the running of the statute of limitations as to any counterclaim existing at that date in favor of respondent, and therefore the counterclaim pleaded and filed on December 2, 1929, by respondent, although more than four years after completion of the contract, was not barred. Perkins v. West Coast Lumber Co., 120 Cal. 27, 52 P. 118; McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Whittier v.Visscher, 189 Cal. 450, 209 P. 23; Maryland Casualty Co. v. Shafer, 57 Cal. App. 573, 208 P. 197. Nor did the amendment of section 438 of the Code of Civil Procedure in 1927 (St. 1927, p. 1620) affect or destroy this rule, as is claimed by appellant. This becomes manifest upon examination of the above decisions, which are predicated alike upon counterclaims on contracts and torts without distinction, and all are based on the general proposition that such counterclaims must be existing at the commencement of action. Nor did such amendment, as appellant contends, have the effect of reducing the former statutory counterclaim to the common law idea of counterclaim, that is, one that may be employed to diminish or defeat plaintiff's claim by way of set-off only to the extent of such claim. Section 666 of the Code of Civil Procedure, which must be read with section 438 as amended, provides that any excess of the counterclaim established over plaintiff's demand must be awarded to defendant by judgment. In the case of Terry Trading Corporation v. Barksy, 210 Cal. 428, 292 P. 474, 478, the court in passing upon the effect of this amendment to section 438 said: "It is likewise perfectly proper to seek affirmative relief by way of counterclaim, which may not only defeat plaintiff's recovery but result in an affirmative judgment for defendant on his counterclaim."

[10] Appellant contends that the evidence does not support the findings or judgment in that the evidence shows that the trial court applied an improper measure of damages. It then attempts to support this contention by quoting the memorandum opinion of the trial judge filed in the court below. This opinion cannot be considered by the appellate court for the purpose of impeaching the findings. Messenkop v. Duffield, 128 Cal. App. 541, 18 P.(2d) 67. The findings of fact and conclusions of law constitute the decision of the court below and are the final expression of the court. Looking to them, we are unable to find anything therein which would support the claim that the court adopted and used an improper measure of damage. Counsel in their briefs agree upon the proper measure of damage applicable herein, but there is nothing in the findings nor in the record of the proceedings to indicate that the court did not adopt and use that measure. We must therefore presume that the court applied the

proper measure of damage in arriving at its decision. The argument of counsel for appellant in support of this point is ingenious but highly speculative. For this court to embark on similar speculation would be contrary to the rules established to protect and sustain findings against everything except manifest or demonstrable error.

[11] Appellant claims the court erred in failing to allow interest on the unpaid balance of expenditures from October 31, 1925, asserting interest was chargeable both by the terms of the contract and by operation of law. The court found that at the end of the harvest time in 1925 appellant was entitled to a credit of $11,414.15 against respondent on account of farming operations under said contract, and at the trial found and liquidated the damages on the counterclaim in the sum of $27,756.44, and gave judgment in favor of respondent for the difference between those two sums without allowing any interest during the interim on the amount of expenditures under the contract. The contract provided that: "Any money advanced, work performed, seed furnished, or any other charges to the account of said first party [Hollister Estate Company] will be paid by first party, and the second party may deduct the same, if approved in writing by the first party, before making payments on said beets. When advances are made by second party for the purposes hereof to be charged to first party, first party shall be charged with interest thereon at seven per cent. per annum from monthly statement to payment." It is also provided that "second party will render monthly statement to first party, covering charges for the preceding month." These provisions appear to render it doubtful whether interest was to be charged on any item except "money advanced," as distinguished from the other items in the monthly statement of "charges." In such case contemporaneous construction by the parties may be resorted to as the best means of solution. Civ. Code, § 3535; 6 Cal. Jur. 304, 305. The audit of the books of account kept by appellant, and the monthly statements rendered, in evidence herein, show that interest was charged only on money advanced as distinguished from other charges. This is sufficient to resolve the doubt and warrant an interpretation of the contract which would limit interest to items of money advanced and exclusive of other charges. Such interest was included in the balance found due.

[12, 13] It is further claimed by appellant that interest thereon at the legal rate should have been added to the amount of expenditures found unpaid in October, 1925, on the ground that such amount of contract expenditures were capable of exact computation and therefore bears interest from the date the amount is due. Civ. Code, §§ 3287 and 3302. The general rule with respect to allowance of interest, when there is no contract to pay interest, is that the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, 9 Am. St. Rep. 164; Gray v. Bekins, 186 Cal. 389, 199 P. 767; Perry v. Magneson, 207 Cal. 617, 279 P. 650. The question whether the claim of appellant, under the tests laid down in the above cases, is, in contemplation of law, a liquidated or unliquidated demand, becomes unnecessary for decision herein, in the light of the law which applies to this case. For we hold that even though, under such tests, appellant's claim was a liquidated demand in October, 1925, it was subject to reduction by virtue of the unliquidated claim of respondent and must therefore be deemed to be an unliquidated sum upon which interest is not recoverable, under the rule that in cases such as here presented, where the deduction is for defective workmanship or defective husbandry under a contract, the court may properly allow interest only on the balance found to be due on the contract after deduction of such damages when liquidated, on the theory that the contractor is entitled to interest only on such amount, of the use of which he has been deprived during the period of default, because it is to that extent only that he has been damaged. Hansen v. Covell, 218 Cal. 622, 24 P.(2d) 772, 89 A. L. R. 670. As the amount of damages in the instant case exceeds appellant's demand, there remains nothing on which to compute or allow interest.

We have examined appellant's assignments of error claimed to have occurred in ruling on the admissibility of evidence, and find no error in any of such rulings.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 1

PEOPLE v. SCHNEIDER.

Cr. 2618.

District Court of Appeal, Second District, Division 1, California.

Dec. 11, 1934.

Hearing Denied by Supreme Court Jan. 10, 1935.

1. Larceny ⇐55

Evidence sustained conviction of petty theft of bond.

2. Criminal law ⇐655(1)

Alleged misconduct of trial court who replied, "You have more nerve than I have," in response to statement of accused that he would appear in propria persona on the trial, *held* not reversible error.

3. Criminal law ⇐1037(1)

Alleged misconduct of prosecutor for misstatements in opening statement to jury, wherein prosecutor told jury that his statements were not evidence, and to which accused did not object, *held* not reversible error.

4. Criminal law ⇐1171(1)

That in course of trial, prosecutor procured certain jewelry from defense witness and introduced it in evidence *held* not reversible error because depriving accused of opportunity to present such evidence, where it related entirely to charge of grand theft on which jury disagreed and not to charge of petty theft of which accused was convicted.

5. Criminal law ⇐1166½(12), 1168(4), 1171(1)

Alleged misconduct of prosecutor in pointing out to jury on blackboard that witness had lost property worth several thousands of dollars, trial court's statements regarding failure of defense witness to be present when called to testify, and striking out certain testimony *held* not reversible error, where alleged errors related entirely to charge of grand theft on which jury disagreed and not to charge of petty theft of which accused was convicted.

6. Criminal law ⇐633(1)

Refusal to permit accused to draw diagram on blackboard that would represent clear vision glass on which he had patent and for manufacture and sale of which he formed partnership in which he sold an interest for which buyer deposited as security a bond which accused embezzled *held* not error.

7. Constitutional law ⇐257

That accused, arrested in Chicago, was not permitted to bring with him to Los Angeles his books and blueprints of his patent on clear vision glass, and for manufacture and sale of which he formed partnership in which he sold an interest for which buyer deposited as security a bond which accused embezzled, *held* not denial of due process.

8. Criminal law ⇐1158(1)

In absence of proper showing of newly discovered evidence in presenting motion for new trial, appellate court cannot reverse judgment of conviction on such ground.

9. Larceny ⇐60

In prosecution for petty theft of bond, evidence *held* to establish that bond which accused sold to third party belonged to prosecuting witness.

10. Witnesses ⇐337(5)

Cross-examination of accused as to whether he had ever been convicted of a felony *held* proper to test his credibility, though he had confessed such charge on his arraignment (Pen. Code, § 1093, subd. 1).

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Arthur E. Schneider was convicted of petty theft, and, from the judgment of conviction and from an order denying his motion for a new trial, he appeals.

Affirmed.

Arthur E. Schneider, in pro. per.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From the record and from an inspection of the respective briefs filed herein it appears that in two separate informations that were filed against him defendant was charged, respectively, with the commission by him of the crime of petty theft and the crime of grand theft; also that, preceding the respective dates when such offenses were alleged to have been committed, defendant had suffered a former conviction of a felony and had "served a term of imprisonment therefor in a penal institution." On his arraignment defendant "confessed" the correctness of such charge of "a previous conviction." Subdivision 1, § 1093, Pen. Code. The said causes were "consolidated" for the purpose of trial thereof, and, such trial having been had, on the one charge, defendant was convicted of the crime of petty theft, and, on the other, to wit, of grand theft, the jury disagreed as to its verdict. From the judgment that followed the conviction of defendant on the charge of petty

theft, as well as from an order by which his motion for a new trial was denied as to such charge, defendant has appealed to this court.

As far as concerns the charge of petty theft, briefly the evidence adduced by the prosecution of the trial of the action, and upon which the jury had a right to found its verdict, shows that defendant was the owner of a patent on an article designated as "clear vision glass," for the proposed manufacture and sale of which he had associated himself with certain other individuals in an organization which was termed a "general partnership," capable of having added to it by associating "special" partners therewith. In accord with such arrangement, defendant sold an interest in the partnership to a Mrs. Stevens for which she agreed to pay the sum of $750, and as security for such payment she deposited with defendant two certain bonds. On the reverse side of the written agreement of "subscription" entered into by the parties, the following so-called "counter agreement" was signed by defendant, to wit:

"This subscription is accepted in lieu of two (2) Straus Bonds as follows—No. 30456 Bond number 1658 $500.00, No. 130853 Bond number 670 $500.00.

"It is further understood that these bonds may be redeemed at any time upon the payment of the above amount on subscription. And it is further agreed that the market value of these bonds may be had at any time."

Regarding the negotiations that occurred between defendant and Mrs. Stevens, it was testified by one witness to the transaction, and corroborated by another, that Mrs. Stevens "finally consented to put those two bonds up as collateral, but they were not to be sold. He (defendant) was to allow her $1,000.00, the valuation on the bonds, and put them in his safe, and simply use them as collateral, but he promised faithfully not to sell them." According to the testimony given by a Mr. Hughes, within a few days after defendant had received such bonds from Mrs. Stevens, he sold one of them to Mr. Hughes for which he paid defendant $117. It also appears that before a sale of such bond would be recognized by a receiver who was in charge of the assets of the issuer of such bond, it was necessary that the delivery of the bond be accompanied by a certificate of ownership by the seller of such bond. At the time when Mrs. Stevens delivered the bond to defendant no certificate of ownership of such bond was either signed or delivered to defendant; nor did defendant deliver any such certificate to Mr. Hughes. But after defendant had sold the bond to Mr. Hughes and he had resold it to another person, Mr. Hughes procured from Mrs. Stevens the required certificate of ownership.

[1] In connection with his first point that "the verdict was contrary to law," appellant repeatedly makes the several statements that the evidence established the fact that he was the owner of a patent for a "clear vision glass"; that he had a valid contract of partnership; that in the city of Chicago he was arrested for the commission of the offense of which he was convicted; that thereupon he waived extradition, but was not permitted to bring with him to Los Angeles his books, blueprints, etc. In that regard, at the trial the facts of the ownership by defendant of the patent, and that he was proceeding in apparent good faith to organize a company for the manufacture and sale of the patented article, were not only conceded by the prosecution, but, as well, it was declared by the trial court that "there isn't any contention that there was not any such an invention, * * * there is no dispute on the question. * * *" Nor was any evidence offered to the contrary of any of the other of such alleged facts. But it should be apparent that none of such facts, nor all of them combined, reach the point here presented by appellant. Although on the trial of the action, such facts may have had some materiality, the case against defendant did not depend upon the question of his good faith with reference to the ownership of the patent, nor upon how he had proceeded with reference to the organization of the company or partnership that was intended to produce the patented article. The other facts to which appellant has thus referred were wholly immaterial to any question of his guilt in embezzling the bond that belonged to Mrs. Stevens and which he sold to Mr. Hughes. Although some of the evidence presented by the prosecution was denied by defendant personally, the province of the jury was to determine what was the fact, and its conclusion thereon is binding upon this court. The evidence to which reference hereinbefore has been had was sufficient to sustain the verdict and the judgment. People v. Tambara, 192 Cal. 236, 219 P. 745.

[2] Appellant complains of alleged misconduct of the trial court in each of two particulars, to wit: (1) That, in response to a statement made by defendant in effect that on the trial of the action he would appear "in propria persona," the judge said, "You have more nerve than I have." (2) Because of "attitude and statements" made by the trial judge in

connection with the failure of a certain witness to be present in court at the very instant when defendant wished him to give his testimony (although said witness did appear during the discussion that took place between defendant and the judge with reference to the absence of the witness).

As to the first of such specifications, defendant has failed to direct the attention of this court to the place in the record where such language may be found; nor, after diligent search therefor, can this court discover it. But, in any event, the matter is of trifling importance. Conceding its existence, it could not have affected the verdict that was returned by the jury. Regarding the other specification to which appellant has referred, after careful scrutiny of the record this court is unable to discover therein anything of a nature derogatory to defendant personally or detrimental to his defense to the action. Such objections are trifling in character and can be of no avail to appellant.

[3] Appellant further predicates prejudicial error upon the alleged misconduct of the deputy district attorney who appeared in behalf of the prosecution, in that in his opening statement to the jury he made certain alleged misstatements of facts which he said he expected to prove. In that connection, it first appears that at no time did defendant offer any objection to any of such criticized remarks. Moreover, that both at the opening and at the close, respectively, of his statement to the jury, the deputy district attorney said: "I warn you that anything I say is not to be taken as evidence because you are only to take the evidence in this case, or in any case, from the lips of those who are sworn. * * * And I admonish you again that the things I have told you are not evidence, but are just those things which I expect to prove by competent evidence."

Appellant also claims that in such statement the deputy district attorney called defendant "a liar." An inspection of the remarks made by the deputy district attorney reveals that no such language was uttered by him.

[4, 5] Appellant further complains that, because in the course of the trial the deputy district attorney procured certain jewelry from one of defendant's witnesses and thereupon introduced the same in evidence as an exhibit in the case, defendant was injured in not being able to present such evidence by his own witness in his own defense. Just how defendant could have been harmed by such incident is not apparent. As was said by the judge of the trial court at the time when defendant complained of the situation, neither side had any "monopoly" on any witness or on any evidence. Moreover, such evidence related entirely, not to the count upon which defendant subsequently was convicted, but to the count on which the jury disagreed as to its verdict. And the last statement is true also regarding certain other alleged misconduct of the deputy district attorney in "pointing out to the jury on the blackboard that the witness * * * had lost property worth several thousands of dollars." It may also be added that appellant has again failed to note in his brief any reference in the transcript to any such incident or circumstance, and that this court has been unable to ascertain the correctness of appellant's statement of fact in that regard; but it is manifest that none of appellant's specifications of misconduct by the deputy district attorney has any merit.

[6] However, appellant urges that "the court erred in matters of law": (1) In "permitting" the deputy district attorney to make the remarks to the jury to which attention hereinbefore has been directed; (2) in "permitting" the deputy district attorney to take the jewelry from the witness, to which fact reference hereinbefore has been had; (3) by making certain statements in connection with the "chart on the blackboard," which incident also hereinbefore has been noted; (4) by striking out certain testimony given by a witness (which related to the charge of grand theft only); (5) by refusing to permit defendant to draw a diagram on the blackboard that would represent "clear vision glass"; and (6) by making statements regarding the situation involved in the fact that a certain witness (with reference to the charge of grand theft only) was not immediately present in court when his attendance at that time was desired by defendant, although he later appeared and gave his testimony.

As to the first of such specifications, it should be clear that in advance of the happening of the incident the judge of the trial court could not know that the deputy district attorney would err in his opening statement to the jury regarding the existence of any given fact or facts, nor, even after having been made, whether the deputy district attorney could establish such facts. Regarding the remainder of such specifications, their immaterialty to this appeal, limited as it is to an investigation of alleged errors that occurred with reference to the charge against defend-

ant of petty theft, already has been pointed out herein. None of them is of any consequence or even available to defendant on his appeal from the judgment here under consideration.

[7] Appellant further contends that he "was denied due process of law" in that, when arrested in Chicago, he was not permitted to bring with him to Los Angeles his books and blueprints of his patent, that, because he was in arrears in the matter of the payment of his room rent in Chicago, his landlord there declined defendant's request to send such documents to defendant, and that, because of his inability to introduce such papers, blueprints, etc., in evidence on the trial of the action, he was unable to show how he had disbursed the moneys that had come into his possession from the "sale" of the bond which was the subject of the charge on which he was convicted. But it is so plain that none nor all of such alleged circumstances, even if true, could constitute "a denial of due process of law" that this court marvels at the suggestion made by defendant in that regard. There is nothing in the point that merits discussion.

Appellant further suggests that "the trial court was prejudiced toward defendant," with the result that defendant was convicted of the offense of which he was charged, when, had the trial court been free from such prejudice, defendant might have been acquitted. In support of such contention, appellant relies upon the so-called "reprimand" and the "attitude and statements" made by the trial judge in connection with the temporarily absent witness, to which incidents reference hereinbefore has been had. But, as hereinbefore has had consideration by this court, the said so-called "reprimand" and the "attitude and statements," if at all available to appellant on this appeal, amount to nothing as affording a cause for a reversal of the judgment. Furthermore, an examination of the record herein leads this court to the conclusion that not only was the trial judge not at all prejudiced against defendant, but, to the contrary, that he was unusually kind to defendant and extended to him every reasonable courtesy and consideration due to him in the premises. The point thus presented by appellant is utterly lacking in merit.

[8] In effect, appellant also claims that, if he should be awarded a reversal of the judgment, on a new trial of the action, he would be able to introduce in his behalf new and additional evidence which should have the effect of securing his acquittal. Of course, even if true that appellant has such evidence at his command and on a new trial could present it for the consideration of a jury impaneled to try his case, in the absence of a proper showing of such proposed evidence in presenting defendant's motion for a new trial, this court may not consider this claim as affording a sufficient reason for making its order by which the judgment here under consideration would be reversed.

[9] Both in his closing brief and in his argument before this court on the question of his appeal, appellant contends that on the trial of the action the corpus delicti of the charge preferred against him was not established in that it was not shown that the bond which he "sold" to Hughes was the same bond that he had received from Mrs. Stevens. But even though it be conceded (without being so decided) that no direct evidence to that effect was presented on the trial of the action, nevertheless the evidence is replete with facts from which many justifiable inferences might be deduced that would warrant such a conclusion. Throughout the trial, both by the prosecution and by defendant, the identity of the bond in question was clearly assumed. As his own witness, defendant did not deny the fact. In that regard he now merely denies that the transaction between him and Mr. Hughes amounted to a sale of the bond, and asserts that all he did in the premises was to borrow $117 from Hughes, and that he deposited the bond with him as collateral security for the debt thus incurred. In fact, in his argument before this court, defendant did not claim that the bond which he procured from Mrs. Stevens was not the identical bond that he sold to, or hypothecated with, Mr. Hughes.

[10] Finally, appellant complains of alleged error in that on cross-examination of defendant he was asked if he had ever been convicted of a felony. Although by the terms of subdivision 1 of section 1093 of the Penal Code the rule is announced that when, in an indictment or information, a defendant is charged with "a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction," nevertheless, repeatedly it has been held by the appellate courts of this state that on the trial of an action, in the event that the defendant therein becomes a witness in his own behalf, on cross-examination, in order to test his credibility as such witness, it is proper to inquire whether theretofore he had ever been convicted of a felony.

This court is clearly of the opinion that defendant had a fair trial.

It is ordered that the judgment and the order by which defendant was denied a new trial be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.



3 Cal.App.2d 213

COLMAR v. PINCKARD.

Civ. 9613.

District Court of Appeal, First District, Division 2, California.

Dec. 20, 1934.

Rehearing Denied Jan. 19, 1935.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Contracts ⇐99(3)

Complainant to establish charge of fraudulent representations justifying rescission of contract must show by clear and decisive proof that defendant has made representation in regard to material fact, that such representation is false and was not actually believed by defendant on reasonable grounds to be true and was made with intent that it should be acted on, and that it was acted on by complainant to his damage, and in so acting complainant was ignorant of its falsity and reasonably believed it to be true.

2. Appeal and error ⇐1010(1)

In action to rescind contract for fraudulent representations, judgment against complainant must be affirmed if evidence is sufficient to support finding against complainant on any one of issues relating to fraud.

3. Corporations ⇐117

That obligations of corporation, which was being continuously operated between January and September, had increased during same period, *held* not to make statement of seller of stock that there had been no substantial change in affairs of corporation during that period a false representation justifying rescission.

4. Evidence ⇐588

Where there was clear and positive evidence of facts as found by trial court, trial court *held* not to have abused discretion in rejecting evidence of two witnesses and basing its finding on other evidence, although evidence of two witnesses was positive and directly in point showing fact to be other than as found by trial court.

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Action by C. F. Colmar against M. E. Pinckard. Judgment for defendant, and plaintiff appeals.

Affirmed.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellant.

Sloss & Ackerman and Ackerman, Wayland & Mathews, all of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff filed a complaint in the ordinary form asking for the rescission of a contract of the sale of the stock of a corporation. The complaint alleged certain misrepresentations as to the indebtedness of the corporation. The defendant answered and denied the material allegations of the complaint and set forth a separate defense in which he alleged that the plaintiff was not the real party in interest. The trial court made findings in favor of the defendant, and from the judgment entered thereon the plaintiff has appealed. In his brief the plaintiff attacks nearly every single finding made by the trial court.

Prior to the 1st day of August, 1926, Victor Etienne, Jr., held a three-eighths interest in and was one of the corporate officers engaged in the management of Cyclops Iron Works, a factory located in San Francisco. At the same time he was the president of a life insurance company. M. E. Pinckard held the controlling interest and was one of the corporate officers engaged in the management of the Vulcan Iron Works, a competitor of the Cyclops Iron Works. Both factories were engaged in the manufacture, etc., of refrigeration machinery. M. E. Pinckard at the same time was engaged in the brokerage business. C. F. Colmar was employed by a real estate firm in San Jose. He had but little capital and that was invested in a venture the financial outcome of which was altogether problematical. He and Mr. Etienne had been acquainted for many years. Mr. Pinckard and Mr. Etienne had also been acquainted for many years and had had business dealings in the purchase and sale of investment securities. A short time prior to the date last mentioned, the Vulcan Iron Works had such financial difficulties that it was taken over by its creditors. Later the creditors liquidated their accounts and the management of the Vulcan Iron Works was turned back to its

owners. The active management then rested in the hands of Robert Kemp. From time to time Mr. Pinckard and Mr. Etienne discussed the sale of the Vulcan Iron Works. Still later that subject was taken up in earnest. The discussions regarding the nature and extent of the property owned by the Vulcan Iron Works, the indebtedness thereof, the status of its accounts, and the sales price of the stock were taken up by Mr. Pinckard and Mr. Etienne. Finally the parties agreed on a sale of the corporate stock of the Vulcan Iron Works for the agreed price of $25,000, payable $5,000 on the 20th day of October, 1926, and $5,000 on the 20th day of each month thereafter to and including January 20, 1927. In carrying out the sale Mr. Etienne brought forward Mr. Colmar as the nominal purchaser and an escrow was opened at one of the banks. The seller produced the stock and deposited it in the escrow. Mr. Etienne promised to make the payments and thereafter did make the payments. Furthermore, from time to time he advanced to the Vulcan Iron Works such amounts as were necessary to carry on the business. When the last payment had been made the bank sent the certificates of stock to Mr. Colmar, who shortly thereafter delivered them to Mr. Etienne. No written contract was made between Mr. Etienne and Mr. Colmar which obligated Mr. Colmar as principal or otherwise.

When Mr. Etienne and Mr. Pinckard were discussing the contract to buy and sell, Mr. Etienne asked for a statement. Mr. Pinckard produced a statement of the Vulcan Iron Works as of January 31, 1926, and stated that was all he had. At the same time he delivered it to Mr. Etienne. In response to a question by the latter he stated there had been no considerable or substantial change in the financial condition of said corporation since the date of the statement. After examining the statement Mr. Etienne questioned the amount of the inventory. After that subject had been settled Mr. Etienne and Mr. Pinckard discussed the sales price. The statement showed total assets $304,132.74; it also showed liabilities $109,364.71. Mr. Pinckard deducted the liabilities from the assets, divided the remainder by two, and the dividend was ascertained to be $82,384.01. Thereupon he requested $80,000 as the sales price. After further discussion Mr. Etienne offered $25,000, which was accepted. The operating force at the Vulcan Iron Works was continued. Mr. Colmar returned to San Jose, and Mr. Etienne at times visited the Vulcan Iron Works, at other times Mr. Kemp called on him, and the controlling management so continued down to the time this action was brought.

The record is full of conflicts. It discloses that the judgment appealed from is the result of the second trial. The first trial resulted in a judgment for the plaintiff. After the first trial was had bankruptcy proceedings were instituted against the Vulcan. During those proceedings two witnesses who had given material testimony during the first trial appeared in the bankruptcy court and gave testimony. On a motion for a new trial that testimony was brought to the attention of the trial judge and, basing his ruling thereon, it is admitted that he granted a new trial. On the second trial those conflicts going to the impeachment of the witnesses and a great deal of other evidence was introduced. The transcript contains over thirteen hundred pages. It will serve no useful purpose to attempt to analyze and state a complete résumé of the evidence.

[1, 2] In reply to the contention of the plaintiff that the findings are not sustained by the evidence, the defendant quotes from Southern Development Co. v. Silva, 125 U. S. 247, 250, 8 S. Ct. 881, 882, 31 L. Ed. 678, as follows:

"In order to establish a charge of this character the complainant must show, by clear and decisive proof—

"First, that the defendant has made a representation in regard to a material fact;

"Secondly, that such representation is false;

"Thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"Fourthly, that it was made with intent that it should be acted on;

"Fifthly, that it was acted on by complainant to his damage; and,

"Sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Having done so, he then contends that if the evidence is sufficient to support the finding on any one of these six issues, the judgment must be affirmed. That contention is sound. White v. Hayward, 33 Cal. App. 550, 553, 165 P. 972. However, the trial court found with meticulous care on each one of said issues and found against the plaintiff on all of them. After a careful examination of the record we are not disposed to say that any single finding is not supported by the evidence.

[3] The finding that is of the utmost importance to the parties is the one in which the court found that the representations of the defendant were not in any manner false, fraudulent or untrue. As stated above, the statement delivered by Mr. Pinckard to Mr. Etienne purported to show the financial condition of the Vulcan Iron Works as of January 31, 1926, whereas the parties were making their contract in September, 1926. There is some evidence that the statement was not exactly correct as of January 31, 1926; however, it is equally clear that one auditor had reported to Mr. Pinckard those facts and figures which he believed to be true, and accepted and acted thereon. However, other accountants making subsequent examinations ascertained some errors in that statement. As we understand the plaintiff, it is his assertion that the falsity rested in the statement of Mr. Pinckard that since the rendition of the statement on January 31, 1926, there had been no substantial change in the affairs of the Vulcan. Addressing ourselves specifically to that statement, it will suffice to remark that the entire record does not disclose any falsity in that statement. Bearing in mind that the Vulcan was a property having gross assets of $304,132.74 and was being continuously operated after January 31, 1926, it is perfectly clear that any man engaged in the manufacturing business would know that many obligations for material and labor must have been incurred in the meantime. Both materials and labor were converted from raw material into manufactured or partly manufactured products. Although, as contended by the plaintiff, the amount of accounts payable, notes payable to banks, and accrued pay-roll account had increased $16,064.63, such fact standing alone does not show a false representation. The record does not disclose such a full and complete accounting as would show that the affairs of the Vulcan were not substantially the same in September, 1926, as in January of that year. In other words, the record does not show that Mr. Pinckard's statement was not entirely correct.

[4] As to the real party in interest, the trial court also found the facts against the plaintiff. He earnestly contends that the evidence of two of his witnesses was positive and directly in point showing the fact to be different from that found by the trial court. Conceding such to be the record, it must likewise be considered that in other parts of the record there is clear and positive evidence of such facts that it may not be said, as a matter of law, that the trial court abused its discretion in rejecting the evidence of the two witnesses relied on by the plaintiff and basing its finding on the other evidence.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

KABISIUS v. BOARD OF PLAYGROUND AND RECREATION OF CITY OF LOS ANGELES et al. *

Civ. 8603.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1934.

Rehearing Denied Jan. 11, 1935.

Hearing Granted by Supreme Court Feb. 14, 1935.

Municipal corporations ⇐218(1)

Board of Playground and Recreation *held* unauthorized to "terminate" employment of beach guard who was permanent employee, to reduce force because of lack of work or lack of funds, in view of charter provision providing for removal only for cause, there being no implied authority since charter purportedly covered all situations; word "terminated" meaning to put an end to employment (Los Angeles Charter, art. 9, § 112, subd. (a).

[Ed. Note.—For other definitions of "Terminate; Termination," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Petition by Charles W. Kabisius against the Board of Playground and Recreation of the City of Los Angeles and others. From a judgment for respondents, petitioner appeals.

Reversed and remanded, and motion of appellant for leave to produce further evidence denied.

Charles W. Kabisius, in pro. per.

Erwin P. Werner, City Atty., Frederick Von Schrader and Loren A. Butts, Asst. City Attys., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for respondents.

PER CURIAM.

As far as are material to the decision of the appeal with reference to the questions

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 50 P.2d 1040.

discussed and decided herein, the facts appear to be that prior to October 3, 1930, the petitioner in the court below was a "permanent" employee as a beach guard of the city of Los Angeles in the department of playground and recreation thereof. On October 3, 1930, the said petitioner was served with a written notice which included the statement that "you will thereafter be terminated on October 9th, according to Rule * * * which covers reduction of force for lack of work and lack of funds." Thereafter, in pursuance of an investigation by the civil service board of said city of the facts that related to the "termination" of the services of petitioner, by order of said civil service commission the Board of Playground and Recreation was directed to reinstate petitioner into the position formerly occupied by him. That order having been ignored by the Board of Playground and Recreation, petitioner instituted in the superior court a petition for a writ of mandate by which he sought an order, which, if granted, would direct the Board of Playground and Recreation to restore petitioner to duty as a beach guard. From a judgment that was rendered in favor of the respondent to said petition, the petitioner has appealed to this court.

Primarily, with reference to the discharge or the suspension of an employee, the powers (and the limitations thereon) possessed by the respondent board are outlined by the provisions of subdivision (a) of section 112 of article IX of the Charter of the City of Los Angeles. As far as is here pertinent, by that section, in substance it is provided that, although the respondent board has power "to remove, discharge, or suspend" an employee of its department, no employee (of the class of which petitioner was a member) may be "removed, discharged or suspended, *except for cause.*" That charter provision contains further regulations relative to notification by such respondent board to the civil service commission of any action taken by the former of the kind herein referred to, and that "upon such filing (of notice) such removal, discharge or suspension shall take effect"; following which, procedure is outlined for any possible investigation and determination by the civil service commission relative to the justification, or lack of justification, for such discharge or suspension of the employee; with power to make a "final and conclusive" order in the premises; "provided, that the order of any appointing board or officer *suspending* any person *because of lack of funds* in such department shall be final, and not be subject to review by said board of civil service commissioners."

It will thus be noted that "*for cause*" only could appellant legally have been "removed, discharged, or suspended" from his position; except that he might have been "*suspended* * * * because of lack of funds." In that connection, it is not contended by respondent herein that any "*cause*" existed personal to appellant's employment, as construed by various authorities to which the attention of this court has been directed, sufficient to authorize either the removal, the discharge, or the suspension of appellant from his position. It therefore follows that the legal justification for depriving appellant of his employment rests upon the validity of the order made by the respondent board, to wit, that his services would be "*terminated* * * * according to rule * * * which covers *reduction of force* for lack of work and lack of funds."

It would be idle to say, or to contend, that as used in the notice to the employee the word "terminated" should carry a meaning identical with the word "suspended." Discussion is unnecessary to establish the conclusion that to terminate an employment is "to put an end to" it. Webster's New Dictionary. And in that regard, the facts as adduced by the evidence received on the hearing in the trial court clearly show that such was the intention of the respondent board, both when the notice of termination of the services of petitioner was served upon him and at all times thereafter. Such being the undeniable situation, the question then arises whether the respondent board exceeded its powers within the purport of the pertinent express charter provisions, or within those powers that may be implied therefrom.

As to the first situation, it is conceded by counsel for respondent that no such express power is contained either within subdivision (a), of section 112 of article IX of the Charter of the City of Los Angeles, or elsewhere within such charter. But it is contended that because in other charter provisions, in general terms the respondent board is given authority to manage, govern, and control the business and affairs that appertain to its declared functions, an implied power was created to discharge an employee whenever within the discretion of such respondent board, or its manager, such discharge was desirable, either for the purpose of reducing the working force of the department on account of lack of work, or because of lack of funds accredited to such department, wherewith to pay the necessary operating expenses thereof. In the total ab-

sence of charter provisions bearing directly upon the questioned right of discharge of an employee, the existence of an implied authority such as asserted by respondent might possibly be conceded. But the language of subdivision (a) of section 112 of article IX of the Charter purportedly covers all situations with reference to the right of the respondent board either "to remove, discharge or suspend" an employee who is engaged in performing services within such department. By its express terms it is there provided that "any board or officer having the power of appointment of officers, members and employees in any department of the government of the city, shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended *except for cause* * * *." And as hereinbefore has been pointed out, the only specified exception to the authority given to such respondent board to in any way discontinue the services of an employee (other than as is therein generally provided for) is by a *suspension* "because of lack of funds." To such a situation the application of the maxim "Expressum facit cessare tacitum," or, as interpreted, "The expressed controls the unmentioned; an unequivocal statement prevails over an implication" (see "Expressio unius exclusio alterius" in Anderson's Law Dictionary), would seem clear. Broad as may be the general powers of the respondent board in the management and control of its delegated functions, in the face of a limitation of such powers by which in the matter of the discharge or the suspension of an employee, the rights of such employee (and incidentally those of the general public) were carefully guarded,—the announcement of a rule, perhaps in accord with general power, but by which, authority, additional to, or materially different from, that provided within the express limitation upon such general power, would be asserted, would be plain opposition to the intent of the rule or maxim to which attention just has been directed. The charter provision authorized a discharge "*for cause*" only. It did not authorize a discharge in order that a "reduction in force for lack of work or lack of funds" might become desirable. In the latter case, in the absence of an express abolishment of the position held by the employee, all that the respondent board had the legal power to do was to suspend him. As is said in the case of Powers v. Board of Public Works, 216 Cal. 546, 549, 15 P.(2d) 156, 157, wherein an analogous situation appeared to be present: "The contention that the resolutions of the board of public works *laying off* these men amounted to an *abolishment* of their positions is not in accord with the facts as disclosed by the record. The record clearly shows that respondents were *laid off* solely because of *lack of funds*, and not because the work they were doing was completed or their jobs abolished. * * *" The fact in the instant case that the services of the employee were "terminated" had no effect upon the position itself in which the petitioner was employed, nor upon his status as a permanent employee.

It becomes unnecessary to discuss any of the other points on appeal suggested by the respective litigants thereto.

It is ordered that the judgment be and it is reversed, and the cause remanded to the superior court for further proceedings in accord with this decision. The motion of appellant for leave to produce further evidence in this court is denied.



In re SPROSTON'S ESTATE. *

SPROSTON v. LATTER et al.

Civ. 9956.

District Court of Appeal, Second District, Division 1, California.

Dec. 20, 1934.

Rehearing Denied Jan. 11, 1935.

Hearing Granted by Supreme Court Feb. 18, 1935.

1. Wills ⇐55(1)

In will contest, evidence *held* insufficient to support finding that testator was incompetent to make will.

2. Evidence ⇐317(18)
Wills ⇐165(5)

Testimony that prior to and subsequent to making of will testator had stated that friend suggested testator make will and leave all his property to friend was hearsay and incompetent as proof of undue influence at time of making of will, although testimony was competent to show state of mind of testator at time suggestions were made.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 52 P.2d 924.

3. Wills ⇐155(1)

To set aside will for undue influence, such pressure must have been exerted on testator at time of making will as to have induced him to leave his property to persons named in will instead of others to whom he would have left property but for such acts.

4. Wills ⇐166(1)

In will contest, evidence *held* insufficient to support finding of undue influence.

5. Wills ⇐163(2)

That legatees and devisees were long-time friends of testator, had loaned testator money and negotiated loans for him, did not establish confidential relation which placed on legatees and devisees burden of proving that testator was free from their undue influence in making will.

6. Wills ⇐82

That testator left nothing to his son but gave all his estate to strangers would not make will unnatural will, where testator had never seen son and did not know when will was made whether son was alive.

7. Wills ⇐82

That will is unnatural would not warrant setting aside will.

HOUSER, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Proceeding by Francis Godfrey Sproston, contesting the probate of the will of Frank Sproston, deceased, opposed by L. B. Latter, executor, and another. From a judgment revoking probate, contestees appeal.

Reversed.

Leo F. Falder and Paul A. Tschirgi, both of Los Angeles, for appellants.

G. Harold Janeway and S. T. Hankey, both of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal is brought by L. B. Latter, executor of the will of Frank Sproston, and his wife, Margaret K. Latter, proponents in a contest filed after probate to the will of Frank Sproston by Francis Godfrey Sproston, son of deceased, from a judgment entered by the court revoking the probate of the will.

The petition of contestant and respondent alleges three grounds of contest: (1) That the will was not duly executed by the decedent. (2) That deceased at the time of the alleged execution of the will was not of sound and disposing mind and memory. (3) That, at the time of signing the alleged will, the testator "was acting under the undue influence of proponents Mr. and Mrs. L. B. Latter," and was "then and there * * * induced by the fraud of the said Latters to sign said instrument."

The main point urged by appellants for a reversal of the judgment is that the findings and judgment do not find support in the evidence.

[1] The findings do not purport to find upon the issues involved in the first ground of contest, the due execution of the will. Respondent concedes there is no evidence to support the contest on that ground. While appellants and respondent in their briefs argue the question of the incompetency of the testator to make a will, in our opinion the findings are lacking in the fundamental elements necessary to proper findings on that issue. The findings at best may be deemed adequate to present for review the issue of undue influence which is the third ground of contest. Notwithstanding our conclusion as to the inadequacy of the findings on the issue of incompetency, we have carefully examined the voluminous transcript of the evidence with a view to a consideration of the issue of incompetency as well as that of undue influence. When the evidence in the record on the question of incompetency of Frank Sproston to make a will is measured by the rule repeatedly declared by our appellate courts, it is found markedly lacking in those elements which are necessary in order to set aside the testamentary act of the deceased. This rule is comprehensively expressed in the opinion in the case of In re Estate of Perkins, 195 Cal. 701, 235 P. 45, 46, as follows:

"It is well settled that, upon the contest of a will on the ground that the deceased was of unsound mind, the actual mental condition of the testatrix at the time of the execution of the will is the question to be determined. [Citing cases.] Evidence as to mental condition before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will.

"The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will. [Citing cases.] Insanity exists as a matter of law only from the time it is shown to exist and

proof of subsequent insanity will not create nor carry a presumption of its past existence. [Citing case.]

"Every mental departure from the normal will not destroy a testamentary disposition, otherwise valid, of the testatrix' estate. It is not the rule of law that no person who is insane may make a valid will. The real rule is that the will of a person, who by reason of insanity is incapable of making valid testamentary disposition of his estate, shall not be upheld. [Citing cases.]

"Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or delusions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act. [Citing cases.]"

The only evidence in the record tending to indicate any mental derangement of the testator is the testimony of several witnesses that on occasions prior to the day on which the will was made as well as on days after the will was made the testator had periods when he did not seem to know where he was; that on several occasions he had delusions, and at times his mind seemed to wander. These same witnesses, however, testified that on the occasions of their visits when they observed this indication of mental disturbances the testator always knew them; that he had lucid periods when he talked intelligently and was rational. There is no evidence whatever that would tend to support a finding of general mental incompetency. At best the evidence only tended to show the testator was suffering from what the opinion in Re Estate of Perkins, supra, characterizes under the second classification of insanity, as a "specific and narrower form of insanity." The evidence falls far short of that required to justify a finding "that the will was the creature or product of any hallucination or delusion," entertained by the testator. In re Estate of Shay, 196 Cal. 355, 237 P. 1079 (cases therein cited); In re Estate of Stump, 202 Cal. 308, 260 P. 543; In re Estate of Smith, 200 Cal. 152, 252 P. 325 (cases therein cited).

The record is equally lacking in the evidence necessary to support a finding that the will was the product of the undue influence of proponents L. B. Latter and his wife, Margaret K. Latter.

Undue influence has been repeatedly defined to be "the exercise of acts or conduct by one person toward another person by means of which the mind of the latter is subjugated to the will of the person seeking to control it." In re Estate of Smith, 200 Cal. 152, 252 P. 325, 328. In Re Estate of Bryson, 191 Cal. 521, 217 P. 525, 533, the court declared the rule, repeatedly used as a measure in determining whether or not a will was the product of undue influence, in the following statement: "'In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires.' * * * 'The presumption of undue influence is not raised by proof of interest and opportunity alone. * * * In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.'"

Frank Sproston and the Latters had been close friends for a number of years. To his acquaintances in general, he was known as a man without family. To a few of his intimates, under a pledge of secrecy, he confided the information that when a young man in England he had married and had a child. It appears that this marriage took place in 1886, but that a few months later, before the contestant, his son, was born, Sproston left England without informing his wife as to where he was going. After leaving, he never had communicated with her, and never saw or heard from his son. Some twenty years after he left home he returned to England for a visit, when he learned that his wife had died and his son had disappeared.

For several years prior to his decease Sproston was afflicted with diabetes. During this period, as well as a period of in-

capacity due to a broken leg, Sproston was the recipient of many friendly courtesies from the Latters. On the morning of March 16, 1932, in response to a request from Sproston, Latter went to the house of Mrs. Cole, where Sproston had a room, for the purpose of taking him to the California Lutheran Hospital. Sproston's friends, if not he himself, had been informed by Sproston's physician that he was in a precarious condition. Before leaving for the hospital, Latter, in conversation with Mrs. Cole, who was a friend of Sproston, suggested that Sproston ought to make his will, which suggestion apparently was approved by Mrs. Cole, for she accompanied Latter to the room of Sproston, when Latter asked him if he didn't want to make a will, to which Sproston replied, "Mr. Latter that is all I hear out of you." On March 21st, five days later, while Mr. and Mrs. Latter were visiting Sproston at the hospital, Sproston asked Latter if he would telephone Dr. Tarnutzer, his physician and lodge brother, to bring or send to the hospital a lawyer, as he wanted to make a will. Later in the day an attorney by the name of William M. McCartney came to the hospital and informed Sproston and the Latters, who were still there, that he had come at the request of Dr. Tarnutzer. Seating himself close to Sproston at his bedside, the lawyer and Sproston held an extended conversation. When the lawyer came into the room, Mrs. Latter left. In the room at the time were three other patients. The conversation between the lawyer and Sproston was evidently carried on in a low tone of voice, for it does not appear that any one overheard their conversation other than occasional words. Mr. McCartney testified that in the conversation Sproston asked a number of questions about the law affecting estates and the requirements as to a will, all of which questions the lawyer answered. Sproston in turn answered the lawyer's questions and told him how he wanted his estate to be distributed. The lawyer was a stranger to Sproston and the Latters. During the conversation between the lawyer and Sproston, as also the preparation and execution of the will, no question was asked of the Latters, and no remark or suggestion made by them to either Sproston or the lawyer relating to the contents of the will. Concerning the insertion in the will of the sentence, "any heir not herein named has been intentionally omitted and they have not been forgotten by me," McCartney testified that during their conversation Sproston said to him, "Should I have any heirs that I am unaware of, could you fix it up so that they could not get anything?" to which the lawyer replied that he could, and that by reason of this request he inserted in the will the quoted words. McCartney further testified that all of the information he had for the preparation of the will he received from the testator, who told him that the persons to whom he was giving his estate had been kind to him and he wanted them to have his property. There is no conflict in the testimony relating to the preparation, drawing, and execution of the will or what occurred in Sproston's room on that day.

The only other evidence in the record that may be deemed competent as an external fact in support of the alleged undue influence is the testimony of one Mrs. Pearn, a neighbor and acquaintance of Sproston in 1930. She testified that some time early in that year, which was more than two years before Sproston's death, while she was in the hallway of the house where he lived, she overheard Sproston say: "I will not, I don't intend to make a will, I am not going to." She testified that a few minutes later she saw Latter come out of Sproston's room.

[2-4] The foregoing recital fairly states all the competent evidence that may be regarded as bearing upon the external facts constituting the undue influence of the Latters. There is other testimony of witnesses which purports to relate statements made by Sproston, not in the presence of the Latters, but prior to and subsequent to the making of the will, wherein Sproston stated that the Latters or Mr. Latter requested or suggested that he make a will and leave all his property to them. This testimony was competent to show the state of mind of the testator at the time the remarks were made, but, as proof of the exercise of undue influence by the Latters on the testamentary act of Sproston at the time he made his will, this testimony is hearsay and incompetent. Estate of Calkins, 112 Cal. 296, 44 P. 577; In re Estate of Arnold, 147 Cal. 583, 82 P. 252; In re Estate of Snowball, 157 Cal. 301, 107 P. 598.

Giving to the testimony that Latter on more than one occasion suggested to Sproston that he make a will, and the fact that Sproston resented the suggestion and retorted that he would not do so, the fullest weight possible, with all the inferences that may reasonably be drawn therefrom, it falls far short of that which will justify a finding that the Latters exercised upon Sproston such "pressure which overpowered the volition of the testator at the time the will was made," so that the will "is not the expression" of Sproston's desires. There is no evidence com-

petent on the issue of external facts of undue influence that the Latters ever urged or requested Sproston to make a will leaving them his property or a will leaving his property to the persons named in his will. It may be conceded that there is sufficient evidence to support a finding that at certain times before and after the will was made Sproston's mental condition was such that he believed at such times that the Latters wanted his property, or were trying to get him to will it to them, or that he felt he was under their influence. But such conditions of mind of the testator constitute no evidence whatever of the external facts of the undue influence of the Latters. To set aside the will on the ground of the undue influence of the Latters, there must be competent evidence of acts or conduct on the part of the Latters that constituted such pressure upon Sproston at the time he made his will as to have induced him to leave his property to the persons named in the will instead of leaving it to others, which he would have done but for such acts or conduct. The evidence is markedly lacking in this essential element.

[5] Respondent contends that a confidential relation existed between the testator and the Latters, and by reason thereof the burden rested upon proponents to prove that in making the will the testator was free from any undue influence on their part. There is no merit in this contention. The most that the evidence shows is that the Latters were longtime friends of the testator, that on one occasion Mr. Latter borrowed some money from him, and on several other occasions Latter as a real estate broker negotiated some loans for him. These circumstances do not justify a finding of confidential relations. In re Bacigalupi's Estate, 202 Cal. 450, 261 P. 470; In re Estate of Hinde, 200 Cal. 710, 254 P. 561; Frantz v. Porter, 132 Cal. 49, 64 P. 92.

[6] Respondent also urges in support of his third ground of contest that the will is an unnatural will, in that the testator left nothing to his son, but gave all of his estate to those who were not of kin. There is no merit in this contention. As already pointed out, Sproston had never seen the son born after he left home almost fifty years previous to the time he made his will. Nor had he ever had any communication with him. Whether or not, at the time the testator made his will, his son was living or dead was a mere matter of conjecture with him. Under these circumstances, it is not unnatural or strange that he should leave his estate to those who had befriended him, especially during the period of his illness.

[7] Furthermore, even if the charge that the will is unnatural could be sustained, this alone would not justify a court in setting it aside. In re Estate of Smith, 200 Cal. 152, 252 P. 325; In re Estate of Martin, 170 Cal. 657, 151 P. 138.

Under the evidence and authorities, we are satisfied that the will in question is a valid expression by the testator of the testamentary disposition of his estate.

Judgment is reversed.

I concur: YORK, J.

HOUSER, Acting Presiding Justice (dissenting).

I dissent. Particularly am I not in accord with the conclusion reached by my associates to the effect that the evidence adduced on the trial of the contest of the will was insufficient to sustain the finding made by the trial court in substance that the execution of the will was obtained by the exercise of undue influence exerted upon the mind of the testator. Not that any criticism is due with regard to the statement of essential facts contained within the prevailing opinion, but that, if those facts, together with certain omitted facts which have a direct bearing both upon the issue of mental capacity of the testator and the issue of undue influence exercised upon him, and the inferences properly deducible from all such evidence, were to be effectually marshaled and taken into consideration, sufficient evidence will appear upon which properly may be rested the finding made by the trial court. It should be remembered that with respect to the quantity and the quality of evidence necessary to sustain a finding of undue influence the rule is no different from that which obtains with reference to a finding of fact by the trial court on any issue in any other kind of a civil action. That rule is universal that, if in essential particulars such a finding is supported by any substantial evidence, an appellate court is powerless to disturb it. In my opinion, the judgment of the trial court should be affirmed.

3 Cal.App.2d 35

PEOPLE v. FOSTER.

Cr. 1407.

District Court of Appeal, Third District, California.

Dec. 12, 1934.

1. Mayhem ⇐5

Evidence *held* to support conviction of mayhem, where defendant bit off ear of host during encounter at party (Pen. Code, § 203).

2. Criminal law ⇐570(1)

In prosecution for mayhem, evidence *held* to support verdict finding defendant sane at time of commission of offense, within meaning of term as defined with relation to criminal responsibility, notwithstanding proof that defendant appeared to be afflicted with some degree of dementia or paresis as result of syphilis and that he had been drinking (Pen. Code, §§ 22, 203).

3. Jury ⇐131(11)

In prosecution for mayhem, refusal to permit re-examination of jurors on voir dire for purpose of separately trying issue of defendant's sanity *held* not error, where jurors were fully examined at beginning of trial, since court assumed they were then asked every essential question regarding qualifications (Pen. Code, §§ 203, 1026).

4. Criminal law ⇐623
Jury ⇐131(11)

Issue as to sanity of accused may be tried either by jury trying original cause or by another jury, but, when tried by same jury, it is not necessary to either re-examine jurors on voir dire or to readminister oath, since trial of issue of insanity is not separate trial (Pen. Code, § 1026).

5. Criminal law ⇐1202(3)

In prosecution of one accused of prior conviction of robbery, perpetrated in Louisiana, admitting purported certificate of general manager of Louisiana state prison in proof of charge without first requiring proof that person signing certificate was such general manager *held* error.

6. Criminal law ⇐1202(3)

In prosecution of one charged with prior conviction of robbery perpetrated in Louisiana, purported certificate of warden of Louisiana penitentiary *held* erroneously admitted without proof of genuineness of signature or of fact that he was warden of that institution.

7. Criminal law ⇐1202(3)

In proving prior conviction of defendant in Louisiana, judgment of commitment of defendant by same name to Louisiana state prison, duly certified by judge, *held* properly admitted, where judge's signature and official standing were duly authenticated.

8. Criminal law ⇐304(9)

Court will take judicial notice of statutes of Louisiana and amendment thereto which vest general manager of state penitentiary with custody and control of records thereof (Code Civ. Proc. § 1875, subd. 3; Act La. No. 70 of 1900, § 2, as amended by Act La. No. 137 of 1916).

9. Criminal law ⇐1202(3)

Statute authorizing filing of copies of records of state penitentiary to prove prior conviction does not dispense with necessity of proving that purported certificate is actually signed by official custodian of records (Pen. Code, § 969b).

10. Criminal law ⇐1202(3)

In prosecution for mayhem, evidence *held* insufficient to show prior conviction of robbery in Louisiana, where there was no authentication of signatures or official standing of manager and warden of Louisiana prison, who signed certificate to prove conviction (Pen. Code, § 203).

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Walter Foster was convicted of mayhem and of a prior conviction of robbery, and he appeals.

Reversed as to former conviction; affirmed as to conviction of mayhem.

Chester Monette, of Eureka, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice THOMPSON delivered the opinion of the court.

The defendant was convicted of the crime of mayhem under the provisions of section 203 of the Penal Code, and of a prior conviction of robbery perpetrated in the state of Louisiana in 1928. From the judgment of commitment which was accordingly rendered and from the orders he has appealed.

The information contains two counts. The first one charges the defendant with the crime of mayhem committed by feloniously and maliciously biting off the left ear of Adolph Kindberg. The second count charges the defendant with a prior conviction of the crime of robbery alleged to have been secured October 27, 1928, in the Fourth judicial district court of the state of Louisiana. The de-

fendant pleaded not guilty of the crime of mayhem and also pleaded not guilty of that offense by reason of insanity. He also pleaded not guilty of the alleged prior conviction of the crime of robbery. He was first tried and convicted by a jury of the crime of mayhem and also of the prior conviction of the felony alleged to have been committed in Louisiana. He was then tried by the same jury on the issue of his sanity and found to be sane. He was thereupon sentenced to imprisonment in the state prison at Folsom for the period of time prescribed by law.

The appellant contends that neither the verdict finding him guilty of mayhem nor the one finding him sane at the time of the commission of the alleged offense is supported by the evidence. It is also claimed the court erred in admitting evidence of the prior conviction, and in separately trying the issue of the defendant's sanity before the same jury which passed upon his guilt of the crime of mayhem, without first permitting an examination of the jurors with respect to the issue of sanity.

[1] The evidence is sufficient to show the guilt of the defendant of the crime of mayhem as charged in the information. It is true that four of the five witnesses who were called by the prosecution testified they did not actually see the defendant bite off the ear of the prosecuting witness. All witnesses testified to the fact that an affray occurred between the defendant and Adolph Kindberg. Among a number of other friends, the defendant was invited to attend a party at the home of Adolph Kindberg in Eureka on the night of December 31, 1933. Some liquor was imbibed by the various persons present on that occasion. The defendant became quarrelsome and used vulgar and profane language in the presence of the guests. Mr. Kindberg protested against his conduct and language. The defendant resented the interference of Kindberg and knocked him down. He then continued to strike and beat Kindberg. An affray ensued. The contesting parties were separated. In an effort to prevent the defendant from entering a closet where a loaded rifle was kept, he again assaulted Kindberg, and, in the mêlée which then ensued, the defendant bit off a part of Kindberg's left ear. Mr. Kindberg testified in that regard: "I had part of my ear bit off. Q. Who bit your ear off? A. Mr. Walter Foster." One of the witnesses testified that he immediately thereafter picked up a portion of the ear which lay upon the floor and threw it into the stove. A physician also testified that he treated the injured man for the maimed member and that a portion of his ear was gone. The reading of the record leaves no reasonable doubt that the defendant bit off a portion of Kindberg's ear.

[2] The verdict of the defendant's sanity at the time of the commission of the offense is also supported by substantial proof. The defendant was a witness in his own behalf on the main trial of the case before the same jury that passed on his sanity. Thirty pages are devoted to the transcription of his testimony. His replies to questions which were propounded to him appear to be perfectly coherent, sound, and reasonable. The jurors had an opportunity of observing him on the witness stand and of judging from his conversation the degree of the rationality of his mind. Another witness testified regarding his conduct and conversation while he remained in jail after his arrest. Four physicians testified as experts regarding his sanity. Three of them said that he appeared to be afflicted with some degree of dementia or paresis as a result of syphilis which he had contracted in 1917. These physicians characterized his mental condition as partial insanity, saying that his affliction would be aggravated by the excessive use of intoxicating liquor to an extent that he might not know the difference between right and wrong. These physicians, however, agreed to substantially what one of them testified to in the following language: He "does feel his responsibility; in a way he realizes right from wrong; he knows what law is about, what law is for; he knows if a man violates the law he is subject to a penalty * * * his moral sense is slightly blunted." One physician testified that, notwithstanding the deterioration of the defendant's brain as a result of syphilis, he absolutely understood the difference between right and wrong and the nature of the acts which he performed. This witness also testified positively that the use of liquor would not minimize his understanding merely because of his ailment. But even though the use of liquor does impair the understanding of one who is afflicted with paresis in its incipiency, we assume that person would still be subject to the established rule that "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition." Section 22, Pen. Code. The jury was fully instructed in that regard. We are therefore of the opinion there is ample evidence that the defendant was sane at the time of the commission of the offense of mayhem, within the meaning of that term as it is defined with relation to criminal re-

sponsibility, and that the verdict is sufficiently supported by competent evidence in that regard.

[3, 4] It did not constitute error for the court to refuse to permit a re-examination of the jurors on their voir dire for the purpose of separately trying the issue of the defendant's sanity. Section 1026, Pen. Code; People v. Davis, 94 Cal. App. 192, 270 P. 715; In re Merwin, 108 Cal. App. 31, 290 P. 1076; People v. Leong Fook, 206 Cal. 64, 273 P. 779. The jurors were fully examined on their voir dire at the beginning of the trial. We must assume they were then asked every essential question regarding their qualifications which would apply to every necessary issue in the case. The trying of an issue of the alleged insanity of a person who is charged with a crime, as provided in section 1026 of the Penal Code, is not a separate trial, but, as the Supreme Court says in the Leong Fook Case, supra, it is merely the separate determination of one of the issues of the original charge against the accused person. The issue as to the sanity of an accused person may be tried either by the jury which tries the original cause against him, or by another jury. When the issue of insanity is tried by the same jury which tries the original charge, it is not necessary to either reexamine the jurors on their voir dire or to readminister the oath to them.

[5, 6] The court erred in admitting in evidence a purported certificate of the general manager of the Louisiana state prison, in proof of the charge against the defendant of a prior conviction of robbery, without first requiring proof that the person who signed the certificate was in fact the general manager of that institution. This document consists of a copy of the commitment of Walter Foster, together with his photograph and an impression of his finger prints. A purported certificate of W. H. Long, as warden of the same penitentiary, was also erroneously admitted in evidence, without proof of the genuineness of his signature or of the fact that he was warden of that institution. Neither the signatures to these instruments nor the fact that the signers of the certificates actually held the respective offices of general manager and warden of the state prison were authenticated. There is therefore no competent evidence that this appellant actually served time in the Louisiana state prison for the prior conviction of robbery, or that he is the same person who was sentenced to imprisonment in that institution.

[7] It is true that one Walter Foster was actually convicted of robbery and sentenced to imprisonment by the Fourth district court of Louisiana. The judgment of his commitment to the Louisiana state prison at Baton Rouge was duly certified by the judge of that court, and his signature and official standing were authenticated in the manner required by law. That document was therefore properly admitted in evidence at the trial of this case.

[8] It is also true that our courts will take judicial notice of the statutes of Louisiana (3 Const. and Stats. of La. p. 1659, Act No. 70 of 1900, p. 116, § 2, and amendment thereto, Act No. 137 of 1916, p. 324), which vests the general manager of the state penitentiary with the custody and control of the records thereof. Section 1875, subd. 3, Code Civ. Proc.; People v. Darling, 120 Cal. App. 453, 7 P.(2d) 1094.

[9, 10] Section 969b of the Penal Code provides that: "For the purpose of establishing prima facie evidence of the fact that a person * * * has been convicted of an act punishable by imprisonment in the state prison of this state, and has served a term therefor in any penal institution, or has been convicted of an act in any other state, which would be punishable as a crime in this state, and has served a term therefor in any state penitentiary or reformatory, * * * the records or copies of records of any state penitentiary * * * in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

The preceding section authorizes the filing of copies of the records of any state penitentiary "certified by the official custodian of such records" as prima facie evidence of a prior conviction of an accused in another jurisdiction, and as proof of the further fact that he actually "served a term therefor." This section of the Code, however, does not dispense with the necessity of proving that the purported certificate is actually signed by that particular officer. Clearly preliminary proof is required that the certificate is genuine. It must be first shown that the person who signs the instrument is really the officer who actually has charge of its records before his certificate to the copies thereof may be admitted in evidence. It would be a travesty on justice to permit the filing of purported copies of the records of a state institution without requiring preliminary proof of the genuineness of the signature to the certificate attached thereto and without proof of the fact that the individual who signs the document is really the officer

who is authorized to do so. The mere existence of a purported certificate to the records of a state institution, without proof of the identity or official authority of the individual who has signed it, does not rise to the dignity of evidence which is worthy of consideration. In the present case neither the certificate of the general manager of the Louisiana penitentiary nor of the warden of that institution is sworn to, acknowledged, or otherwise authenticated. If a notary public had certified that he knew them to be the persons and the officers they represented themselves to be, and the authority of the notary were authenticated in the manner required by law, we have no doubt the certificate of the general manager of the Louisiana state prison, regarding the facts therein stated, would become competent evidence of the identity of Walter Foster and of the fact that he had actually served time in that prison for the prior conviction of robbery.

In support of the competency of these unauthenticated certificates of the general manager and the warden of the Louisiana state prison, the Attorney General has cited People v. Murphy (Cal. App.) 34 P.(2d) 723; People v. Sheridan, 136 Cal. App. 675, 682, 29 P.(2d) 464; People v. Darling, 120 Cal. App. 453, 7 P.(2d) 1094; and People v. Wilson (Cal. App.) 33 P.(2d) 476. None of these cases involve the preliminary proof of the authenticity of the signatures of the officers signing the certificates. The Sheridan Case states that the signature to the copies was duly authenticated by the clerk and the judge of the county. The question of the genuineness of the signatures and the official capacity of the signers of the certificates in the other cases were not involved. It was contended in these other cases that there was a lack of evidence that the signers of the certificates had legal custody of the records. These cases merely hold that our courts will take judicial notice of the statutes of a sister state which designate the officer having charge of the records of a state prison.

For the reason that there is no authentication of the signatures or official standing of the general manager and warden of the Louisiana state prison, their certificates were erroneously admitted in evidence, and the record on appeal therefore contains no competent evidence that this defendant served time for the prior offense of robbery in the Louisiana state prison or that the impression of his finger prints is genuine. For the same reason, there is no competent evidence that this defendant is the same person who was formerly convicted of robbery in the Louisiana court.

The judgment is reversed in so far as it applies to the former conviction of the defendant. The fact that the evidence is insufficient to sustain the judgment of conviction and the service of a sentence for the former offense in no way affects the sufficiency of the evidence or the validity of the judgment of conviction of the main charge of mayhem.

The judgment of conviction of the crime of mayhem and the orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 323

PEOPLE v. ADAIR et al.

Cr. 2644.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1934.

1. Forgery ⇐44(1)

In prosecution for forgery of checks, evidence *held* sufficient to establish fraudulent intent (Pen. Code, § 21; Code Civ. Proc. § 1962, subd. 1).

2. Criminal law ⇐1169(5)

In prosecution for forgery of checks, reference by handwriting expert on redirect examination to comparison he had made of checks with exemplars in police files made by known forgers, but with no statement of what he found, *held* not prejudicial to accused, where court promptly admonished jury to disregard matter.

3. Forgery ⇐8

Counts in information alleging forgery of fictitious name and setting out specific acts constituting offense with clearness *held* sufficient, as against contention that there is no such crime as forgery of fictitious name (Pen. Code, § 470).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Arthur Adair and Philip Ainsworth were convicted of forgery, and from the judgment and an order denying a motion for a new trial, Arthur Adair appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Victor J. Hayek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant Adair was accused on one count of forgery and two counts of forgery of a fictitious name, after prior conviction of a felony. He admitted the former conviction and was convicted and sentenced on all three counts. From the judgment and order denying motion for new trial, he appeals.

[1] Intent to defraud is said to be lacking to support the jury's verdicts. The check set out in count 1 was drawn by appellant's codefendant, Ainsworth, and cashed by Adair at a market where he was known by sight, the proceeds being used in part to settle an old account and the balance being handed to appellant in cash. The two other checks which were passed by Ainsworth were declared by a handwriting expert to have been written by appellant, and the latter told the officers he had written them. At the trial, Ainsworth, who had pleaded guilty to the two latter counts, testified that he had written the two latter checks, notwithstanding a prior denial to the officers. The jury may reasonably have concluded that the two defendants were operating together, and the fraudulent intention logically appeared from the circumstances (Pen. Code, § 21) and from the deliberate commission by them of an unlawful act (Code Civ. Proc. § 1962, subd. 1; People v. Ball, 102 Cal. App. 353, 282 P. 971).

[2] On redirect examination, the handwriting expert referred to a comparison he had made of the questioned checks with some exemplars in the police files made by "known forgers," but made no statement as to what he found. In response to an objection, the trial court promptly admonished the jury to disregard the matter, explaining that the witness did not mean to indicate that defendant was a forger, thereby precluding any prejudicial inference on the part of the jury.

[3] Appellant contends that the information is defective in charging "forgery (fictitious name)," and urges that "there is no such crime." The specific acts constituting the offense are set out with sufficient clearness, and designation is immaterial. People v. Eppinger, 105 Cal. 36, 38 P. 538. "Whether the signatures in question were forgeries of names of existing persons or whether they were names of fictitious persons is immaterial." People v. Gayle, 202 Cal. 159, 259 P. 750, 752. The information is sufficient and proper under Pen. Code, § 470.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 164

WILLIAM PITT WHITE ESTATE CO. v. SUPERIOR COURT IN AND FOR HUMBOLDT COUNTY.

Civ. 5246.

District Court of Appeal, Third District, California.

Dec. 18, 1934.

1. New trial ⇐165

Court cannot vacate its order denying motion for new trial and again pass on motion, unless prematurely or inadvertently passed on (Code Civ. Proc. § 473).

2. Mandamus ⇐154(4)

Respondent *held* not entitled to writ of mandate, directing superior court to order transcript, refused by reporter until appellant deposited or gave security for payment of stated sum as compensation, in absence of allegation that undertaking was filed in lieu of arrangement with reporter for payment of compensation (Code Civ. Proc. §§ 953a, 953b).

Proceeding by the William Pitt White Estate Company, a corporation, for a writ of mandate to the Superior Court in and for Humboldt County.

Motion to dismiss the petition granted, petition denied, and writ discharged.

Arthur W. Hill and W. C. White, both of Eureka, and Arthur W. Hill, Jr., of San Francisco, for petitioner.

Blaine McGowan, of Eureka, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Petitioner herein presented to this court a petition for a writ of mandate directed to respondent superior court requesting said court to order or procure a transcript of certain proceedings, or if that could not be done to

grant a new trial to petitioner, and in support thereof set forth that an action in replevin had been commenced in the superior court of Humboldt county, wherein Jesse J. Lampely was plaintiff and petitioner herein was defendant. Upon the same day George Lampely also filed an action in replevin against petitioner, which actions were, by order of the court, consolidated for trial, duly tried, and a judgment rendered in favor of respective plaintiffs and against defendant, the petitioner herein.

In due time appellant therein filed a notice of motion for a new trial, and thereafter the matter was heard and an order entered denying the motion for a new trial. Thereupon appellant, pursuant to the provisions of section 953a of the Code of Civil Procedure, gave notice of appeal to the District Court of Appeal from the order and judgment denying the motion for a new trial, and at the same time filed a request for a transcript to be prepared in accordance with said section.

It is then alleged in the petition for writ of mandate that petitioner personally called upon the court reporter and requested that the amount be fixed as the cost of transcribing such testimony, petitioner alleging it was ready, willing, and able to pay for such transcribing, and so informed the said stenographic reporter. The reporter, so it is alleged, refused to fix the amount of such compensation, stating that she was in failing health and memory and unable to transcribe such testimony, and for that reason refused to name the amount thereof. It is also alleged that demand was made upon the clerk to fix the amount of the undertaking as provided by section 953b of the Code of Civil Procedure, but the clerk also refused to fix the amount thereof. The petitioner also alleges a request was made of the court at the time of the argument on the motion for a new trial that a new trial be granted if the transcript could not be furnished, but the court refused to grant a new trial or order such transcript to be prepared.

In response to the petition for a writ of mandate, this court issued an alternative writ, returnable on a day certain. To this petition respondent answered, particularly denying on information and belief that the reporter refused to prepare a transcript, but alleged that the reporter then and there stated to petitioner that she would not prepare the same until petitioner deposited the sum of $500 or gave security for the payment thereof, and that, when payment was made or security given therefor, the transcript would be prepared and filed.

Respondent has also filed and noticed a motion for judgment on the pleadings or to dismiss the petition for the writ. It is to the latter motion we will now direct our attention.

[1] As a ground for dismissal, it is urged, first, that respondent superior court is powerless, as a matter of law, to grant a new trial, said respondent having once passed upon a motion for a new trial, it cannot review that action; and, secondly, that it does not appear from the petition for the writ that it is impossible to have a phonographic report of the trial, nor does it appear that any undertaking to pay the clerk the cost of preparing such transcript had been filed as required by section 953a of the Code of Civil Procedure.

We believe the motion to dismiss must be granted. Respondent herein having passed upon the motion for a new trial, the order then made was conclusive, and that court cannot vacate its order and again pass upon the motion. It is only where a court has prematurely or by inadvertence passed upon a motion for a new trial that the order may be set aside. Whitney v. Superior Court, 147 Cal. 536, 82 P. 37. There was here no attempt to invoke the power conferred on the court by section 473 of the Code of Civil Procedure. The rule is expressed in 20 California Jurisprudence, 204, that "an order granting or refusing a new trial made in due form after the submission of a motion for that purpose and in the regular exercise of the jurisdiction of the court, is reviewable only upon appeal, and the trial court may not vacate or set it aside and again decide the motion. The statute authorizes but one motion for a new trial and the order thereon is final and conclusive so far as the court making it is concerned," which statement is fortified by ample authority there collected.

[2] We believe also the second ground urged by respondent against the granting of the writ is a sufficient answer to the petition; it not being alleged that any undertaking had been filed in lieu of an arrangement made with the reporter for the payment of her compensation.

The petition must be denied and the writ discharged. It is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

DOLNEY v. NATIONAL THRIFT CORPORATION OF AMERICA.

Civ. 8934.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Rehearing Denied Jan. 30, 1935.

1. Appeal and error ⇐1010(1)
Appellate court could not interfere with findings supported by substantial proof.

2. Contracts ⇐346(1)
Where both parties to contract alleged its cancellation and mutual abandonment and substitution of new contract on which both parties relied, first contract became immaterial as respected issues in pleading and was relevant only in incidental evidentiary capacity.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by John Dolney against the National Thrift Corporation of America. Judgment for plaintiff, and defendant appeals.

Affirmed.

Halverson & Halverson (by George Halverson), of Los Angeles, for appellant.

Bernard Potter, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Appellant, defendant below, has appealed from a judgment for money and claims errors of the trial court in failing to find on all material issues and in denying a motion for new trial and contends that the findings are not supported by the evidence. We have examined the record and the evidence brought here by reporter's transcript and note therefrom that there is complete unity of pleadings, proofs, and findings in respect to the following facts:

In 1930, upon representations made to him by the selling agents of appellant, respondent purchased from appellant, under a subscription agreement, two thrift certificates aggregating a matured valuation of $55,000 and paid thereon the initial payments required. Shortly thereafter, respondent received from appellant the sum of $100 as refund on the above payments. About March 30, 1931, respondent, being dissatisfied with the transaction and claiming misrepresentations on the part of the sales agents, demanded of appellant a cancellation of the sale and return of his money. Thereupon, appellant agreed to such cancellation and a new agreement was made between appellant and respondent, and pursuant thereto, respondent surrendered and delivered to appellant the two certificates on March 30, 1931, and on April 6, 1931, received on account of said new agreement the sum of $721.50. It is for the difference between this amount and the amount which respondent alleges the appellant promised to repay and alleged to be the sum of $2,028.50, that respondent brought suit, his cause of action being based on the new agreement.

[1] The only material issue in dispute, as reflected by the pleadings and the proofs, consists in the terms and conditions of the new agreement; respondent alleging and contending that appellant agreed to repay the sum of $2,750 in consideration of his surrendering the two certificates, while appellant alleges and contends that, through its selling agent, it agreed to repay to respondent in cash the sum of $721.50 of the money he had paid on the two certificates, to wit, the sum of $2,821.50 less the sum of $100 previously repaid, and to deliver to respondent four $500 gold bonds to cover the balance of $2,000, in consideration of the surrender of the two certificates by respondent. On the issue thus joined there was a sharp conflict in the evidence presented by the opposing parties. There was substantial proof to support respondent's version of the new agreement and the findings of the court sustaining the same, and under the established rule governing in such a case on appeal, the appellate court cannot interfere with or change the findings of the trial court.

[2] This state of the pleadings and proofs render immaterial the apparent issues of misrepresentations in respect to the first agreement of sale, ratification of such agreement, estoppel by reason of the clause in such agreement absolving appellant from the effect of misrepresentation of its selling agents, and waiver of fraud in the first agreement, together with the points and argument predicated thereon on this appeal. And while all these issues were disposed of by the findings, any defect therein, or any lack of evidentiary support thereof, is entirely immaterial to a decision of the case on the material issues framed by the pleadings. For it is patent that where both parties allege a cancellation and mutual abandonment of a previous contract and the substitution of a new and different one therefor, on which both the plaintiff and defendant rely in their

respective pleadings, and differ only as to the terms and conditions thereof, the first contract becomes entirely immaterial in so far as issues in pleading are concerned, and can be relevant only in an incidental evidentiary capacity in connection with the question of negotiation of and consideration for the new and substituted agreement.

The findings are supported by substantial evidence, the conclusion and judgment are supported by the findings, and the trial court committed no error in denying the motion for a new trial.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 148

KITTLE MFG. CO. v. SPEER.

Civ. 8898.

District Court of Appeal, Second District, Division 2, California.

Dec. 18, 1934.

Hearing Denied by Supreme Court Feb. 14, 1935.

1. Judgment ⊜585(4)

Term "transaction," within statute barring subsequent action where defendant omits to set up counterclaim upon cause arising out of transaction set forth in complaint as foundation of plaintiff's claim, embraces, not only commercial negotiation or contract, but also whatever may be done by one person which affects another's rights and out of which cause of action may arise (Code Civ. Proc. § 439).

[Ed. Note.—For other definitions of "Transaction," see Words & Phrases.]

2. Judgment ⊜585(4)

Cause of action to recover advancements on commissions payable under contract was barred by failure to plead it as counterclaim in defendant's prior action to reform contract and to recover commissions earned thereunder (Code Civ. Proc. §§ 438, 439).

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by the Kittle Manufacturing Company against Charles P. Speer. From a judgment for defendant, plaintiff appeals.

Affirmed.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for appellant.

J. E. Ricketts, of Covina, for respondent.

CRAIL, Justice.

[1] The sole contention of appellant is that the trial court erred in applying the provisions of section 439 of the Code of Civil Procedure as a bar to his recovery. Said section reads as follows: "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor." The term "transaction" employed in this section embraces, not only a commercial negotiation or contract, but also whatever may be done by one person which affects another's rights and out of which a cause of action may arise. Colla v. U-Drive Autos, Inc., 111 Cal. App. (Supp.) 784, 294 P. 378.

Appellant was the plaintiff in the trial court, and commenced this action against respondent to recover, among other items, the sum of $3,270.19 (as more fully set out in a bill of particulars) paid by appellant to respondent over a period of several months by way of advancements for commissions on sales of certain orchard heaters by virtue of a written contract between the parties. The defendant pleaded the provisions of said section as a bar to appellant's recovery alleging that appellant had failed to set up said items as a counterclaim in a prior action brought by respondent against appellant for commissions under the same contract.

The trial court found and decided that appellant had paid respondent as advancements upon commissions the said sum of $3,270.19, but that in a prior action respondent had sued appellant to reform the said contract and to recover a balance alleged to be due for commissions and for an accounting and for sums to be found due; that said cause was tried and judgment was entered for the reformation of the contract and for the sum of $6,934.80 as the balance due for commissions; that the claim for the items comprising the $3,270.19 in the pending action arose out of the transactions set forth in the complaint in the prior action, and was not pleaded nor proved, nor offered to be proved, although existing at that time, and was now barred by the provisions of said section.

[2] The complaint in the prior action contained three counts. The first was for a ref-

ormation of the contract by the insertion of the words "sole and exclusive" before the words "sales representative." In the second, the respondent set forth as the foundation of his claim the transaction or transactions wherein he had made sales of heaters under the said contract, as written or as reformed if reformation was had, and whereby he had earned commissions amounting to $6,934.80. The third count was for an accounting in respect to other sales. In that prior action judgment was entered in favor of respondent decreeing reformation of the contract and for the said sum of $6,934.80.

In the prior action, plaintiff's sole cause of action was not for a reformation of the contract, but included an action for commissions earned thereunder.

Out of the above transactions, to wit, the execution of the contract and the sales thereunder by respondent and the accrual of commissions thereon, there also arose a cause of action against respondent and in favor of appellant by way of counterclaim for such advances, if any, as had been made by appellant to respondent on commissions earned or to be earned by him for such sales, which tended to diminish or defeat respondent's recovery. This is such a counterclaim as is described in section 439, and also in section 438 as it existed at the commencement of the action, a failure to plead which results in a bar to a subsequent action thereon.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



3 Cal.App.2d 221

GOLDHAHN v. DREW et al.

Civ. 9038.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1934.

1. Appeal and error ⊂=930(1)

Reviewing court must accept as true all evidence tending to support verdict, and must consider it in aspect most favorable to prevailing party.

2. Automobiles ⊂=246(50)

In action by pedestrian struck by truck, instruction on effect of truck driver's failure to keep to right of center of intersection in making left turn *held* warranted by evidence.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Gertrude Marion Goldhahn, a minor, by Karl E. Goldhahn, her guardian ad litem, against Harold P. Drew and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Kidd, Schell & Delamer, of Los Angeles, for appellants.

Burke, Hickson, Burke & Marshall, of Los Angeles, for respondent.

CRAIL, Justice.

[1] The plaintiff, a 10 year old girl, by her guardian ad litem, sued the defendants, appellants herein, for damages for personal injuries arising out of an automobile accident wherein appellants' trailer, which was drawn by appellants' truck, struck the plaintiff at a time when she was a pedestrian upon a public highway. The truck driver approached an intersection at which there were several children standing on the curb of the corner to his left waiting to cross the street to the rear of another truck and trailer which stopped at the corner. The second truck and trailer proceeded to make a right turn, thus obstructing the view of appellants' truck driver. Appellants' driver, without diminishing his speed or sounding his horn or applying his brakes, made a left turn from the right and rear of the children, and at the same instant the plaintiff attempted to walk quickly across the street, but stopped while appellants' truck was passing, and while so standing still was struck by the rear of appellants' trailer which came around the corner on an angle. The jury returned a verdict in favor of the plaintiff, and it is the duty of this court to accept as true all evidence tending to support the verdict and to consider it in the most favorable aspect toward the prevailing party. 2 Cal. Jur. 879.

The appellants' first contention is that there was no substantial evidence of appellants' negligence; and, second, that there was no evidence that the negligence, if any, was the proximate cause of the injuries. We have reviewed the testimony and believe that there

is such evidence. Appellants' next contention is that the evidence affirmatively shows contributory negligence on the part of the respondent. But we are not prepared to say in the light of the evidence in this case that as a matter of law the 10 year old child was guilty of contributory negligence.

[2] The final contention of appellants is that the court erred in giving an instruction which was to the effect that, if the driver of appellants' truck as he made the left turn did not travel in the traffic lane to the right of and next to the center of the roadway, and if he failed to pass to the right of the center of the intersection, he was guilty of negligence. Appellants assert in this regard that the evidence of all the witnesses shows that the appellants' driver did keep close to the center of the street and did pass beyond the center of the intersection in making his turn. But here again one of the witnesses testified contrary to appellants' contention. There is also a diagram or map which attempts to give a visual exposition of the testimony of certain witnesses by marks indicating where the truck and trailer went. Some of these marks are clearly on the left-hand side of the center. This evidence warranted the giving of the instruction.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.

BANK OF AMERICA v. CITY OF GLENDALE. *

Civ. 8250.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1934.

Hearing Granted by Supreme Court Feb. 18, 1935.

1. Eminent domain ⇐153

Where deed to property purchased subject to pending condemnation proceedings is silent as to award money, such money belongs to and is payable to purchaser.

2. Evidence ⇐390(1)

Parol evidence is inadmissible to contradict terms of deed conveying property subject to condemnation proceedings, which conveys entire property and is silent as to award.

3. Appeal and error ⇐714(5)

Where judgment is rendered after demurrer sustained, appellate court is confined to allegations in complaint, and an admission in briefs cannot support a fact not alleged.

4. Courts ⇐90(1)

Denial of hearing by Supreme Court of decision of District Court of Appeal is an express approval of conclusion reached, although not an approval of reasons assigned therefor.

5. Trial ⇐165

On motion for nonsuit all inferences from evidence favorable to plaintiff must be indulged.

6. Eminent domain ⇐153

Bank's deed to land, not reserving right to award for portion of land in condemnation proceedings, assignment of which was made to bank upon entry of interlocutory decree but before payment was made, did not convey right to award, since such right became personal at time of interlocutory decree and was not dependent on city's taking possession of property on final judgment in condemnation proceedings subsequent to execution of deed (St. 1903, p. 376, as amended; p. 379, § 14, as amended; Code Civ. Proc. § 1255a).

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by the Bank of America against the City of Glendale. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 33 P.(2d) 1051.

Bernard Brennan, Aubrey N. Irwin, and A. L. Lawson, all of Glendale, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

A proceeding was commenced by defendant city under the Street Opening Act of 1903 (Stats. 1903, p. 376, as amended) to condemn for street purposes ten feet on the front of certain lots owned by one Khodigian. November 1, 1926, an interlocutory judgment was entered in favor of Khodigian for the sum of $2,937.20. December 14, 1926, the latter deeded said lots to one Brown, who was an officer of and acting in behalf of the bank to whose rights plaintiff herein succeeded.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 50 P.2d 1035.

At the same time and by a separate instrument Khodigian assigned to Brown his interest in and to said award. Such assignment was not recorded. On December 31, 1926, Brown deeded the property to one Eversole, and by mesne conveyances the title thereto was finally vested on one Jewett, May 26, 1927. On February 28, 1927, Brown executed an assignment of said award to plaintiff's predecessor. All of such deeds of conveyance included the portion sought to be condemned for street purposes without exception, reservation, or agreement concerning the portion to be condemned or the disposition of any compensation therefor, but did contain the usual provisions making such conveyances subject to conditions, reservations, rights, and rights of way of record. In due time an assessment was levied by the city against the portions of the lots not subject to condemnation, amounting to $3,202.03. Said Jewett, who owned the property at that time and "had no notice or knowledge" of the assignment of the award "nor of any agreement that he should not be entitled to the award except such as might be implied by law," obtained from Khodigian a "satisfaction of judgment in duplicate for the aforementioned award, together with a written demand to offset said assessment by the amount" thereof. The city's street superintendent complied with such demand and Jewett paid the difference in cash, whereupon the superintendent filed a duplicate satisfaction of judgment and demand with the clerk of the superior court. Said superintendent had no knowledge of said assignment prior to the time the assessment was paid and satisfied, nor any notice thereof except "such as might be implied by law." April 18, 1928, final judgment was made and entered in said proceeding confirming in all respects the interlocutory judgment as to said lots and condemning said frontage for street purposes. Defendant city did not enter into possession of the property until after said final judgment. A claim was filed by plaintiff's predecessor with said city for the amount of the award, which was denied.

The facts above recited were stipulated, and judgment was entered in favor of plaintiff for the amount of the award, with interest from the date it was offset and paid as aforesaid. From such judgment defendant has appealed.

Appellant's contention is, in effect, that the interlocutory judgment merely fixed the price at which the city could take the property and that it had the option to take it or not up and until the payment of the award, and that a deed to the property not reserving a right to the award, after such interlocutory decree and prior to such payment, as shown by the evidence here, "passes the property with all rights and burdens appertaining thereto, precisely as if no such judgment had been rendered, save that the grantee takes as the grantor, held subject to the right of the public to acquire the same upon payment of the amount of the judgment" (Price v. Engelking, 58 Ill. App. 547, 551); that under such circumstances "the right to damages passes, as an incident to the land, to the succeeding owner" holding title at the date of taking (Obst v. Covell, 93 Minn. 30, 100 N. W. 650); and that "the right to the damages only became complete when the right of the public became complete", which was long after respondent's predecessor had parted with the title to the land. Hull v. Phillips, 128 Mo. App. 247, 107 S. W. 21. On the other hand, respondent urges that the right to the award accrued and became personal to Khodigian at the time the interlocutory decree was entered, and passed to respondent's assignee Brown, by the separate assignment and separate and apart from the conveyance of Khodigian's interest in the land.

Regardless of what the law may be elsewhere or may heretofore have been supposed to be in California, we are compelled to say that we think it is now as respondent contends, in view of the recent decision of Tom v. Eddy, 137 Cal. App. 577, 31 P.(2d) 443. The history of such decision is not only interesting but, as we read it, it seems to shatter appellant's contentions. The trial court therein granted a motion for nonsuit at the close of plaintiff's evidence and the judgment thereupon entered was reversed by the District Court of Appeal. 29 P.(2d) 803. Such court, however, thereafter vacated such decision and on authority of Security Co. v. Rice, 215 Cal. 263, 9 P.(2d) 817, 818, 82 A. L. R. 1059, and McDaniels v. Dickey, 219 Cal. 89, 25 P.(2d) 404, reversed itself.

[1, 2] The case of Security Co. v. Rice, supra, as we read it, holds "that, where property is purchased which is subject to pending condemnation proceedings and the deed conveying said property is silent as to the award money to be paid in the proceedings, said money belongs to and is payable to the purchaser"; and also that parol evidence cannot be introduced to contradict the terms of a deed conveying property subject to condemnation proceedings which conveys the entire property and is silent as to the award. It is to be noted, too, that such decision cites with apparent approval the cases cited and

quoted from in stating appellant's contentions herein, and quotes from the case of Price v. Engelking, supra, which squarely supports such contentions, the following very pertinent language: "When, therefore, appellants, after judgment, conveyed these premises to Henry Engelking, they conveyed all the rights which they had growing out of the ownership of this property. If nothing further was done by the city, Henry Engelking would have remained the owner they made him. As thereafter the city paid into court the amount of the judgment, the administratrix of Henry Engelking is entitled to such money. It was paid for his land, his title, his possession, not that of appellants."

[3] In the case of McDaniels v. Dickey, supra, the appeal was from a judgment entered after demurrers sustained without leave to amend. The complaint was silent as to the act under which the proceedings were instituted, and seems to have been fatally defective in failing to establish a right in plaintiff to the award. Respondent herein urges that the proceeding was instituted under the act of 1903, and points to admissions in the briefs on appeal. The complaint, however, did not so state, and we understand the rule to be that where a judgment is rendered after a demurrer sustained, the appellate court is confined to the allegations of the complaint in the consideration of the case (Biggart v. Lewis, 183 Cal. 660, 192 P. 437), and that an admission in the briefs on appeal cannot support a fact not alleged. Stone v. Imperial Water Co., 173 Cal. 39, 43, 159 P. 164. Nor did the Supreme Court act on such admission. It apparently did take judicial notice of the general codes on eminent domain, and said that under such codes the right to compensation would have accrued to respondents prior to their sale of the property "regardless of whether the accrual actually occurred at the entry of the interlocutory decree or upon the expiration of thirty days therefrom, during which period under section 1255a of the Code of Civil Procedure the condemnor would have the right to abandon the proceedings," which seems to have left open the question raised here.

[4-6] A petition for rehearing of the decision in Tom v. Eddy, supra, was denied by the District Court of Appeal and an application for a hearing thereof in the Supreme Court was denied by such court on May 28, 1934. While a denial of a hearing by the Supreme Court of a decision by a District Court of Appeal is not to be taken as an approval of the reasons assigned for the decision, it certainly is an express approval of the conclusion reached. In the cited case such conclusion was an affirmance of the judgment of nonsuit on the ground that under the evidence plaintiff was not the owner of the land at the time the compensation accrued. The plaintiff's evidence there showed that he obtained title to the property after the entry of the interlocutory decree in a condemnation proceeding under the Street Opening Act of 1903, fixing the award for damages to the property conveyed to him, without any reservation of said damages in the deed or otherwise, and showed that he was the owner of the land sought to be condemned at the time the award was paid to defendant. The right to abandon the proceedings, therefore, existed until such payment was made (section 14, Stats. 1903, pp. 376, 379, as amended); and giving effect to the rule that on a motion for nonsuit all inferences favorable to plaintiff that can be drawn from the evidence must be indulged, it would be inferred that the land was not taken until after such payment. That being the case, and appellant there being the owner of the land at that time, when the only substantial right to the award accrued, we do not believe the Supreme Court would have denied a hearing if it had seen any merit in the contentions made by appellant here; and we are forced to conclude that such court must have been of the opinion that the right to the award accrued and became personal prior to the vesting of the title to the land in the plaintiff there.

We see no merit in the contention that appellant was given notice of the bank's claim to the award because it had moved to be substituted as defendant in the proceeding in place of Khodigian and served on the city attorney of Glendale with its notice of motion a copy of the assignment under which it claimed. If appellant's contention is correct, the deed from Khodigian conveyed all his rights and there was nothing for the separate assignment to act on; and the Brown deed did likewise. The abandonment of the proceedings to be substituted would therefore seem to nullify any claim of notice. On the other hand, if the right to the award became personal at the date of the interlocutory decree, such right was transferred by Khodigian's assignment and passed to Brown and to the bank, and the city was not justified in paying the award to anyone except the bank or its assignee.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

LIUZZA et al. v. BRINKERHOFF et al.

Civ. 9626.

District Court of Appeal, First District, Division 2, California.

Dec. 20, 1934.

Rehearing Denied Jan. 19, 1935.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Fraudulent conveyances ⇐277(1)

Presumptions of consideration for deed, against fraud, and in favor of fair dealing, are rebuttable.

2. Fraudulent conveyances ⇐299(13)

Presumption of ownership of realty by grantee in deed thereof and undisputed evidence that her subsequent deed, conveying property to her daughter soon after automobile accident resulting in judgment against mother, made latter insolvent and was executed for expressed purpose of rendering property free from execution, warranted court's finding that mother's deed was without consideration and made and accepted for purpose of defrauding her creditors.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit by Auralia Liuzza, a minor, by her guardian ad litem, Jessie Liuzza, and the latter, individually, against Emelie Brinkerhoff, Dorothy A. Bell, and others. From a judgment for plaintiffs, defendant Dorothy A. Bell appeals.

Affirmed.

Morgan V. Spicer and J. W. McCaughey, both of San Francisco, for appellant.

James F. Brennan and Patrick J. Murphy, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs, as judgment creditors of Emelie Brinkerhoff, now deceased, sued to set aside a deed of conveyance from Emelie Brinkerhoff to her daughter, Dorothy Bell. The trial court gave judgment for plaintiffs on the grounds that the deed was without consideration, and given with the intention and for the purpose of defrauding the creditors of the grantor. Defendant Dorothy Bell appeals on typewritten transcripts.

On May 7, 1927, Mr. Liuzza was struck by an automobile driven by Emelie Brinkerhoff and he died of the injuries sustained in this accident. Plaintiffs brought an action against said Emelie Brinkerhoff for damages for the death and had a judgment for $5,000. This judgment is as yet wholly unsatisfied.

At the time of the accident, Emelie Brinkerhoff had two pieces of property in her name which it is claimed was given to her in 1915 by her brother, Harry Burt Cronon, to hold in trust for her daughter Dorothy. The negotiations concerning the trust were all oral and the deed was not recorded until 1924. It was not until a few days after the accident that the mother deeded the property to her daughter and this action left Emelie Brinkerhoff insolvent.

[1] Of the four questions stated by appellant in her brief, consideration need be given to the second only as this is determinative of the controversy. This relates to the finding that the deed was without consideration and in fraud of creditors. Appellant relies on the presumption of consideration from the written instrument and the presumption against fraud and in favor of fair dealing. These presumptions are rebuttable and the sole question then is whether there is substantial evidence supporting the finding. In this connection, the trial court found that the deed to appellant was without any consideration whatever; that it was made for the purpose of defrauding, to hinder and delay her creditors; and that the appellant accepted the deed with knowledge of said fraudulent intention and for the purpose of aiding and assisting the fraud.

[2] The evidence tending to show that the transfer was fraudulent fully supports this finding. The legal title stood in Mrs. Brinkerhoff's name and from this fact the presumption arises that she was the absolute owner. The deed to Mrs. Brinkerhoff was executed in August, 1915. It was not recorded until 1924. Her deed to the appellant was executed in May, 1927, just three days after the accident. It was falsely dated as of February 3, 1927, to make it appear that it had been made before the accident. For twelve years she claimed and exercised full ownership and proprietorship over the property and did not at any time concede, assent to, or recognize the trust relationship. During the lifetime of Mrs. Brinkerhoff the appellant did not assert any claim that the property was held in trust for her. This claim was not pleaded in appellant's answer, but was raised for the first time in the trial of this action. At the time Mrs. Brinkerhoff executed the deed to appellant, and prior thereto, both of them expressed the desire and purpose to have the property conveyed so that it would not be subject to execution on the part of the respondents. The appellant knew all the cir-

cumstances under which the deed was executed and knew that the conveyance would leave her mother insolvent. It is also significant that, though the evidence of the purported trust was that Mrs. Brinkerhoff should hold the property until the appellant reached her majority, and that that event occurred in the year 1921, the appellant made no demand upon her mother to fulfill the trust and that she and her mother both treated Mrs. Brinkerhoff as the sole owner of the property.

The evidence offered by appellant relating to the purported trust was so unsatisfactory and improbable that the trial court could well reject it in full and rest its finding upon the presumption of ownership in Mrs. Brinkerhoff arising from the deed to her, and in the undisputed evidence that her deed to the appellant made her insolvent and that the transaction was made for the expressed purpose of rendering the property free from the claims of respondents.

There is no error in the record.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



3 Cal.App.2d 432

BLUE DIAMOND CO. v. GOLLOS et al.

Civ. 8953.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 27, 1935.

1. Escrows ⇐5

Where stranger's instructions had been rejected by escrow holder, stranger's letter "superseding" former instructions, giving new instructions to be followed, "otherwise" former instructions were to stand, entitled escrow holder to follow latter instructions; "otherwise" meaning "under any other conditions."

[Ed. Note.—For other definitions of "Otherwise," see Words & Phrases.]

2. Appeal and error ⇐1010(1)

Where judgment is supported by findings sustained by the evidence, appellate court will not interfere.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by the Blue Diamond Company against Alexander Richard Gollos, sometimes known as A. R. Gollos and A. Gollos, and the Bank of America National Trust & Savings Association, sued as the Merchants' National Trust & Savings Bank. From a judgment in favor of the Bank, plaintiff appeals.

Affirmed.

O'Melveny, Tuller & Myers, Pierce Works, and W. B. Carman, Jr., all of Los Angeles, for appellant.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Plaintiff, a building materials company, appeals from judgment in favor of respondent bank. An escrow had been started with the bank by defendant Gollos and one Reynolds, from whom the former was purchasing an apartment site. A sum of $47,500 remained unpaid on the purchase price. Gollos went to plaintiff and made certain representations concerning a projected building loan which he hoped to obtain and use for the erection of an apartment building. Plaintiff interested itself in the proposition, apparently with the idea that by extending its credit resources to Gollos it would receive the contract to supply the building materials for the structure and profit thereby.

On October 6, 1926, Gollos executed and delivered to plaintiff three promissory notes totaling $95,000 to be held by the latter as security, and received in turn a letter from plaintiff agreeing to accept $47,500 in full payment of the same. Thereupon plaintiff borrowed $47,500 on a note executed to Lasker Finance Corporation and by it sold to Discount Corporation of America. Later plaintiff was obliged to and did pay this note. The proceeds of the loan by Lasker to plaintiff was delivered in the form of a check payable to the latter.

After 3 o'clock in the afternoon of October 7, 1926, one Windmueller, assistant credit manager of plaintiff, went to defendant bank and left with the stenographer, to be handed to the escrow officer, one Bander, two documents: (1) Check $47,500 Lasker to plaintiff and specially indorsed by latter to the bank; (2) letter of instructions to the bank concerning the Gollos-Reynolds escrow directing it to use the check when they hold for plaintiff various documents, including an assignment of the proceeds of mortgage for $200,000 to be placed on the property, an acceptance of the same by a specified surety company, an

assurance by Lasker Corporation that it would pay the existing incumbrance on the property, a bond guaranteeing faithful performance of the building contract, an indemnity bond and a contract to purchase promptly materials to erect the building on the property, and closing, "Unless you shall have the above for us within ten days from this date, time being strictly the essence hereof, you will hold the within note for our further instructions. Yours very truly, Blue Diamond Company by Black, Hammack & Black." The stenographer accepted the check, and declined the letter of instructions on the ground that plaintiff was not a party to the escrow. Both documents were left at the bank, however, with that limitation, since the escrow officer was not personally present. The next morning the escrow officer phoned Windmueller and Gollos, informing them that the bank did not consider plaintiff a party to the escrow and that Gollos would have to place the amount above indicated in escrow that day, October 8, 1926, or the escrow would be concluded and Gollos would lose the property.

Thereupon Windmueller wrote a letter to the bank and had it delivered. It was as follows: "Superseding our escrow instructions handed to you October 7th relative to the use of our check in the sum of $47,500 you are hereby authorized to use this check for the sole purpose of paying off the balance due on the property covered by this escrow and only when you can show this property in the name of Alexander R. Gollos free and clear of all encumbrances. Otherwise, our escrow instructions are to be followed in every detail. Blue Diamond Company, by Arthur E. Windmueller, Assistant Credit Manager." The same day Lasker delivered a cashier's check for $47,500 to the bank and received from it the check drawn by Lasker to plaintiff, and indorsed by the latter to the bank, and Lasker canceled the same.

The escrow was closed. The money was paid to Reynolds. Gollos got title to the property and continued his relations with plaintiff until prior to the time he was adjudicated bankrupt in February, 1929.

On December 21, 1926, plaintiff filed this action against the bank to recover the amount of the check in question. The complaint and summons were served on the bank January 30, 1928. There is no assertion by the bank that it complied with any of the requirements of the above-quoted letter, signed by Black, Hammack & Black.

Plaintiff contends that the delivery of the check by Lasker to plaintiff in exchange for the cashier's check was unauthorized and improper. It is obvious, however, that the act of the bank in accepting such a cashier's check was in effect the same as cashing the first check. There is no rule which would preclude the bank from presenting the check to its maker and receiving the cash or its equivalent in lieu of the check thus presented, and certainly no detriment could be shown by such a substitution.

[1] The evidence amply supports the finding of the trial court that Windmueller was the duly authorized agent and representative of plaintiff in handling the transaction with the bank, the further finding that the second letter above quoted superseded the earlier letter which had not been accepted by the bank, and that the bank applied the proceeds of the check in conformity with the conditions contained in the second letter. Plaintiff suggests that the last sentence in the second letter: "Otherwise, our escrow instructions are to be followed in every detail," should be construed as embodying in the second letter all the provisions of the first. Since the earlier letter had been expressly rejected by the bank, and since the second letter used the word "superseding" rather than "supplementing," the court properly concluded that the terms of the first letter did not bind the bank and the second letter superseded it in all respects. "Otherwise" may be used with propriety in the sense "under any other conditions," and such a use appears reasonable here.

Our attention is directed to a further finding relating to the dealings between plaintiff and Gollos during the thirteen months' time intervening between the filing of this suit and the service of the complaint. It appears unnecessary to discuss its legal implications, but the facts confirm the correctness of the trial court's conclusions on the other matters as above outlined. When the suit was filed, plaintiffs attached the property which had been in escrow, and which then stood in the name of Gollos free and clear of incumbrance.

Plaintiff agreed to release the attachment so that Gollos could put a first trust deed for $200,000 on the property to secure money to erect a building. Gollos agreed that he owed plaintiff $47,500, plus interest and attorneys' fees, and gave the latter an attachment bond signed by Gollos but without sureties. Then Gollos executed two notes for $60,000 each, one payable to plaintiff and the other to another party, executed a second trust deed for $120,000 to secure the said notes and deposited it together with note to plaintiff for $60,000 with plaintiff to secure the attachment

bond. It was agreed that plaintiff was to furnish $25,000 worth of building materials to be paid for out of the proceeds of the first trust deed loan.

When the attachment had been levied, plaintiff was fully secured by virtue of the fact that Gollos had clear title to the attached property, which was the identical property that had been obtained through the escrow. Plaintiff at the time of the escrow had placed the money in the hands of the bank, with directions to secure clear title for Gollos. The latter got clear title to the property, and plaintiff filed suit attaching it while the title was still in that condition. Being thus secured, the plaintiff thereafter relinquished his superior rights thus acquired, and accepted a subordinate security, with the expectation of making a profit from the sale of building materials. The realization of this hope unfortunately fell far short of plaintiff's expectations.

[2] Since the findings support the judgment and are themselves supported by the evidence, it is not within the province of an appellate court to substitute another determination for that of the trial court.

Judgment affirmed.

I concur: CRAIL, J.

This opinion was prepared by Hon. Robert H. SCOTT, Justice pro tempore.

CITY OF LOS ANGELES v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 14867.

Supreme Court of California.

Dec. 26, 1934.

Rehearing Denied Jan. 24, 1935.

1. Statutes ⇐194

"Ejusdem generis" rule is not mandatory, and usually is applied where enumeration of several classes of persons or things is followed by provision for other persons or things.

[Ed. Note.—For other definitions of "Ejusdem Generis," see Words & Phrases.]

2. Eminent domain ⇐149

Statute providing that, where property sought to be taken is incumbered by a "mortgage or other lien," and indebtedness thereby secured is not due at time of entry of judgment, amount of such indebtedness may, at plaintiff's option, be deducted from the judgment and the lien of the mortgage or other lien continued until payment of the indebtedness, *held* not to prevent city, under ejusdem generis rule, from deducting in condemnation proceeding by it amount of street improvement liens against property involved (Code Civ. Proc. § 1248, subd. 8).

[Ed. Note.—For other definitions of "Mortgage" and "Other Lien," see Words & Phrases.]

In Bank.

Petition by City of Los Angeles for a writ of mandate to be directed to the Superior Court of the State of California in and for the County of Los Angeles, to compel the entry of a judgment.

Peremptory writ of mandate directed to issue.

For prior opinion, see 32 P.(2d) 999.

Ray L. Chesebro, City Atty., Frederick von Schroeder, Asst. City Atty., and Walter L. Bruington, Deputy City Atty., all of Los Angeles, for petitioner.

J. Wiseman Macdonald, of Los Angeles, for respondent.

LANGDON, Justice.

This is a petition for a writ of mandate. Plaintiff city of Los Angeles commenced proceedings in condemnation of land owned by Frances A. Wright by filing its complaint March 16, 1926. Subsequently, on March 20, 1928, the court found the value of the property as of June 21, 1927, in the sum of $18,153, and entered its interlocutory judgment. On March 8, 1928, prior to the entry of the judgment, assessments for certain street improvements became liens on the property. They were not due at that time, and the city withheld from the amount fixed by the judgment the sum necessary to pay them, and tendered the balance to the owner of the property. She refused to execute a full satisfaction of judgment, and the lower court denied plaintiff's motion for entry of final judgment on such terms. Plaintiff then made this application for a writ of mandate to compel the entry of the judgment.

Petitioner's right is established by section 1248, subd. 8, of the Code of Civil Procedure, which provides: "When the property sought to be taken is encumbered by a mortgage or other lien, and the indebtedness secured thereby is not due at the time of the entry of the judgment, the amount of such indebtedness may be, at the option of the plaintiff, deducted from the judgment, and the lien of the mortgage or other lien shall be continued until such indebtedness is paid." The statutory declaration seems entirely clear. The defendant property owner, however, urges that the ejusdem generis rule should apply, and that the words "mortgage or other lien" should be construed as "mortgage or similar lien," or "mortgage and lien of like nature." So construed, it is contended, the statute will be restricted in its application to liens created by the property owner, and will not include a street assessment lien created by law.

[1, 2] The rule of construction relied upon is of course not positive or mandatory, but is simply an aid to the ascertainment of the legislative intention. Usually it finds its application in a case where several classes of persons or things are enumerated, and then the provision for "other" things or persons follows; and not where, as here, but one class is first enumerated. See State v. Broderick, 7 Mo. App. 19, 21. Nor is there any logical reason to be found for the restrictive interpretation urged by defendant. The purpose of the statute is obviously to prevent a situation wherein the condemnor will pay the full value of the land, and thereafter will be forced to pay again to holders of liens on the land, when the liens become due. Bearing this purpose in mind, it certainly makes no difference whether the lien was created by the owner, as in the case of a mortgage, or arose in other ways.

The case of Marin, etc., Water District v. North Coast Water Company, 40 Cal. App. 260, 180 P. 620, 621, fully supports the conclusion we have reached. In that case a condemnation suit was brought, and prior to judgment taxes were assessed and became a lien on the property. The plaintiff, however, paid the full amount determined by the court as the value of the property, and went into possession. Subsequently the property was sold for delinquent taxes. Plaintiff redeemed it, and brought an action to recover the amount paid. The court held that it could not sue for reimbursement, because its only right was to deduct the amount before paying the judgment to the property owner. Speaking of section 1248 of the Code of Civil Procedure, the court said: "It gives to the person taking property by proceedings in eminent domain the right to retain from the sum of money to be paid for it the amount necessary to discharge any lien existing thereon, but his neglect to adopt this course would not give rise, in the absence of some other provision of law creating it, to a right of action to recover it when once paid. The right given by this section seems to be one the extent of which is measured by the mode prescribed for its exercise." The foregoing discussion and holding is necessarily based upon the preliminary conclusion that the statute does cover tax liens.

Let a peremptory writ of mandate issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

In re SCHNURR'S ESTATE.
L. A. 13960.

Supreme Court of California.
July 5, 1934.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

On rehearing.

Prior opinion 32 P.(2d) 970.

Manley C. Davidson, of Los Angeles, and John H. McDaniels, Myrick & Deering and Scott, and Francis V. Keesling, all of San Francisco, for appellants.

Lawrence L. Larrabee, of Los Angeles, for respondent.

PER CURIAM.

Upon the foregoing stipulation, it is ordered (1) that the judgment of the superior court of Los Angeles county, sustaining the contest to the allowance of the claim of the appellants and claimants herein against the estate of William Schnurr, deceased, be reversed, with directions to the trial court to dismiss the contest of the contestant and respondent and to make its order for the payment of the claim of the claimants and appellants in the due course of administration of said estate in the sum of $8,172.09, together with interest at the rate of 7 per cent. on said sum from the 24th day of November, 1930, the date of the approval of said claim by the trial court, until said claim is paid; (2) that claimants and appellants be awarded costs of their appeal herein; (3) that the remittitur be issued forthwith.

KERN COUNTY LAND COMPANY, a Corporation, Petitioner, v. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al., Respondents.

KERN ISLAND CANAL COMPANY, a Corporation, Petitioner, v. RAILROAD COMMISSION OF THE STATE OF CALIFORNIA et al., Respondents.
S. F. 15130, 15131.

Supreme Court of California.
Dec. 28, 1934.

In Bank.

Application for writ of certiorari to review an order of the Railroad Commission requiring a canal company to discontinue service to certain lands. Writ granted.

On Rehearing.

For former opinion, see 38 P.(2d) 401.

McCutchen, Olney, Mannon & Greene, of San Francisco, for petitioners.

Ira H. Rowell, Roderick B. Cassidy, Frank B. Austin, and Arthur T. George, all of San Francisco, for respondents.

Athearn, Chandler & Farmer, of San Francisco, and Arthur M. Free, of San Jose (Edward G. Chandler and Milton T. Farmer, both of San Francisco, of counsel), amici curiæ.

PER CURIAM.

In view of the petitions for modification of the order appended to the foregoing opinion, it is appropriate to state that it was not intended that the commission might not make a general finding as to what water, if any, is available to the consumers in the Panhandle area which is not required by the consumers in the old area and the use of which would not prejudice the rights of the consumers in that area. Furthermore, it was intended that the commission should retain a continuing jurisdiction over the matter and in connection therewith it would undoubtedly have the power to formulate and enforce such rules and regulations governing water service as might be necessary for the protection of consumers of the Canal Company and to permit the sale and delivery of water by it to consumers in the Panhandle area when the same may be done without prejudice to the rights of consumers in the old area for present and prospective domestic and irrigation uses.

The petitions for modification and for rehearing are denied.

2 Cal.2d 75

MARSH v. STATE BAR OF CALIFORNIA.

L. A. 14832.

Supreme Court of California.

Dec. 18, 1934.

1. Attorney and client ⇐58

Attorney at law *held* suspended from practice for three years where guilty of dilatory tactics in handling of cases, particularly in view of many complaints lodged against him over period of years (Code Civ. Proc. § 287, subds. 2, 5).

2. Attorney and client ⇐58

Discipline of attorney by suspension from practice is not "punishment," and is not punitive in character, but is for protection of courts and legal profession.

[Ed. Note.—For other definitions of "Punishment," see Words & Phrases.]

3. Attorney and client ⇐49

Disbarment proceedings are peculiar to themselves and governed exclusively by statutes specifically covering them, purpose of such proceedings being to determine fitness of officer of court to continue in that capacity.

4. Attorney and client ⇐58

Although in disciplinary proceeding against attorney penalty for repeated offense may be much greater than would have been imposed were it first offense, such increased penalty is not meting out of further punishment for prior acts, but is adjudication of attorney's fitness to continue in practice.

5. Attorney and client ⇐58

Mitigating circumstances may be considered in determining punishment to be imposed in disciplinary proceedings against attorney, such as motives and purposes actuating accused, previous good record, characteristics and nature, testimonials as to good character and reputation, or attorney's youth and inexperience and fact that he was not guilty of intentional wrongdoing.

6. Attorney and client ⇐58

Incriminating circumstances, such as previous poor record of accused, his years of practice, knowledge of wrongdoing, or repeated misconduct, may be considered in disciplinary proceeding against attorney in determining whether or not more severe penalty should be imposed.

In Bank.

Action by Llewellyn F. Marsh against the State Bar of California to review an order of the Board of Governors of the State Bar of California adopting findings of the local administrative committee and recommending the suspension of petitioner from the practice of law for a period of three years.

Petitioner suspended for three years.

Llewellyn F. Marsh, of Los Angeles, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PRESTON, Justice.

This proceeding was instituted to review an order of the board of governors of the State Bar of California, adopting findings of the local administrative committee, and recommending to this court the suspension of petitioner from the practice of the law for a period of three years.

[1] Petitioner was admitted to practice in this state in May, 1917, and is now about 38 years old. From time to time his dilatory tactics have antagonized clients to such an extent that they have lodged complaints against him, but few of which, however, have proceeded to formal hearing.

About February 1, 1933, petitioner received at Los Angeles a letter from Mr. Chas. J. Soderbery, a resident of Coronado, asking him to accept employment to secure an annulment of the marriage of Mr. Soderbery's minor son. An early termination of the marriage was desired because the obtainment of a school teaching position by the wife depended upon her resuming her maiden name. On February 4th petitioner replied accepting the employment, naming a fee of $75 and $12 costs, 50 per cent. thereof payable in advance, and stating that the "matter if started immediately could ordinarily be completed within approximately two weeks time."

On February 7, 1933, Mr. Soderbery sent petitioner a check for $50 on account and gave him all necessary information to enable him to proceed with the annulment. However, during ensuing months, despite continuous demands, petitioner neglected and refused to perform his duties under said employment or to advise Mr. Soderbery as to the status of the matter, except that once, during the month of March, he called at Mr. Soderbery's office and misrepresented to him that he would at once prepare papers for taking the son's deposition and that the reason the action had not then been begun was that the "bank holiday had closed the courts." About May 17, 1933, Mr. Soderbery discharged petitioner, asked for a return of his money, and employed new counsel, who procured the annulment. Petitioner then neglected to return the $50. Repeated efforts to reach him were unavailing. Finally, on December 9, 1933, after this proceeding had been instituted and set for hearing, petitioner visited Mr. Soderbery at Coronado, apologized to him, and refunded said sum.

Petitioner's attitude throughout this hearing was highly apologetic. He said that when he noted the marriage in question had taken place in Arizona, "legal complications" came to his thought and he did not know how to proceed; that he had been very busy with other matters and ill a portion of the time. At the conclusion of the hearing Mr. Soderbery said that he was satisfied with petitioner's apology and the return of his money and that he did not wish to see petitioner punished as he felt he had learned his lesson.

From these facts the local administrative committee concluded that petitioner was guilty of acts involving moral turpitude, dishonesty, and corruption (subdivision 5, § 287, Code Civ. Proc.), and of violation of his oath and duties as an attorney (subdivision 2, § 287, Code Civ. Proc.). It further found that on September 24, 1930, in another disciplinary proceeding where the facts were similar to those here shown, this court ordered petitioner's suspension from practice for one year (Marsh v. State Bar, 210 Cal. 303, 291 P. 583), and that petitioner there presented the same defense of "negligence" as pleaded here, which defense is without merit. The committee quoted from said reported case the following remarks of one of the members of the board of governors of the State Bar: "A review of the facts of these three cases under consolidation would indicate that the respondent is at least a careless and 'sloppy' practitioner, and that his negligence borders very closely upon moral turpitude. This type is not safe to represent clients in the practice of the law, particularly implicated, as he seems to be, in constant trouble with his clients over money matters, delays and actual misrepresentation." Marsh v. State Bar, supra, page 306 of 210 Cal., 291 P. 583, 584.

The committee further found that the above comments were as applicable to the present proceeding as to the former "except as to the discipline recommended, which, in view of respondent's former record, should be greater." It therefore recommended petitioner's suspension for a period of three years, as aforesaid.

Petitioner contends that the present record, considered without reference to his prior wrongdoing, falls far short of showing facts sufficient to justify his suspension, and certainly not a three-year period of suspension. He asserts that he has already suffered full punishment for the former wrongdoing and should not now be punished a second time for it, as contemplated by the recommendation made. The State Bar replies that the court must consider its opinion in the earlier proceeding, which characterizes petitioner's misrepresentations to his clients as "outright dishonesty," and therefore the proposed penalty is just.

This situation requires us to declare to what extent and for what purposes prior disciplinary proceedings will be considered by this court, particularly when incorporated in the findings and recommendation as in this record.

[2, 3] It must first be noted that although the word "punishment" is frequently used, the discipline of an attorney is not punitive in character. " 'This court has uniformly treated disbarment proceedings as peculiar to themselves, and governed exclusively by the Code sections specifically covering them.' Matter of Danford, 157 Cal. 425, 108 P. 322. The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual, but for the protection of the courts and the legal profession." In re Vaughan, 189 Cal. 491, 496, 209 P. 353, 355, 24 A. L. R. 858, quoted with approval in Fish v. State Bar, 214 Cal. 215, 222, 4 P.(2d) 937. See, also, 1932 Cal. Jur. Supplement, p. 71 of article on The Practice of Law, § 38.

[4] The penalty being designed not to punish the individual but to protect the public, the courts, and the legal profession, is it not clear that, in order to fulfill such purpose, the prior record of an attorney must be taken into consideration in determining his fitness to continue in practice? If the prior attempt at discipline has been ineffective to cure the evil, as witness the fact that the same offense has been repeated, then such further penalty should be imposed as will tend to either effect the reformation of the offender or else remove him entirely from the practice. Thus, although the penalty for a repeated offense may be much greater than would have been imposed were it a first offense, such increased penalty is not a "meting out" of further punishment for prior acts, as contended by petitioner, but is an adjudication of the attorney's fitness to continue in practice.

[5] It is well established that mitigating circumstances may be considered in determining the punishment to be imposed in disciplinary proceedings, such as the motives and purposes which actuated the accused, his previous good record, his characteristics and nature, testimonials as to his good character and reputation, or his youth and inexperience and the fact that he was not guilty of intentional wrongdoing. Barbee v. State Bar, 213 Cal. 296, 2 P.(2d) 353; Dahl v. State Bar, 213 Cal. 160, 1 P.(2d) 977; Mills v. State Bar, 211 Cal. 579, 296 P. 280, 297 P. 19; In re Petersen, 208 Cal. 42, 280 P. 124; In re Sadicoff, 208 Cal. 555, 282 P. 952; In re McCowan, 177 Cal. 93, 170 P. 1100; 1932 Cal. Jur. Supplement, Article on Practice of Law, p. 102, § 65, and pp. 114, 115, § 78, and many cases cited.

[6] If such mitigating circumstances may be considered in alleviating or lightening the penalty, does it not follow that incriminating circumstances, such as the previous poor record of an accused, his years of practice, knowledge of wrongdoing, repeated misconduct, etc., may likewise be considered in determining whether or not a more severe penalty should be imposed? The fact that an offense is a repetition of offenses for which an accused has previously been disciplined shows that the wrong is not unintentional but is done deliberately with knowledge that such conduct is forbidden and thus it merits a greater penalty.

In the instant case, considering the many complaints lodged against petitioner over a period of years, it would seem that he has continuously neglected to avail himself of the opportunity to mend his ways.

It is therefore ordered that petitioner herein, Llewellyn F. Marsh, be and he is hereby suspended from the practice of law in this state for the period of three years from and after the date of filing of this order.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.



2 Cal.2d 127

LINCOLN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14787.

Supreme Court of California.

Dec. 26, 1934.

Rehearing Denied Jan. 24, 1935.

1. Mortgages ⇐381

At time deed of trust was executed, on February 24, 1933, no right of foreclosure existed in absence of unusual and peculiar circumstances.

2. Mortgages ⇐381

Statute giving beneficiary or trustee of trust deed right to maintain action for foreclosure of trust deed *held* not unconstitutional as applied to trust deed executed prior to enactment of statute, since statute did not enlarge obligation of trustor, but was purely remedial in giving beneficiary and trustee ad-

ditional means of enforcing existing rights (Code Civ. Proc. § 725a, as added by St. 1933, p. 1673, § 7).

3. Constitutional law ⇐169

"Obligation of contract" refers to rights of parties arising under contract and not to any remedy for enforcement of such rights.

[Ed. Note.-For other definitions of "Obligation of Contract," see Words & Phrases.]

4. Constitutional law ⇐169
Contracts ⇐324

Legislation designed to enforce performance of contract executed prior to enactment of legislation does not impair obligation of contract, and is constitutional.

5. Constitutional law ⇐169

Existing remedy for enforcement of obligation of contract cannot be so altered by legislation as to take away or impair any of rights given by contract, nor can specific and exclusive remedy provided by contract be changed by legislation, since specific remedy is part of contract.

6. Mortgages ⇐417

Provision in trust deed authorizing trustee or beneficiary upon default to commence any action or proceeding affecting security of deed of trust or interests of beneficiary *held* sufficiently comprehensive to permit beneficiary or trustee to maintain action for foreclosure of trust deed, as subsequently provided by statute (Code Civ. Proc. § 725a, as added by St. 1933, p. 1673, § 7).

7. Mortgages ⇐580

Provision in trust deed authorizing trustee or beneficiary upon default to commence any action or proceeding affecting security of deed of trust or interests of beneficiary, *held* to authorize imposition on trustor of costs or expenses incidental to foreclosure of deed of trust.

In Bank.

Original proceeding in mandate by E. J. Lincoln against the Superior Court in and for Los Angeles County and Hon. Marshall F. McComb, Judge of Department 7 thereof.

Peremptory writ of mandate issued.

Rehearing denied; SHENK, J., dissenting.

W. O. Shelton and George W. Burch, Jr., both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

WASTE, Chief Justice.

This is an original proceeding in mandate to compel the respondent superior court to entertain and determine an action commenced therein to foreclose a deed of trust. A general demurrer to the petition has been filed.

[1] Petitioner, as beneficiary under a trust deed, instituted an action in the respondent court on May 7, 1934, to foreclose the same. At the time the trust deed was executed, on February 24, 1933, no right of foreclosure existed in the absence of unusual and peculiar circumstances not here present. Bank of Italy Nat. Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940. However, on August 21, 1933 (St. 1933, p. 1673, § 7) prior to the commencement of this suit, section 725a was added to the Code of Civil Procedure. This new section gives to the beneficiary or trustee of a trust deed the right to maintain an action for its foreclosure in the manner and subject to the provisions, rights, and remedies relating to the foreclosure of a mortgage. The respondent court refused to grant petitioner the relief sought even though the defendant trustors had permitted their defaults to be entered in the action. Its refusal to act was based on the conclusion that it was without jurisdiction because of the asserted unconstitutionality of section 725a as applied to trust deeds executed prior to its enactment. To test the propriety of the court's ruling in this particular the present proceeding was instituted.

[2-4] We cannot agree with the respondent court in its conclusion that section 725a, supra, is unconstitutional in so far as it purports to apply to trust deeds antedating its adoption. The right of foreclosure therein provided for is given as an alternative to the exercise of the power of sale under a trust deed. The section is a remedial statute which merely affords a new and additional means of enforcing a right. The cases distinguish between laws which impair the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made. Bernheimer v. Converse, 206 U. S. 516, 530, 27 S. Ct. 755, 51 L. Ed. 1163. The obligation of a contract has reference alone to the rights of the parties arising thereunder and not to any remedy for their enforcement. A remedy afforded by a statute passed subsequent to the execution date of a contract may be invoked by a party to the contract who has been wronged by its nonperformance. In other words, one who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legisla-

tion that is designed only to enforce performance of his obligation. Such legislation does not impair the obligation of the contract and is constitutional. Bernheimer v. Converse, supra; Wilson v. Standefer, 184 U. S. 399, 410, 22 S. Ct. 384, 46 L. Ed. 612; New Orleans C. & L. Ry. Co. v. Louisiana, 157 U. S. 219, 224, 15 S. Ct. 581, 39 L. Ed. 679; Aikins v. Kingsbury, 170 Cal. 674, 678-681, 151 P. 145; Colma Veg. Ass'n v. Bonetti, 91 Cal. App. 103, 112, 267 P. 172; Maguire v. Cunningham, 64 Cal. App. 536, 551-553, 222 P. 838.

That section 725a, supra, is purely remedial does not admit of doubt, as it affords, as stated above, merely a new and additional means of enforcing an existing right. The respective rights of the trustor and beneficiary are neither increased nor diminished by the section. It does not enlarge the obligation assumed by the trustor, but only enables the trustee or beneficiary to compel the performance of that obligation. In other words, the right of the beneficiary to have the property sold in the event of default remains as at the time the contract was executed, while the right of the trustor to have the property reconveyed to him upon satisfying the debt obligation, to secure which the property was conveyed to the trustee, is in no way affected by the section. Without any further condition than that specified in the trust deed, viz. satisfaction of the debt obligation, the trustor has the right to have the property reconveyed to him. In addition, in the event of foreclosure, he acquires an equity of redemption not otherwise available to him.

The case of Schwertner v. Prov. M. Building-Loan Ass'n, 17 Ariz. 93, 148 P. 910, presented a situation wherein at the time of the execution of the trust deed therein involved the law provided, in event of default, for an advertised sale of the property but, at the time of breach, had been amended to provide for judicial foreclosure. Referring to the change in the law, the court declared: "This is a remedial statute, and it is well settled that laws changing the remedy or substituting another and different remedy are valid, so long as they do not impair the obligation of contracts."

[5-7] Of course, the existing remedy cannot be so altered as to take away or impair any of the rights given by the contract, nor can a specific and exclusive remedy, provided by the contract itself, be changed by legislation, because it constitutes a part of the contract. Wilson v. Standefer, supra, page 410 of 184 U. S., 22 S. Ct. 384; Aikins v. Kingsbury, supra, page 680 of 170 Cal., 151 P. 145. The deed of trust here involved, as is customary, provides for an advertised sale by the trustee in the event of default. This remedy is not expressly declared to be the exclusive remedy available to the beneficiary to protect his rights under the instrument. On the contrary, the instrument contains a provision authorizing the trustee or beneficiary, in the event the trustors "fail or refuse to make any payment or do any act," which they are obligated to make or do, "to commence * * * any action or proceeding affecting or purporting to affect the security of this Deed of Trust, the interests of Beneficiary or the rights, powers and duties of Trustee hereunder, whether brought by or against Trustor, Trustee or Beneficiary." This provision is sufficiently comprehensive to include any remedies subsequently authorized by the Legislature for the protection of the beneficiary's rights or enforcement of the trustors' obligations under the instrument. Likewise, this provision, impliedly at least, would seem to authorize the imposition on trustors of any costs or expenses incidental to a foreclosure and of which complaint is here made.

In conclusion, we reiterate that because the beneficiary elects to accept all the incidents of judicial foreclosure when he pursues the alternate remedy provided by section 725a, supra, and because the trustor loses no substantive right, but, in fact, gains a statutory right of redemption, by the beneficiary's election, the section is not unconstitutional as applied to trust deeds executed prior to its enactment. The demurrer is overruled.

Let a peremptory writ of mandate issue as prayed.

We concur: THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

SHENK, Justice (concurring).

I concur in the result on the second ground stated in the main opinion, viz. that the trust deed involved contains a provision authorizing the trustee or beneficiary, in case of default, "to commence any action or proceeding" affecting the security of the deed of trust or the interests of the beneficiary, and that under this authority the beneficiary could commence an action in foreclosure as provided in section 725a, pursuant to the contract. In my opinion the question of an impairment of the contract is therefore not properly in the case.

Furthermore, I am not persuaded that section 725a does not generally impose such additional burdens on the trustor as to render the section objectionable as against outstanding deeds of trust which do not contain the authorization to foreclose. The following are a few of them:

(1) He is subjected to the expense of the foreclosure suit against which he has in effect contracted.

(2) Under his contract he has the undisputed right of possession for three months (section 2924, Civ. Code), plus twenty days (section 692, Code Civ. Proc.), not only after default, but after the notice of default has been recorded. Under section 725a, the trustor may be subjected to foreclosure and sale within a few weeks.

(3) Under his contract a deficiency judgment may be recovered against him only in an independent action.

(4) He is subjected to costs of suit not recoverable under his contract.

The option of the beneficiary or trustee to foreclose instead of to sell as provided by the contract can hardly be said to be for the benefit of the owner of the land, and I cannot ascribe to the creditor the beneficent motive to pursue a course less advantageous to himself. If the intention be to benefit the debtor, the law should provide that at his option also a foreclosure should be had. But no one would contend that the debtor could compel the creditor to pursue the course of court foreclosure unless the contract so provided.



2 Cal.2d 227

PEOPLE v. McQUATE.

Cr. 3814.

Supreme Court of California.

Dec. 31, 1934.

1. Homicide ⇐253(1)

Evidence, including autopsy surgeons' testimony that deceased received six severe blows on head, and testimony indicating that defendant, who had been living with deceased, attempted to dig grave under deceased's house prior to homicide, sustained conviction of first degree murder (Pen. Code, § 189).

2. Homicide ⇐233

Motive need not be proved to justify conviction, though presence or absence of motive is circumstance going to question of guilt.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Tellie McQuate, also known as Thomas M. Jones, pleaded guilty to a charge of murder, and, the trial court having found him guilty of murder in the first degree, he appeals.

Affirmed.

J. A. Donnelly, of San Diego, for appellant.

Thos. Whelan, Dist. Atty, of San Diego, U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

CURTIS, Justice.

The defendant pleaded guilty to the charge of murdering one Ella Straw, and the court fixed a day for the taking of evidence for the purpose of determining the degree of the crime. The defendant did not take the witness stand either at his preliminary examination or at the hearing before the trial court to determine the degree of the crime to which he had pleaded guilty. There was no eyewitness to the crime. However, shortly after his arrest the defendant made an extended statement which was taken down by a shorthand reporter. In this statement, he admitted the killing of Ella Straw, and detailed the circumstances surrounding the commission of the crime. This statement is relied upon by the prosecution as evidence of defendant's guilt, and defendant also relies upon it as showing that he is guilty of murder in the second degree only, and that the trial court erroneously found him guilty of murder in the first degree and imposed upon him the death penalty.

[1] From the statement of defendant, which was admitted in evidence against him without any serious objection on his part, it appears that the defendant, a man 44 years of age, was living with the deceased, Ella Straw, in the latter's home in San Diego. Mrs. Straw was at least 70 years of age, possibly a few years older. She had lived in San Diego for some years previous to meeting the defendant. Something like a year and a half before her death, Mrs. Straw became acquainted with the defendant, and, notwithstanding the disparity in their ages, they began living together as husband and wife in the

home of Mrs. Straw. They occupied the same room and slept together in the same bed, until about a month before the death of Mrs. Straw. The defendant during this time went under the name of Thomas M. Jones, although subsequently he gave his true name as Tellie McQuate. Mrs. Straw owned her home and also three other houses which she rented, and supported herself from their rental. The defendant had no regular employment. In fact, during the time he lived with Mrs. Straw he followed no remunerative employment whatever. The only work he did was performed upon Mrs. Straw's property in repairing and painting some of the buildings thereon. Mrs. Straw supplied him with money to meet all his needs. In fact, she was more than liberal in providing the defendant with clothing and spending money. On the evening of October 8, 1933, which was Sunday evening, they attended a mission on Twelfth street in the city of San Diego. On the way home from the meeting, they stopped at a market and made a few small purchases. After reaching home, they had some sandwiches and drank some beer and then went to bed. At the market where they had stopped on their way home from the mission, the defendant had spoken to another woman. This incident seemed to have furnished the basis of a quarrel between the deceased and defendant after their return home. They continued to argue and quarrel after they had gone to bed, although at that time they were occupying separate rooms. Shortly after retiring, the defendant got out of bed and went to the kitchen to get a drink. In doing so, it was necessary for him to pass through the room of the deceased. The quarrel between himself and the deceased was still in progress, and, when the defendant, on his way back from the kitchen, reached the bed in which the deceased was lying, he picked up a hammer, which was lying near her bed, and hit the deceased over the head two or three times. The defendant then attempted to talk with the deceased, but she made no reply. The defendant was of the opinion that she was dead. He covered her with the bed clothes and then went to bed. He slept until about 8 or 9 o'clock the next morning. He got up about 10 o'clock, cooked breakfast for himself, and, after eating breakfast, went out into the yard, worked around the yard and watered the flowers. This was on Monday morning, October 9th. On Wednesday or Thursday, he attempted to dig a grave under one of the houses owned by Mrs. Straw, in which to bury the body. He left off digging the grave when he struck hardpan, as he feared the burial of the body in such a shallow grave would lead to its early discovery. After abandoning the plan to bury the body, the defendant decided to throw it into the bay. Accordingly, so his statement relates, he dismembered the body some time on Saturday, October 14th. He first, with a knife and saw, cut off her lower limbs, and then cut in two each limb by severing it at the knee joint. He then wrapped the dismembered portions of the body in two packages, the disjointed lower limbs in one package, and the body or torso in the other. Each package was wrapped in a heavy sack, around which was wrapped oilcloth. Defendant then borrowed an automobile and transported these two packages down to one of the piers on the waterfront and threw them into the bay. He returned the automobile to the owner, and the next morning went down to the bay and saw the body, as wrapped in those two packages, floating upon the water. While there he saw some "navy boys" picking up the "sacks." He went up town and later attended a show, and as he was coming out of the show at about 5 o'clock in the afternoon he bought a daily paper containing an account of the finding of the body of Mrs. Straw and stating that he was wanted for her murder. He immediately hired a taxicab and was driven to Los Angeles. Before this, however, he abstracted from Mrs. Straw's purse $250, which he took with him to Los Angeles, together with $60 of his own money.

He was arrested in Los Angeles some seven months thereafter, to be more exact, about the 27th of May, 1934. At the time of his arrest, he was sitting in the plaza, when an officer noticed a billy or blackjack in his possession. He was taken in charge by the officer by reason of having such an article in his possession, and thereafter, by some means not clearly shown in the record, his connection with the murder of Mrs. Straw was ascertained, with the result that his prosecution for that crime followed.

In the statement of the defendant he told how he took the body of Mrs. Straw from the bed, where it lay after she was killed, into the bathroom, where he dismembered it as related above, and that, after he had placed the dismembered parts into the two packages or sacks, he had washed out the bathtub and also hosed out the house, removing all blood stains or other evidence of his crime.

In addition to the statement of the defendant, other evidence was admitted at the hearing before the trial court. After the two

sacks containing the dismembered body of the deceased were rescued from the waters of the bay, and on the day of their recovery, which was Sunday, October 15th, two doctors, one of whom was a deputy county autopsy surgeon and the other of whom was assistant police surgeon of the city of San Diego, performed an autopsy on the body of said deceased. On the same day, the autopsy surgeon to the coroner of the county of San Diego examined the body after the autopsy. The substance of the evidence of these doctors was that there were six severe lacerations of the deceased's scalp, indicating that she had received six heavy blows on her head; that she had an exceedingly thick skull; that the blows did not fracture the skull; that there was but a slight hemorrhage of blood in the brain; that the deceased did not come to her death as a result of the blows on her head, but from hemorrhage due to the amputation of her lower limbs; and that she had not been dead more than forty-eight hours, and possibly not more than twenty-four hours, at the time the autopsy was performed. Besides the testimony of these doctors, one of the neighbors of the deceased testified positively of seeing and conversing with her on Thursday next preceding the Sunday on which her body was found in the bay, and was quite positive that she saw the deceased and defendant walking together on the following Friday. She, however, would not be absolutely positive that she saw deceased on Friday. Witnesses also testified that they had visited the house under which defendant stated that he attempted to dig a grave, and found the condition there exactly as described by the defendant.

Practically the sole contention of the defendant is that the testimony adduced at the hearing held for the purpose of determining the degree of his crime did not adequately show a willful, deliberate, and premeditated killing so as to establish first degree murder, as defined by section 189 of the Penal Code of this state. This contention, in our opinion, is not tenable. It is true that the defendant in his statement claimed that he only struck the deceased two or three times, and that he did so with no intent of killing her, but for the purpose of quieting her and stopping the quarrel in which the two were then engaged. But her condition after her death showed that she had received six severe blows on the head, lacerating her scalp and severely injuring her skull. The presence of these six severe wounds on the head of the deceased completely refutes the claim of defendant that he struck deceased simply for the purpose of quieting her, and affords ample justification for the inference that he inflicted the fatal blows with the intent of killing the deceased. That he did not succeed in producing her death by these means, but later she bled to death as a result of his amputating her lower limbs before her life was extinct, only aggravates his crime, and shows a deliberate purpose and intent to take the life of the deceased. Another fact we think is worthy of consideration which, when viewed in the light of all the other facts and circumstances in the case, places the defendant in a most unfavorable situation. The defendant stated that after he had killed the deceased on Sunday evening, the 8th of October, he attempted on Wednesday or Thursday following to dig a grave under one of the deceased's houses, in which to bury the body. We have already referred to the evidence of the doctors to the effect that the deceased had not been dead more than forty-eight hours at the time her body was recovered from the bay and the testimony of one of the neighbors that she saw the deceased on Thursday of the week of her death. This evidence would tend to show that the defendant killed the deceased not earlier than Friday, and that in digging the grave under the house on Wednesday or Thursday he was planning for the disposition of the dead body of the deceased before he killed her and not after her death. If such was the fact, and we think the evidence justifies such a conclusion, then a clear case of willful and premeditated murder has been made out against the defendant.

Defendant relies upon the cases of People v. Howard, 211 Cal. 322, 295 P. 333, 71 A. L. R. 1385, and People v. Connors, 124 Cal. App. 216, 12 P.(2d) 43, in support of his contention that the evidence before the court showed only a case of second degree murder. In those cases, like the instant case, reliance was placed largely upon the statements of the defendants showing the circumstances and conditions under which the killing was accomplished, and it was held in each of those cases that, if the jury should reject the statement of the defendant as to the manner in which the deceased met death, then there would be a dearth of evidence tending to show the conditions as they existed at the time of the homicide and from which it might reasonably be held that the murder was in fact willful, premeditated, and intentional. No such situation is presented in the instant case. There is evidence aside from the statement of the defendant as to the circumstances and

conditions under which the deceased met her death which clearly indicates, not only that she was murdered, but that the means used to cause her death were employed intentionally and with due deliberation. We refer, of course, to the evidence of the doctors who performed the autopsy upon the body of the deceased when they testified that the deceased had received six heavy blows upon her head, and that before life was extinct her body was mutilated by the amputation of her lower limbs.

[2] As to the motive or motives which prompted defendant to take the life of his benefactress, for such the evidence shows she was, the record before us is not entirely silent. The defendant in his statement admitted that he had become dissatisfied with the relations existing between himself and the deceased. She asked him to marry her, and he refused, giving as a reason for his refusal the fact that they were continually quarreling before marriage and that it was only reasonable to conclude that the same condition would continue after marriage. When they first began living together, they occupied the same room and bed and deported themselves as man and wife. Some month or more before the murder, this relationship had become distasteful to defendant, and he refused to continue it and slept in a separate bed in a room adjoining that occupied by the deceased. He admitted that he was getting tired of her. According to his statement, the frequent and violent quarrels were usually occasioned by his attentions to other women. Then the question of her money, we think, may have provided a motive for his taking the life of the deceased. As we have seen, immediately after killing her, he robbed her purse of $250 and fled from the scene of his crime. While it is not indispensable that motive be proven as an element necessary to justify a conviction of one charged with crime, the presence or absence of motive is a circumstance going to the question of the guilt or innocence of the defendant. In this case we think the evidence is such as to warrant an inference that the defendant may have been actuated in taking the life of the deceased, either by a desire to end his relations with her, which had become distasteful to him, or for the purpose of robbing her of her money. Probably both of these motives had some part in causing the defendant to decide to take decedent's life. But, independent of any evidence as to the motive of the defendant, we are in accord with the trial court in its conclusion that the evidence showed that the defendant was guilty of murder in the first degree.

The judgment should therefore be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.



2 Cal.2d 133

PEOPLE v. McKINLEY.

Cr. 3832.

Supreme Court of California.

Dec. 26, 1934.

1. Criminal law ⇨1202(3)

In prosecution for petty theft, with prior conviction of felony, documents and records relating to accused's service of term for prior conviction in another state prison, properly certified by keeper of records of such prison, *held* admissible (Pen. Code, § 969b).

2. Criminal law ⇨1202(6)

In prosecution for petty theft, with prior conviction of felony, it was unnecessary for judgment to state that defendant had served time for prior felony; only necessary elements being that fact was charged, proved, and found by jury (Pen. Code, §§ 644, 667).

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

James F. McKinley was convicted of the offense of obtaining money under false pretenses amounting to petty theft, with prior conviction of a felony, and he appeals.

Affirmed.

Prior opinion, 35 P.(2d) 572.

James F. McKinley and Edwin F. Franke, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SHENK, Justice.

The defendant was charged by information in two counts with obtaining money under false pretenses amounting to petty theft, with prior conviction of a felony. He was found

guilty by a jury of the offense charged under each count and of the charge of prior conviction. He was sentenced by the court to imprisonment in the state prison at Folsom for the term prescribed by law.

The defendant on this appeal from the judgment of conviction devotes his arguments to the main contention that the evidence is insufficient to justify the judgment of conviction of the prior conviction of a felony.

[1, 2] There was admitted in evidence, certified by the keeper of the records of Oklahoma state prison, a judgment of conviction of the crime of obtaining money under false pretenses, the fingerprints and photographs of one J. W. McKinley, and an affidavit that the judgment of conviction accompanied J. W. McKinley at the time he was committed to the Oklahoma state prison, and that the fingerprints and photographs were made at that time. It was in evidence that the defendant's fingerprints were the same as the fingerprints introduced with the record of conviction in the state of Oklahoma. On cross-examination the defendant testified:

"Did your memory get hazy about what happened to you when you were in Oklahoma? A. Well, I don't know as I have ever been in Oklahoma. They don't have anyone here who ever seen me in Oklahoma.

"Q. Would you believe him if he were to testify to that effect? A. If they would bring the warden here from the State Penitentiary, and if the warden says I have served time under him, why, I might."

The documents received in evidence were properly authenticated by certification and were admissible pursuant to section 969b of the Penal Code. The evidence supports the charges of petty theft and the charge of such prior conviction.

[3] The defendant contends that the judgment of the court was improper upon which to confine him to state prison pursuant to section 667 of the Penal Code, because it failed to state that the defendant had served a term in a penal institution for the prior felony of which he was found to have been convicted. The defendant relies on In re Boatwright, 216 Cal. 677, 15 P.(2d) 755. That case, however, did not decide the question which the defendant presents. The discussion in the decision relied upon refers to the question whether, pursuant to section 644 of the Penal Code, the court in pronouncing judgment should make the order that the person charged is an habitual criminal before he may be held for the life term prescribed by said section. In the present case the information in each count alleged the prior conviction and that the defendant had served a term in a penal institution therefor. The verdict as to each count found the defendant guilty of the particular offense after prior conviction of a felony as charged in the information. The judgment as to each count recited that the defendant had been found guilty of petty theft after prior conviction of a felony, the judgments to run concurrently. There is no necessity for the further statement in the judgment that the defendant had served time for a prior felony, when, as here, the fact was charged, proved, and found by the jury, in order to subject him to the term prescribed by section 667 of the Penal Code.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.



2 Cal.2d 115

SOUTHERN CALIFORNIA ROADS CO. v. McGUIRE et al., Board of Public Works of City of Los Angeles.

S. F. 15215.

Supreme Court of California.

Dec. 26, 1934.

1. Highways ⇨113(3)

Contract let by municipality for improvement of city street, constituting part of state highway system, which contract was authorized by agreement between city and state department of public works whereby cost was to be defrayed by state and work was subject to state inspection, must comply with wage provisions of general law, since improvement was not a "municipal affair" (St. 1933, pp. 2033, 2034, §§ 5, 7; St. 1931, p. 910; Const. art. 11, § 6; Pol. Code, § 363z, as added by St. 1933, p. 902).

[Ed. Note.—For other definitions of "Municipal Affairs," see Words & Phrases.]

2. Highways ⇨97¾

Statute authorizing department of public works to enter into contracts with cities or counties for construction of state highways "in any manner provided by law" does not change existing law relative to manner of

performing work (Pol. Code, § 363z, as added by St. 1933, p. 902).

In Bank.

Original proceeding by the Southern California Roads Company against Hugh J. McGuire and others, members of and constituting the Board of Public Works of the City of Los Angeles, for writ of mandate.

Petition and alternative writ discharged.

Young, Lillich, Olson, Graham & Kelly, E. R. Young, and E. L. Searle, all of Los Angeles, for petitioner.

Chas. R. Nelson, of Los Angeles, amicus curiæ for Jahn & Bressi Const. Co.

Gibson, Dunn & Crutcher, of Los Angeles (Henry B. Ely and B. P. Griffith, both of Los Angeles, of counsel), amici curiæ.

U. S. Webb, Atty. Gen., John O. Palstine, Deputy Atty. Gen., and Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Thatcher J. Kemp, Deputy City Atty., all of Los Angeles, for defendants.

C. C. Carleton, Frank B. Durkee, and C. R. Montgomery, all of Sacramento, amici curiæ.

Entenza & Gramer, of Los Angeles, for Los Angeles Building Trades Council and all Affiliated Crafts; Los Angeles District Council of Carpenters and all Affiliated Unions.

Chas. F. Lowy and Leo L. Schaumer, both of Los Angeles, and Arthur L. Johnson, of San Francisco, amici curiæ, for Joseph J. Creem.

CURTIS, Justice.

This is an original proceeding for a writ of mandate directed to the defendants as the members of and constituting the board of public works of the city of Los Angeles, requiring defendants to pass upon the sufficiency and form of a certain contract for the improvement of Sepulveda boulevard from National boulevard to Venice boulevard in said city, and to sign and execute said contract on behalf of said board of public works. On the filing of this petition, an alternative writ of mandate was issued and served on said defendants. The defendants have appeared and filed a general demurrer to the petition.

The petition shows that the refusal of the defendant board of public works to execute said contract was based upon the ground that neither the notice inviting bids for the performing of the work contemplated by said contract nor the draft of said contract specified the general prevailing rate per diem wages in the city of Los Angeles for each craft or type of workman needed to execute said contract.

The improvement of Sepulveda boulevard contemplated by said contract was to be constructed in pursuance of an act of the Legislature approved May 26, 1927 (St. 1927, p. 1562), as amended at its last session (St. 1933, p. 2029). Section 5 of this act provides in part as follows:

"The California Highway Commission shall have jurisdiction and authority as provided in this section with respect to any State highway lying within any municipality as specifically described by law, also with respect to a State highway, the natural course of which runs or passes into or through any municipality or contiguous municipalities. Unless any such route or routes within a municipality is specifically described by law it shall be the duty of the highway commission to designate and to determine the location of connecting portions either through or around the municipality as the commission may determine will be of the greatest benefit to through traffic and the said commission shall determine such connecting portions with respect to all State highways, the natural course of which runs or passes into or through any municipality. * * *

"The Department of Public Works is hereby authorized to construct, reconstruct, widen, otherwise improve or maintain any such highway within a municipality or upon the allocation of any funds by the California Highway Commission for any said purpose the director of the Department of Public Works may as he shall deem expedient enter into a cooperative agreement with such municipality for the performance of any such work by the State or by such municipality or for the division of the cost thereof as between the State and such municipality. All work performed under the provisions of this section shall be approved by the Director of Public Works.

"The Director of Public Works may delegate to any such municipality all or any part of the powers and jurisdiction vested by law in him or in the Department of Public Works over and in respect to all or any section of any such State highway within such municipality."

By section 7 of said act as amended in 1933, certain highways or routes were classified and designated as secondary state highways, and the department of public works

was authorized and directed to lay out and construct said highways "by the most direct and practicable routes, as determined by the California Highway Commission, between the termini stated herein, and to improve and maintain the same subject to the provisions of this act as applicable." The remainder of said section 7 as amended is devoted entirely to the designation by name, route number, and termini of the secondary state highways which are created by said act. Among the state highways so created and classified as secondary highways which said department of public works was authorized and directed to lay out, improve, and maintain were included ten public streets in the city of Los Angeles, among which was that part of Sepulveda boulevard between Pico boulevard and Venice boulevard. In pursuance of the act of the Legislature above mentioned, as amended in 1933, and on December 21, 1933, a contract was entered into between the city of Los Angeles and the department of public works, acting through the director of public works, for some seventeen different improvement projects in the city of Los Angeles, included in which were said ten secondary state highways created by section 7 of the act of the Legislature mentioned above, one of which was Sepulveda boulevard between Pico boulevard and Venice boulevard, designated in said contract as item No. 12. By this contract it was agreed that the state would construct improvements designated therein as items 1, 2, 3, and 14, and that the city of Los Angeles would construct, or cause to be constructed, improvements designated as items 4 to 13, inclusive, in said contract, being the said ten secondary highways referred to above.

The cost of these improvements was to be provided by the state, partly from funds budgeted by the California highway commission, authorized under the provisions of the National Recovery Act (48 Stat. 195) for expenditure within the city for the improvement of the federal aid route within said city, and partly from funds allotted by the state highway commission for expenditure within said city; the amount of such funds having been budgeted from the state highway fund for co-operative work within incorporated municipalities.

The contract further provides that the city shall construct or cause to be constructed, the improvements designated as items 4 to 13, inclusive, in accordance with specifications and estimates to be approved by both parties, and that the work of constructing said improvements shall be done to the satisfaction of the department of public works of the state, and shall be subject to the inspection of its representatives, and, furthermore, that no change shall be made in the approved specifications except in minor matters due to unforeseen contingencies, unless approved by the state, and that said work shall be done by contract unless the performance thereof shall be done by day labor. The department of public works also agreed to delegate to the city the expenditure of funds to defray the costs of items 4 to 13, inclusive. After the execution of said contract by the city of Los Angeles and the department of public works, the city advertised for bids for the improvement of Sepulveda boulevard between National boulevard and Venice boulevard, being a portion of the work and improvement designated in said item 12. The petitioner herein submitted a bid agreeing to perform said work and improvement for the sum of $86,371.84, and the board of public works of said city accepted said bid and awarded the contract for performing said work to petitioner as the lowest responsible bidder, for the contract price of $86,371.84, and ordered the city attorney to prepare said contract for said work. These proceedings were all ratified by the department of public works, and on or about June 22, 1934, the department of public works allocated and transmitted and paid to the treasurer of the city of Los Angeles the sum of $86,371.84 for the purpose of paying the cost of said work and improvement, the contract for which had been awarded to petitioner.

Thereafter said contract was prepared and executed by said petitioner, and, accompanied by proper and sufficient undertakings as required by law, for faithful performance, and for payment of labor and materials, was transmitted to the board of public works of said city by the city attorney, with a recommendation by him that the board of public works refuse to sign said contract, on the ground that the notice inviting bids and the contract itself did not specify the general prevailing rate of per diem wages in the city of Los Angeles for each craft or type of workman needed to execute said contract. Acting upon said recommendation, as stated before, the board of public works, on June 22, 1934, refused to sign or execute said contract.

It is conceded that neither the notice inviting bids for said work nor the contract itself contained any specification of the general prevailing rate of per diem wages as

provided in the Public Works Wage Rate Act enacted in 1931 (St. 1931, p. 910). The validity of this act was approved by this court in Metropolitan Water District v. Whitsett, 215 Cal. 400, 10 P.(2d) 751.

[1] It is the contention of petitioner that the construction of the work and improvement of Sepulveda boulevard by the city of Los Angeles is a municipal affair, and that in the performance of said work under the contract with petitioner it is not subject to the provisions of the Public Works Wage Rate Act of 1931.

The city of Los Angeles operates under a freeholders' charter, and by its charter has availed itself of the privilege extended to charter cities by section 6 of article 11 of the Constitution, empowering them "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." If, therefore, the contemplated improvement of Sepulveda boulevard is a municipal affair as this term is used in the Constitution, the Public Works Wage Rate Act, being a general law, would not be applicable to the contract providing for its improvement. City of Pasadena v. Charleville, 215 Cal. 384, 10 P.(2d) 745. On the other hand, if the improvement of said street as contemplated by said city is of more than local concern, or if it is an affair in which the people generally of the state are concerned, the city in the construction of said improvement is subject to and is controlled by the general laws, including the Public Works Wage Rate Act of 1931.

Petitioner cites authorities to the effect that the improvement of its streets by a city is a municipal affair, and that a municipality is not subject to general laws in making such improvement when it has elected to avail itself of the privilege afforded by the Constitution to become independent of general laws in its municipal affairs. Conceding that these authorities are all that petitioner claims them to be, it may be seriously questioned whether they govern the present situation. The street which the city plans to improve under the contract with the petitioner is not an ordinary city street, and in fact, legally speaking, it is not a city street at all. By section 7 of the Act of May 26, 1927, as amended in 1933, above referred to, as we have already stated, certain highways, including Sepulveda boulevard, "are hereby declared to be and are hereby classified as secondary State highways and the Department of Public Works is hereby authorized and directed to lay out and construct said highways * * * and to improve and maintain the same," etc. Not only has Sepulveda boulevard been declared by legislative act to be a state highway, with the right of the state through its highway commission to improve and maintain it, but, as we have seen, the money to make the identical improvement contemplated by said contract has been forwarded by the state, and by its proper officer paid into the city treasury. While the city has been delegated authority to expend said money in the construction of said improvement, it is expressly provided that the work of constructing said improvement shall be subject to the approval of the department of public works of the state, and that all plans, specifications, and estimates for said improvement shall be submitted to, and approved by, the same, and shall not be changed, except in minor and unimportant details, without the approval of the state. After the improvement is completed, the city agrees to maintain the street as improved, but, should the department of public works consider the maintenance of said street by the city inadequate or unsatisfactory, and the city fail to correct the unsatisfactory condition after due notice, the department of public works may enter upon said street and maintain said street, and the cost thereof will be defrayed from the city's share of the one-quarter cent gasoline tax allocation. We think it is apparent from the foregoing statement of the law governing the status and improvement of said street that Sepulveda boulevard is not an ordinary city street, as that term is generally understood and as it is used in the authorities cited by petitioner, but that, as provided by said act, it is a state highway. We think it is also apparent that the manner in which it is contemplated to improve said street, as shown by the contract between the department of public works and the city, whereby the entire cost of said improvement is to be met and defrayed by the state except that furnished by the federal government through the state, and the work of constructing said improvement is subject to inspection of the state's authorized representatives, indicates beyond any question that the work of improving said street is not merely a local or municipal affair of the city, but that it is an affair in which the state has a direct and vital interest. This conclusion appears so obvious that citation of authority would seem unnecessary. However, practically the same question was be-

fore this court in the recent case of Young v. Superior Court, 216 Cal. 512, 15 P.(2d) 163.

In that case the petitioner, the owner of a lot in the city of Bakersfield, filed a petition in this court for a writ of prohibition to restrain the superior court of Kern county from taking further proceedings in a condemnation action pending before said court for the purpose of acquiring property for the construction of a state highway partly within and partly without said city. It was contended that the city of Bakersfield was a chartered city and that the opening of said street was a "municipal affair in so far as such acquisition applied to the property located within the city of Bakersfield." In denying said writ this court, at page 516 of 216 Cal., 15 P.(2d) 163, 165, gave its reason as follows:

"It is insisted that by the charter provisions, and particularly section 12 of article 3, the city accepted the offer contained in section 8 of article 11 of the Constitution as amended at the general election held on November 3, 1914, permitting cities to remove themselves from the operation of general laws as to municipal affairs by incorporating in their charters a general provision to that effect. The contention presents an interesting question, inasmuch as the charter was ratified by the electors of the city four days after the constitutional provision became a part of the organic law. But, in any view of the case now presented, the contemplated acquisition and improvement cannot be deemed a matter of purely municipal concern. As above outlined, the improvement is to be a part of the state highway system designed and constructed in part under the supervision of the department of public works of the state. It is located both within and without the city of Bakersfield. It is to be financed from federal, state, and county funds with the remainder from special assessment on the property within and without the city specially benefited. As such, it is of more than local concern, the general law is controlling, and the county of Kern, having instituted the proceeding, is the mandatory of the state to carry it forward to completion. Allied Amusement Co. v. Byram, 201 Cal. 316, 256 P. 1097; County of Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897; Stege v. City of Richmond, 194 Cal. 305, 228 P. 461; Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754."

Petitioner further contends, and cites authority supporting its position, that the state may surrender to a municipality its control over a matter which may be of general concern to the people of the state if, in the judgment of the state, it is for the best interests of the people so to do, and that, under its co-operative contract with the city of Los Angeles for the improvement of the several streets and highways enumerated therein, the state has surrendered to said city its control over the construction of ten of said projects. There can be no question of the power of the state to surrender to a city or county control over certain matters which are of general concern to the people of the state if in the judgment of the state it is for the best interests of the people to do so. Instances of such acts may be found in the cases of Watson v. Greely, 67 Cal. App. 328, 227 P. 664, and Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141. The transactions therein involved were approved by the courts. The legality of the provision of the co-operative contract between the city and the state, whereby the city is given the right to improve certain state highways within the city, is not questioned. Still it does not necessarily follow that the work to be done in making said improvements is merely a municipal affair. The highways to be improved are public highways of the state, and they are of general concern to the people of the state. A large portion of the money to improve them is money belonging to the state, and the people of the state are concerned in its expenditure. To protect the interests of the state in the improvement of said highways, the state has reserved a supervisory authority over the city in the construction of said improvements and in the maintenance of said highways after their improvement. The improvement of said highways from their inception to their final completion are projects of the state. They are not municipal affairs in any sense in which those words are used in the Constitution. It follows, therefore, that all contracts for their construction are governed by, and are subject to, said general laws of the state. Petitioner concedes that, if the state should improve said highways under contract with some private individual or firm, it would be required to comply with the Public Works Wage Rate Act, but contends that, by delegating the authority to the city of Los Angeles to make said improvements, it may do indirectly what by express provisions of law it is prohibited from doing directly. We do not think that, by the above-mentioned provisions of the act of 1933, it was intended to make any such distinction

in the manner of letting contracts for the improvement of these newly created state highways.

[2] Petitioner also relies upon section 363z of the Political Code, enacted in 1933 (St. 1933, p. 902), which in part reads as follows: "The Department of Public Works may enter into contracts with any county, city and county, city, or joint highway district, or two or more of any of them in respect to the proportion of the expense of the acquisition, construction or improvement of any State highway to be borne by the respective bodies to such contract. Any such contract * * * may provide for the doing of the actual work of construction, or any part thereof, by any party thereto, *in any manner provided by law.*" The particular words in this section of the Code on which petitioner relies are those italicized above. Petitioner contends that this section of the Code should be read in connection with section 5 of the act of 1927, as amended in 1933, and hereinbefore set out, and subdivision j of section 3 of said act, requiring the department of public works to spend annually from the state highway fund a certain percentage of the money received from the gasoline tax within the incorporated cities of the state, the proportion which each city is to receive to be determined by its population according to the last federal census.

By reading these several provisions of the law together, petitioner argues that the Legislature in its enactment "declared a policy to relinquish control and jurisdiction of the improvement of a city street constituting a part of the state highway system and place that control and jurisdiction in the city, making such improvement a municipal affair and not subject to the control of general laws." Petitioner bases this argument exclusively upon the provision found in said section 363z of the Political Code, giving to the municipality that has contracted with the state to improve a state highway within its corporate limits the right to provide for the doing of said work of construction "in any manner provided by law." In amplification of its argument, petitioner calls attention to the State Contract Act (St. 1933, p. 2108), which provides, among other things, that the construction or improvement of any state structure, building, road, or other state improvement of any kind, with certain exceptions not relevant here, shall be done under the exclusive control of the department of public works. Section 2. It was to avoid the general provisions of this act requiring the construction of all state improvements to be done under the exclusive control of the department of public works, petitioner contends, that section 363z of the Political Code was enacted, which empowers the department of public works to enter into contracts with municipalities or joint highway districts for the construction of state highways. With these several provisions of the law in mind, petitioner concludes that the intent of the Legislature in providing in section 363z that any contract made pursuant to said section by the state with a county or city or other state agency mentioned therein "may provide for the doing of the actual work of construction * * * by any party thereto, in any manner provided by law," was to provide that the law governing the letting of contracts by the party authorized to let such contracts should govern, and that, if the agreement be between the state and a county operating under a county charter, and such agreement provided that the improvement contract shall be let by the county, then the manner provided by law for the letting of such contract is to be found in the provisions of the county charter, and, if the agreement for such highway work be between the state and a city governed by a freeholders' charter, and such agreement provides that the improvement contract shall be let by the city, then the manner provided by law for the letting of such contract is the manner provided by the charter of said city. We are not able to agree with this argument of petitioner. It will be noted that the provision of this Code section provides that "any such contract [that is the contract between the Department of Public Works and city, city and county, or joint district] * * * may provide for the doing of the actual work of construction, or any part thereof, by any party thereto, in any manner provided by law." This section does not purport to limit, enlarge, or in anywise modify or change the existing law relative to the manner of doing such construction work, but simply gives the parties to such contract the authority to contract for its construction in pursuance of such existing laws. We agree with the construction placed on this section of the Code by the Attorney General in a brief filed herein as amicus curiæ, in which he takes the position that this section of the Code is simply a legislative declaration that the provisions of law governing the award and execution of contracts by any of the parties to such an agreement may be followed in awarding a construction contract. If the state does the work directly, it must proceed under the law governing state contracts; if a city or county

does the work as the state's agent, the agent should follow the law governing it in regard to the letting of contracts dealing with matters which are not exclusively municipal affairs.

This disposes of all questions raised by respondents in their attack upon the validity of the contract as drawn and presented to them for the improvement involved herein. As the contract fails to comply with the provisions of the Public Works Wage Rate Act, it cannot be sustained, and the respondents' refusal to execute said contract was based upon legal and valid grounds.

One of the amici curiæ filing briefs herein raises two further questions respecting the validity of said contract. These questions do not arise from any of the facts stated in the petition, and for that reason they are not properly before us. The party raising these questions has failed to adequately support its contention by a sufficient brief or citation of authorities, and therefore we express no opinion on these questions. We feel it is sufficient in this proceeding to consider only the questions which are properly before us as shown by the allegations of the petitioner and the general demurrer thereto of respondents.

For the reasons hereinbefore given, the petition is denied, and the alternative writ heretofore granted is discharged.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

In re DEN'S ESTATE. *
DEN et al. v. LUTON.
L. A. 14476.

Supreme Court of California.
Dec. 31, 1934.
Rehearing Granted Jan. 30, 1935.

Executors and administrators ⇐121(1)

Appointment of administrators with the will annexed to succeed prior appointees whose appointments were made without objection for purpose of bringing action to determine interest of estate in certain property *held* not error after decree of final distribution, in absence of showing by contestant that purpose of appointment was unfounded (Probate Code, § 1067).

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Barbara County; H. S. Shaffer, Judge.

Petition by Alfonso L. Den and another for appointment as administrators with the will annexed of the estate of Nicholas A. Den, deceased, opposed by Carrie Bell Luton. From an order granting the petition and dismissing the contest, contestant appeals.

Affirmed.

Heaney, Price & Postel and Clarence A. Rogers, all of Santa Barbara, for appellant.

Jerome H. Kann, Schauer, Ryon, Goux & McMahon, and Schauer, Ryon & McMahon, all of Santa Barbara, for respondents.

SHENK, Justice.

This is an appeal from an order appointing Alfonso L. Den and Ysabella Den McDonald, administrators with the will annexed of the estate of Nicholas A. Den, deceased, in the place and stead of administrator Richard O. Hyland, resigned, and dismissing the contest thereto instituted by the appellant, Carrie Bell Luton.

The decedent died in 1861 leaving practically all of the real and personal property owned by him to Jose Maria Hill and Charles E. Huse, as trustees, to be partitioned and administered by them as such trustees. A decree of final distribution was entered in 1875. That decree provided for the distribution of the real and personal property, and "any other property not now known or discovered which may belong to the estate, or in which the estate may have any interest" to the trustees; the administration of the estate was decreed closed, and the executors were discharged.

Despite the entry of said decree and in 1921 the record shows that letters of administration with the will annexed were granted to A. M. Ruiz, for the purpose of administering on some property as to which it appears the decedent owned a record title at the time of his death, but as to which it was represented to the court and decreed by it that a court action was necessary to determine the interest of the estate therein. In 1930, Richard O. Hyland petitioned for letters of administration with the will annexed to succeed A. M. Ruiz who had died. In that petition it is al-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 45 P.2d 963.

leged that, upon the death of Ruiz, the estate remained unadministered and not closed. Hyland was appointed such administrator in January, 1931. The record does not show that there was any opposition to the petitions of Ruiz or Hyland. In March, 1933, Hyland's resignation as administrator was filed. At the same time, Alfonso L. Den, a son of the decedent, and Ysabella Den McDonald, a granddaughter, petitioned for letters with the will annexed to succeed Hyland. It was to this petition that the contestant, Carrie Bell Luton, another granddaughter, filed opposition on the ground that the property in question passed under the decree of distribution in 1875, and that there was no necessity for administering it.

Were the question simply whether the property of which the decedent had record title at the time of his death passed by the decree of distribution in 1875, it might be said that the appellant had shown merit in her appeal. The authorities cited by her may be said to settle the question that title to such property passes by the decree of distribution, and that no further administration is necessary. But in the present case the record shows that there was some necessity for a court action to be brought by representatives of the estate in order to determine the extent of the decedent's or the estate's ownership in the property; and that this necessity was the basis for the appointment of an administrator with the will annexed in 1921. The subsequent orders are merely orders to make appointments to fill the vacancies caused by the death and resignation of administrators so appointed. It would seem that the question whether the necessity existed has become final by the first order made in 1921 as to which no opposition was entered, and we have here a collateral attack on that order. Assuming, however, that the question could be considered now, the contestant has made no showing in the trial court nor on the record on appeal that the claimed necessity was unfounded, and that the action of the court in making the present order was an abuse of discretion. The order appears to be supported by section 1067 of the Probate Code, which provides that the final settlement of an estate shall not prevent a subsequent issue of letters of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should again be issued. The appellant has not shown that the cause which presumably led the court to issue the letters did not exist. See Casey v. Gibbons, 136 Cal. 368, 370, 68 P. 1032.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.

PRESTON, Justice.

I dissent.

When the decree of distribution containing the blanket clause became final, no letters de bonis non could lawfully issue thereafter. The possessor of any such purported letters could maintain no suit whatsoever. The moment the decree came in evidence showing a distribution of the whole estate, that moment the plaintiff would be nonsuited.

The holder of these letters can have no standing whatever in court for any purpose. To confirm his appointment is to create a trouble maker. It is the province of the trustees to protect the trust estate. If they are dead or have become unfaithful, application for new trustees could be maintained.

This appeal, I think, is perfectly good, as it is no answer that the present appointee is the successor of prior appointees whose appointments were made without objection.



2 Cal.2d 186

HALL v. WILLIAMS, County Auditor, and four other cases.

Sac. 4850–4854.

Supreme Court of California.

Dec. 28, 1934.

Rehearing Denied Jan. 25, 1935.

1. Officers ⇐100(1)

Where charter of Sacramento county made certain offices appointive instead of elective, empowered board of supervisors to fix compensation attached thereto, and provided that compensation of elective officers should be fixed six months prior to their election, compensation fixed by board for incumbents of such appointive offices *held* valid though incumbents had been elected before adoption of charter (Pol. Code, § 4056d, as amended by St. 1933, p. 1674; Pol. Code, §§ 4236a, 4236c, 4236e, 4236f, 4236j, as amended by St. 1933, pp. 1734, 1736, 1737, 1738, 1741, §§ 2, 4, 6, 7, 10; St. 1933, pp. 3094, 3100, 3101, §§ 15 (b), 28, 34, 35; Const. art. 11, § 5, as amended in 1933).

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

2. Officers ⇐100(2)

Statutes fixing compensation of county clerk, tax collector, recorder, treasurer, and school superintendent of Sacramento county could, after adoption of charter by such county, be superseded, modified, or otherwise affected by ordinances of board of supervisors (Pol. Code, § 4056d, as amended by St. 1933, p. 1674; Pol. Code, §§ 4236a, 4236c, 4236e, 4236f, 4236j, as amended by St. 1933, pp. 1734, 1736, 1737, 1738, 1741, §§ 2, 4, 6, 7, 10; St. 1933, pp. 3094, 3100, 3101, §§ 15 (b), 28, 34, 35; Const. art. 11, § 5, as amended in 1933).

In Bank.

Separate applications by Harry W. Hall, by Edward T. Ryan, by Charles A. Root, by Frank P. Christophel, and by R. E. Golway for writs of mandate to be directed to L. P. Williams, as County Auditor of the county of Sacramento, to compel respondent to draw warrants for salaries of petitioners as county clerk, tax collector, recorder, treasurer, and superintendent of schools, respectively, which were consolidated and argued together.

Writs of mandate denied.

Prior opinions, 25 P.(2d) 891, 25 P.(2d) 895, and 25 P.(2d) 896.

Archibald D. McDougall and Bronson, Bronson & Slaven, all of San Francisco, and W. H. Hatfield, of Sacramento, for petitioners.

Neil R. McAllister, Dist. Atty., and Ralph H. Cowing and Gordon S. Hughes, Deputy Dist Attys., all of Sacramento, for respondent.

PER CURIAM.

The above-entitled cases all involve identical questions of law, and were consolidated and argued together. They are therefore herein considered together.

The petitioner in each case sought a writ of mandate to compel respondent, as auditor of the county of Sacramento, to draw a warrant in his favor as compensation for services, under sections 4236a, 4236f, 4236c, 4236e, and 4236j of the Political Code. Petitioner Hall is the county clerk of said county; petitioner Ryan is the tax collector; petitioner Root is the recorder; petitioner Christophel is the treasurer; and petitioner Golway is the superintendent of schools. Respondent auditor refused to draw the warrants as demanded, contending that petitioners were entitled only to such salaries as had been fixed by the board of supervisors.

Petitioners were elected to their respective offices in August, 1930, for terms of four years. At the time of their election, their compensation, fixed by Political Code, § 4236a et seq., was $4,000 per year. The Legislature in 1933 (St. 1933, p. 1734 et seq.) amended these sections to reduce the salaries to $3,600 per year, and petitioners concede the validity of these amendments, and demand the compensation thus specified. However, in April, 1933, the voters of the county adopted a new charter, which was approved by the Legislature in May, and by its terms went into effect July 1, 1933 (St. 1933, p. 3088). Thereafter the board of supervisors of the county fixed the salaries of petitioners at $250 per month, by ordinance effective August 16, 1933. It is this action which petitioners attack, claiming that the board lacked power under the charter to make the change applicable to them.

[1] Section 15 (b) of the charter gives the board power to provide by ordinance for "the compensation of elective and appointive officers," unless such compensation is otherwise fixed by the charter, provided that the compensation of elective officers shall be fixed at least six months prior to the election of such officers. Section 34 provides that the compensation of elective officers shall be fixed by ordinance of the board, and specifies the maximum compensation. Section 35 makes the same provision as to the compensation of appointive officers. However, the elective officers listed in section 34 do not include petitioners. Their offices, formerly elective, are now appointive, and are listed in section 35, and under the provisions of that section, the board of supervisors has the power to fix the salaries of the persons holding such offices. There is nothing in the charter to indicate that petitioners are excluded from the operation of a section which expressly applies to their offices, merely because they were chosen for the offices by election, whereas future holders of the same offices will be appointed. They might object, it is true, to cutting down their terms, but the charter expressly protects their tenure. Section 28 provides: "All county officers holding offices which were elective immediately prior to the time this charter takes effect shall continue to hold their respective offices until the expiration of their present terms, unless sooner removed in the manner provided by law. The terms of all other county officers shall expire upon the taking effect of this charter, provided, however, that each shall continue to hold office until his successor has been appointed and

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

has qualified." Here we have a clear recognition by the framers of the charter that certain offices are no longer elective, and provision is made for safeguarding the tenure of the incumbents. But the charter just as clearly avoids any language which might be construed to safeguard their salaries. It follows that the framers of the charter, well aware of the problem presented by elected incumbents in offices now appointive, nevertheless concluded that their salaries should be subject to the determination of the board.

[2] It may be pointed out, however, that even if petitioners were correct in their contention that the charter provisions do not apply to them, and that their salaries should be determined in accordance with the general law, they would have no better case. Section 4056d of the Political Code, as amended in 1933 (St. 1933, p. 1674), provides that the board of supervisors of each county "shall have the power and it shall be the duty of such board to regulate the compensation of all county * * * officers" (with certain exceptions not applicable here). The section further provides that "all laws or parts of laws now in force establishing, regulating or otherwise affecting the salaries or compensation of county officers" (excepting those not covered by the section) "are hereby continued in force and effect solely as ordinances of the respective counties to which they relate, and may be superseded, modified or otherwise affected by ordinances hereafter adopted in the respective counties. * * *" The California Constitution, article 11, § 5, as amended in 1933, provides that the boards of supervisors in the respective counties "shall regulate the compensation of all officers in said counties" (with exceptions not applicable here), and, referring to section 4056d of the Political Code, declares that said section "is hereby validated and made fully and completely effective." Petitioners are unmistakably within the terms of the above constitutional and statutory provisions. Section 4236a et seq. of the Political Code, upon which they rely, are clearly "laws now in force" which may be "superseded, modified or otherwise affected by ordinances," as stated in section 4056d of the Political Code, supra. The board of supervisors has by ordinance superseded the compensation provisions of the general law, and the schedule thus fixed is the measure of petitioners' claims. The legislative power to reduce the salary of such an incumbent elective or appointive county officer is unquestioned.

The applications for writs of mandate are denied.

McDOUGALL v. WILLIAMS, County Auditor.

MAPES v. SAME.

Sac. 4855, 4856.

Supreme Court of California.

Dec. 28, 1934.

Rehearing Denied Jan. 25, 1935.

Officers ⇐100(1)

Charter of Sacramento county, fixing compensation of members of board of supervisors at not to exceed $50 per month, *held* applicable to members elected before adoption of charter (St. 1933, pp. 3093, 3116, §§ 10, 90; Pol. Code, § 4236n, as amended by St. 1933, p. 1743; Const. art. 11, § 7½).

In Bank.

Separate applications by Donald McDougall and by Ollie Mapes for writs of mandate to be directed to L. P. Williams, as Auditor of the county of Sacramento, to compel respondent to issue warants for salaries of petitioners as members of the Board of Supervisors of such county.

Writs of mandate denied.

Prior opinion, 25 P.(2d) 896.

Chas. L. Gilmore, of Sacramento, Archibald D. McDougall, and Bronson, Bronson & Slaven, all of San Francisco, and W. H. Hatfield, of Sacramento, for petitioners.

Neil McAllister, Dist. Atty., and Gordon S. Hughes and Ralph H. Cowing, Deputy Dist. Attys., all of Sacramento, for respondent.

Forrest C. Hill, of Sacramento, amicus curiæ.

PER CURIAM.

The above-entitled cases involve the same questions of law. They were argued together and are herein considered together.

Petitioners are members of the board of supervisors of Sacramento county. On July 1, 1933, a new charter went into effect in said county, which made provision for salaries of supervisors. St. 1933, p. 3088. Petitioners were incumbents at this time, receiving salaries of $2,000 per year under the provisions of section 4236n of the Political Code. In August, 1933, an amendment to said section went into effect (St. 1933, p. 1743), providing for compensation of $1,920 per year. Section 10 of the new charter provides for compensation of $10 per meeting, but not exceeding $50 per month. Petitioners claim that the charter provision is inapplicable, and seek

writs of mandate to compel payment of their salaries under section 4236n of the Political Code, as amended.

The charter in express terms applies to petitioners, and makes no exception in favor of incumbents, nor is it possible to read any exception into its language. Section 90 provides that it shall take effect July 1, 1933. Under article 11, § 7½, of the California Constitution, such a charter provision supersedes the general law dealing with compensation.

The applications for writs of mandate are denied.



2 Cal.2d 136

PEOPLE ex rel. DAVIDSON et al. v. MERTZ.

L. A. 14950.

Supreme Court of California.

Dec. 26, 1934.

Rehearing Denied Jan. 24, 1935.

Municipal corporations ⊂=211

Elector who satisfied requirements of School Code for eligibility to elective city board of education by having resided within Los Angeles school district for more than five years prior to election *held* eligible for membership on board of education of city of Los Angeles, notwithstanding he had not resided in city of Los Angeles for two years preceding election, as required by city charter (Pol. Code, § 58; School Code, § 2.471, and § 2.971, as added by St. 1931, p. 2511).

In Bank.

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Proceeding in the nature of quo warranto by the People, on the relation of Kenneth C. Davidson and others, against Stewart O. Mertz, also known as S. O. Mertz. From a judgment for plaintiff, defendant appeals.

Reversed.

For prior opinion, see 34 P.(2d) 726.

Otto A. Gerth, Roy A. Linn, and M. M. Lyter, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and John J. Beck and David R. Faries, both of Los Angeles, for respondents.

PER CURIAM.

This is a proceeding in the nature of quo warranto, challenging the validity of defendant's position as a member of the board of education of the city of Los Angeles. Defendant was elected June 6, 1933, at an election held within the Los Angeles city high school district, took office, and acted as a member of the board until this action was filed on June 29, 1933. Section 307 of the charter of the city provides that no person shall be eligible for said office unless he has been a resident of the city for at least two years preceding his nomination or election. Defendant had not resided within the city for this period, but had, for more than five years prior to his election, resided within the Los Angeles school district. On motion by plaintiffs, the lower court gave judgment on the pleadings, declaring that defendant was ineligible and disqualified from acting as a member of the board, and declared the office vacant, for lack of compliance with the charter requirement.

The situation presented here is, in substance, the same as that considered by this court in Gerth v. Dominguez, 34 P.(2d) 135. As pointed out in that decision, the various school districts under the supervision of the Los Angeles city board of education extend beyond the boundaries of the city, and are by the provisions of the School Code annexed to and deemed a part of the city for the purpose of electing members of the board. See School Code, § 2.471. Hence we held that the right to vote at such an election, expressly given by the School Code, and the right to vote at a recall election, impliedly recognized therein, were safeguarded to residents of the districts, though they lived outside the city limits; and provisions of the city charter purporting to deny these rights were held ineffective because in conflict with the general law. Fundamentally the decision rested upon the settled doctrine that the school system is not a municipal affair, but a matter of general concern, upon which the state law is supreme.

Section 2.971 of the School Code (as added by St. 1931, p. 2511) provides that the members of any elective city board of education "shall be elected at large from the territory within the boundaries of the school district or districts which are under the jurisdiction of said city board of education." Section 58 of the Political Code provides that "every elector is eligible to the office for which he is

⊂=For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

an elector, except where otherwise specially provided. * * *" Under the principles declared in the Gerth Case, supra, these sections establish the eligibility of defendant to the office in question, despite the conflicting provisions of the city charter.

The judgment is reversed.



2 Cal.2d 109

WALLACE v. BOARD OF SUP'RS OF ALAMEDA COUNTY et al.

S. F. 15316.

Supreme Court of California.

Dec. 24, 1934.

1. Municipal corporations ⇐31

1918 constitutional amendment to permit charter for consolidated city and county government, applicable only to Alameda county, *held* not available to such county because it is not now organized under general law as required, in that it has been organized under freeholders' charter since 1927 (St. 1927, p. 2029; Const. art. 11, § 7½, as amended in 1914, and § 7½a, as added in 1918).

2. Municipal corporations ⇐31

County of Alameda, by adoption of county charter and ratification thereof by Legislature, removed itself from constitutional classification of counties which could frame charter for consolidated city and county government, since such a new charter proceeding would be tantamount to surrender and annulment of county charter in an unauthorized way (St. 1927, p. 2029; Const. art. 11, § 7½, as amended in 1914, and § 7½a, as added in 1918).

3. Municipal corporations ⇐31

Where electors of county signed petition for election of board to prepare and propose charter for consolidated city and county government under one section of Constitution, other sections authorizing consolidation of city and county governments were not available (Const. art. 11, § 7; § 7½, as amended in 1914; § 7½a, as added in 1918; § 8½, par. 4).

In Bank.

Petition for mandamus by William C. Wallace against the Board of Supervisors of the County of Alameda and others.

Peremptory writ issued.

C. W. White, of Hayward, for petitioner.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakly and Robert H. McCreary, Deputy Dist. Attys., all of Oakland, for respondents.

Jesse G. Benson, of Oakland, and Wm. J. Locke, of San Francisco, amici curiæ.

Frederick Dubovsky and James P. Montgomery, both of Oakland, amici curiæ in the interests of the 20,217 electors who signed the petition for the electors.

SHENK, Justice.

This proceeding in mandamus is submitted on a general demurrer to the petition filed as a return to the alternative writ. The purpose of the petition is to compel the respondent Board of Supervisors of Alameda County to take no action with reference to calling an election of a board of freeholders to prepare and propose a charter for a consolidated city and county government as prayed for in an initiative petition.

On October 22, 1934, the initiative petition was filed with the county clerk praying that an election be called for the purpose of electing said board of freeholders. The petition was found to have been sufficiently signed by qualified electors of the county and a special election will be called, and the expense thereof incurred for the purpose intended, unless it is the duty of the respondent board to disregard the petition.

The proponents of the petition for the election have proceeded, as noted in the petition, "pursuant to section 7½a of article 11 of the Constitution," and the only question presented is whether it is competent for the petitioning electors or the board to proceed under that section when properly construed and in the light of the following facts:

Prior to January 18, 1927, Alameda county was organized under general law. On that date a charter for the county, prepared, proposed, and adopted under the authority of section 7½ of article 11 of the Constitution, was ratified by the Legislature. Stats. 1927, p. 2029. While the county was so organized and operating under general law, section 7½a of article 11 was added to the Constitution in 1918. That section provides in part: "Any county organized under the general law, and having, at the time this section takes effect, a population of two hundred thousand inhabitants or over, * * * and having within its territorial boundaries one or more incorporated cities or towns, may frame a char-

ter for a consolidated city and county government, by causing a board of fifteen freeholders * * * to be elected by the qualified electors of said county, at a special election." Then follow, in some fifteen pages (Stats. 1917, pp. 1921–1936), the procedure for the adoption of such a charter and a recital of what it is competent to incorporate therein.

The foregoing section of the Constitution is couched in general terms and on its face is available to any county as to which the prerequisites exist, namely, (1) a county organized under general law; (2) having in 1918 a population of 200,000 or over; and (3) having within its boundaries one or more incorporated cities or towns.

The proposition submitting the measure to the voters at the election held November 5, 1918, stated that the proposed section 7½a of article 11 of the Constitution provided for "Organization within county of consolidated city and county government" and "authorizes any county having a population of 200,000 or more, not a consolidated city and county nor operating under any county charter, to frame charter for consolidated city and county government." In the argument in favor of said amendment sent to the voters prior to the 1918 election, it was stated that this amendment was proposed by the Legislature at the request of Alameda county, and that "it applies solely to Alameda county and does not affect any other county in the state. San Francisco and Los Angeles counties are both exempted from its operation by reason of their operation under freeholders' charters. Other counties are excepted by reason of their population."

After the adoption of this amendment in 1918 and prior to 1926 proceedings were taken in Alameda county to adopt a charter under the authority thereof, but the proposed charter failed of adoption because of an adverse vote at the polls.

Thereafter, in 1926, a freeholders' charter for Alameda county was proposed and adopted by the electors of the county pursuant to section 7½ of article 11 of the Constitution (added in 1911 and amended in 1914), and this county charter was, as above stated, ratified by the Legislature in January, 1927. Since that date the county has been organized and is operating under said county charter. Under section 7½ a county charter adopted thereunder "may be surrendered and annulled with the assent of two-thirds of the qualified electors of such county, voting at a special election, held for that purpose, * * * and, in the event of the surrender and annulment of any such charter, such county shall thereafter be governed under general laws in force for the government of counties."

[1] There are at least two sufficient reasons why the county of Alameda may not now avail itself of the authority granted by said section 7½a. The first is that, as to said county, one of the three prerequisites above mentioned is absent, namely, the requirement that the county availing itself of the authority granted by said section be a county organized under general law; whereas, the county of Alameda since 1927 has been organized under a freeholders' charter. Counsel for the respondents concede the absence of this prerequisite, and apparently recognize the fatal effect of its absence on the proceedings pending before the respondent board, but amici curiæ on behalf of the respondents urge that the constitutional language is susceptible of the construction that if all three conditions were present when section 7½a was added to the Constitution, the electors of the county could at any time thereafter proceed thereunder notwithstanding the fact that the county might thereafter, as here, be organized as a charter county under another section of the Constitution. Section 7½a cannot be so read. There is no such limitation as to the first requirement. The language plainly means that when the authority of the section is sought to be invoked the only county qualified to invoke the same is a county then organized under the general law. The limitation as to population, as of the time when the amendment went into effect, is in line with the declared purpose to make the amendment when effective applicable only to Alameda county, as that county was then the only county in the state, other than charter counties, which had a population of 200,000 or over.

[2] The second reason is that by the adoption of a county charter in 1926, and the ratification thereof by the Legislature in 1927, the county of Alameda removed itself from the constitutional classification of those counties to which, on the face thereof, the constitutional amendment was made applicable. As stated, the authority of the section was invoked by the county while it was organized under general law, but the effort failed. It then effectually organized under a charter, pursuant to section 7½, which section contains within itself the method by which such a charter may be surrendered and annulled, that is, with the assent of two-thirds of the electors of the county voting at a special election called for that purpose. To permit the new charter proceeding to go forward would, if carried to completion, be tan-

tamount to the surrender and annulment of the present county charter in a way not authorized by the Constitution.

[3] Some of amici curiæ call attention to the fact that the last paragraph of section 7½a contains a provision that said section shall not "apply to any consolidated city and county, organized as such at the time this section takes effect; nor shall the provisions of this section apply to any county, which at the time this section takes effect, had adopted a freeholders' charter, and was organized and operating under such freeholders' charter." From this language it is argued that it was intended that any county which was not organized and operating under any such charter when the section took effect could thereafter avail itself of said section, notwithstanding the fact that in the meantime such county had organized under a special charter under section 7½. The argument is unavailing. The first prerequisite is plain and unambiguous and must be held to be operative when the authority of the section is invoked. Furthermore, the language of the last paragraph of section 7½a was but a further assurance that the proposal for its adoption was limited to Alameda county alone and was not intended to disturb charter counties organized under other sections of the Constitution. Amici curiæ further insist that, assuming the difficulties encountered in proceeding under section 7½a to be insuperable, still sections 7 and paragraph 4 of section 8½ of article 11 contain provisions authorizing a consolidation of city and county governments and that if section 7½a is not now available to the electors of the county, the authority granted by sections 7 or 8½ is available to effectuate the purposes of the electors whose names are signed to the petitions now before the respondent board. A conclusive answer to this contention is that said petition specifically sets forth that the proceedings contemplated thereby were taken and the election is demanded pursuant to the authority granted by section 7½a; and we find no right anywhere granted to the board to switch from the procedure definitely taken under one section of the Constitution, with the attendant details then required to be followed, to the procedure entirely different in plan and effect, provided for in another section of the Constitution.

Let the peremptory writ issue as prayed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.

3 Cal.App.2d 359

PEOPLE v. THOMPSON.

Cr. 1402.

District Court of Appeal, Third District, California.

Dec. 26, 1934.

1. Criminal law ⇐829(12)

Requested instruction on degree of proof sufficient to warrant conviction *held* properly refused, in view of court's instructions in which reasonable doubt was given its statutory definition (Pen. Code, §§ 1096, 1096a).

2. Indictment and Information ⇐161(5)

Allowance of amendment to information charging burglary by substitution of garage located upon premises in place of basement under dwelling as place entered *held* not error, where no showing was made that defendant was prejudiced thereby and amendment did not change offense from that shown at preliminary examination (Pen. Code, §§ 956, 1008).

3. Criminal law ⇐1144(3)

Where record on appeal from conviction for burglary did not contain evidence taken at preliminary examination as to actual point of entry, court assumed that amendment of information by substitution of garage located upon premises in place of basement under dwelling as place entered did not change offense from that shown at preliminary examination (Pen. Code, §§ 956, 1008).

4. Indictment and Information ⇐175

Particular place is not element in crime of burglary, but is for identification of act only to protect accused from being twice tried for same offense (Pen. Code, § 956).

5. Indictment and Information ⇐86(2)

In prosecution for burglary, where complaining witness testified that motor which was subject of the larceny was either in basement of house or in garage on same premises, information charging basement under dwelling as place entered, and which was later amended by substitution of garage located upon premises as place entered, *held* sufficient to protect defendant from subsequent conviction for same offense (Pen. Code, §§ 956, 1008).

6. Burglary ⇐41(1)

Evidence sustained conviction for burglary (Pen. Code, § 21).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Charles Thompson was convicted of burglary, and he appeals.

Affirmed.

Gilbert Moody, of Turlock, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant, Charles Thompson, together with another, was charged by an information of the crime of burglary; the information alleging that upon a day certain defendant did then and there burglariously enter a certain basement under a particular dwelling house.

The defendant was convicted and now prosecutes this appeal upon the following grounds: (1) Error of the court in refusing to give a particular instruction; (2) error in allowing the amendment to the information; (3) insufficiency of the evidence; and (4) that the verdict was contrary to the evidence.

[1] Defendant requested the giving of the following instruction:

"The circumstances which will amount to the degree of proof sufficient to warrant a conviction can never be previously defined. The legal test which has been applied is that the evidence, when considered as a whole, must establish the defendant's guilt so clearly and so conclusively as not to admit of any reasonable theory consistent with his innocence.

"Circumstances which are consistent with an innocent purpose cannot be said to have a tendency to connect and implicate the defendant with the commission of the offense charged."

This was refused by the court on the ground that the principles therein contained were already covered by the instructions given. This we believe is correct. The court gave the following instruction which seems to adequately care for the situation pointed out by appellant in his proposed instruction.

"In a criminal case, the jury should not find the defendant guilty of any offense unless his guilt is established by the evidence to a moral certainty and beyond all reasonable doubt, and the burden is on the prosecution to establish such guilt.

"The law presumes every man innocent until his guilt is established to a moral certainty and beyond all reasonable doubt, and this presumption attaches at every stage of the case, and to every fact essential to a conviction.

"Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge.'

"While presumptions of law, independent of evidence, are in favor of innocence, and every man is presumed to be innocent until proven guilty, yet, if the evidence establishes the truth of the charge to a reasonable and moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are to act conscientiously upon it, it is your duty to find the defendant guilty. The law does not require demonstration or that degree of proof which excludes all possibility of error and produces absolute certainty. Such proof is rarely available. Moral certainty only is required or that degree of proof which produces conviction in an unprejudiced mind.

"The term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for its existence, arising out of evidence in the case; such doubt as you are able to find a reason for in the evidence. As applied to the evidence in criminal cases, it means an actual and substantial doubt growing out of the unsatisfactory nature of the evidence in the case. It does not mean a doubt which arises from some mere whim or vagary or from any groundless surmise, suspicion or guess."

The instruction given contains the definition of a reasonable doubt as defined by section 1096 of the Penal Code, and section 1096a of that Code provides that, if the definition of reasonable doubt is given in the language of the Code, no further instruction on that subject need be given.

[2, 3] At the conclusion of the evidence, and just prior to the closing argument of the district attorney, the prosecution moved to amend the information by substituting "garage located upon the premises" in place of "basement under the dwelling house." The motion was granted over the objection of defendant.

The allowance of this amendment is cited as error, but in this we cannot agree with appellant. Section 1008 authorizes the court to amend an indictment or information for any defect or insufficiency at any stage of the proceedings, and provides that a reasonable continuance may be granted if the substantial rights of the defendant would be affected thereby.

Section 956 of the Penal Code also provides that, "when an offense involves the commission of, or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, or of the place where the offense was committed, or of the property involved in its commission, is not material."

In view of the fact that no request for a continuance was made, we may assume defendant did not consider any of his substantial rights were prejudiced by the amendment, and also by the fact that, as none of the evidence bearing upon the actual point of entry, taken at the preliminary examination, was produced before us, we must assume that the amendment does not change the offense from that shown at such preliminary examination. People v. Johnston, 114 Cal. App. 241, 299 P. 805; People v. Nahhas, 121 Cal. App. 428, 9 P (2d) 278. In the absence of such record, this court must indulge all presumptions in favor of the judgment. People v. Seitz, 100 Cal. App. 113, 279 P. 1070.

[4, 5] The transcript reveals that the complaining witness testified the motor, which was the subject of the larceny, was either in the basement of his house, the only entrance to which was by an outside cellar door, or was in the garage located about ten or twelve feet from his house on the same premises. The particular place is not an element in the crime of burglary, but is for identification of the act only to protect the accused from being twice tried for the same offense. In the instant case the information is entirely sufficient to protect defendant from a subsequent conviction for the offense described therein.

[6] Appellant next contends the evidence is insufficient to support the verdict of guilt against appellant, and particularly that there is nothing to show appellant entered the premises with a criminal intent. The testimony reveals that appellant and one Louis Reynolds engaged a taxicab one evening about 8 o'clock, and together proceeded to the house of the complaining witness, a brother of Louis Reynolds. There, without permission, the two entered the basement and garage in search of the motor, and appellant, finding the motor in the garage, placed it in the taxicab, and then together they drove out into the country about two miles, where the motor was concealed under some bushes. That night appellant returned alone to the spot where the motor was hidden, and moved the same to another hiding place. The following morning the two principals, with the same taxicab driver, returned to the place where the motor had been concealed, and drove to Stockton, where the motor was sold and the profits divided.

The fact that they went in the evening after dark, drove into an alley, and turned off the lights and motor of the taxicab, that the motor was taken into the country and hidden, and then taken to Stockton and sold at a price considerably below its actual value, was all evidence that the jury could consider in determining whether appellant entered with a criminal intent. The intent with which an act is committed is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused. Section 21, Pen. Code.

The complaining witness testified that he gave no one permission to take the motor, and the police officer testified defendant told him that he got some of the proceeds from the sale thereof.

We are of the opinion that the judgment of conviction should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.



In re OUNJUIAN'S ESTATE. *

HINES, Administrator of Veterans' Affairs, etc., et al. v. MILLER.

Civ. 9960.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1934.

Rehearing Denied Jan. 29, 1935.

Hearing Granted by Supreme Court Feb. 27, 1935.

1. Insane persons ⇐65

Where for some months prior to bank failure, incompetent's guardian had been looking for proper investment of estate's funds, term deposit in bank pending decision as to investment *held* not a "loan on personal security in lieu of an investment" so as to render guardian liable for loss due to bank failure.

2. Insane persons ⇐45

Where incompetent's guardian agreed that his surety should have joint control with

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 52 P.2d 220.

him over estate's funds, guardian was a guarantor of the funds and was liable for partial loss of term and checking deposits due to bank failure, but was not liable for balance in escrow department.

Appeal from Superior Court, City and County of Los Angeles; Charles S. Crail, Judge.

Final accounting by Theodore Miller, former guardian of estate of Alea K. Ounjuian, an incompetent person. From an order settling the account, Frank T. Hines, Administrator of Veterans' Affairs, and United States Veterans' Administration, and Albert P. Keck, guardian of such estate, appeal.

Reversed in part, and affirmed in part.

Carlos S. Hardy, of Los Angeles, for appellant Keck.

H. C. Veit and J. C. Shunk, both of Los Angeles, for appellant Hines.

Mills, Hunter & Dunn and C. R. Liljestrom, all of Los Angeles, for respondent.

HAHN, Justice pro tem.

Appeal from an order settling the final account of a former guardian of the estate of Alea K. Ounjuian, an incompetent person.

Two questions are raised by appellant which are stated as follows: "1st: Whether the former guardian should be surcharged with funds which he deposited in a bank which failed, said deposit being in the form of a term deposit. 2d: Whether, if not otherwise liable for the loss of said funds, the fact that said funds were under the joint control of his surety, a bonding company, would make the guardian a guarantor of said funds and liable for their loss."

These questions arise by reason of the allowance by the court as a credit in the guardian's final account of the sum of $5,227.38, which amount was treated as lost to the estate because of the failure of the Bank of West Hollywood wherein the funds of the estate were on deposit. This amount represents three items: $4,800, balance of a term deposit in said bank; $347.38, balance on deposit in a checking account; and $80, balance in the escrow department of the bank remaining from the proceeds of property sold for the estate.

Appellant contends that this term deposit was an investment of estate funds, and, inasmuch as no court approval was had for making this term deposit, the guardian is liable to the estate for this loss of $4,800.

[1] The evidence shows that respondent for some months prior to the bank failure was seeking a suitable investment for these funds, and had contacted a broker with a view to purchasing some bonds. Pending a decision on the question of such an investment, respondent deposited $8,000 of estate funds in a term account in the Bank of West Hollywood, where he was also carrying a small amount in a checking account. Before he found a satisfactory investment for the $8,000, the bank failed. In the process of liquidation, dividends to the amount of $3,200 were paid on this account, leaving $4,800 unpaid in the term account, which amount was treated as a loss of estate funds, and for which the guardian in his account asked credit. On this branch of the appeal, we feel the court, under the evidence, was justified in finding that the money deposited in said bank was for temporary safe-keeping and did not constitute a "loan on personal security in lieu of an investment."

As to the second point, it appears that, at the time the United States Fidelity & Guaranty Company furnished the guardian's bond for respondent, he entered into a written agreement with the bonding company by the terms of which the bonding company was to have joint control with the guardian over the funds in both the bank deposit accounts. Respondent testified that he could not draw any of the funds on deposit in the bank without the counter signature of a representative of the bonding company.

In Re Estate of Wood, 159 Cal. 466, 114 P. 992, 36 L. R. A. (N. S.) 252, the court had before it a similar question. The money belonging to the estate of the minor on deposit in the bank was subject to withdrawal only on the joint signatures of the guardian and a representative of the bonding company that furnished the bond for the guardian. In holding the guardian liable for loss of funds on deposit upon failure of the bank, the court gave approval to the rule of liability as stated in the syllabus in the case of McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118: "If a trustee enters into any arrangement with reference to trust funds which surrenders or limits his control over them, he becomes a guarantor of the fund, irrespective of his motives, or whether his surrender of control was the cause of the loss of the fund." The opinion cites other cases which sustain the view expressed in the above quotation.

We are unable to distinguish the instant case from that of In re Estate of Wood, supra, nor does respondent cite us to any case

in this or other jurisdictions which is in conflict with the views therein expressed.

[2] We therefore conclude that the court erred in allowing the guardian credit in his final account for the said items of $4,800 and $347.38. The judgment is reversed only as to the allowance of the two items of $4,800 and $347.38. Otherwise it is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



2 Cal.App.2d 708

OHLSON v. FRAZIER et al.

MAYERS et al. v. SAME.

Civ. 9050.

District Court of Appeal, First District, Division 1, California.

Dec. 10, 1934.

1. Automobiles ⇐181(1)

Driver of automobile familiar with mountainous dirt highway *held* negligent in drawing up alongside school bus on straightaway approach, which was 19 feet wide and 150 feet long and bordered side of ravine, to hairpin curve, and attempting to pass bus on hairpin curve, distance around which was 100 feet, and which was 70 feet wide at center.

2. New trial ⇐68

Whether owner and driver of automobile was grossly negligent in collision with school bus, so as to be liable for damages sustained by guest passengers in automobile, *held* for trial judge on motion for new trial, regardless of finding of jury (St. 1929, p. 1580, § 141¾).

3. New trial ⇐71

On motion for new trial, probative force and evidentiary value of evidence of both parties, whether evidence is conflicting, is for trial judge.

4. New trial ⇐72

Trial judge can grant motion for new trial if he is satisfied jury's finding is contrary to weight of evidence.

5. Appeal and error ⇐979(2)

Granting of new trial by trial judge will not be interfered with by appellate tribunal if there is any evidence in record fairly supporting inferences drawn by trial judge.

6. Appeal and error ⇐933(1)

In action for damages sustained in collision when driver of automobile attempted to pass bus, reviewing court in reviewing grant of new trial must accept as true testimony that there was room to pass and that driver of automobile would have been able to complete pass safely had not bus driver swung to left of center of roadway.

7. Automobiles ⇐245(24)

Driver and owner of automobile *held* not grossly negligent as matter of law in attempting to pass school bus on hairpin curve, where there was room to pass and driver and owner would have been able to complete pass safely had not bus driver swung to left of center of roadway, as regards liability of driver to guest passengers (St. 1929, p. 1580, § 141¾).

8. Appeal and error ⇐930(1)

On appeal from judgment in favor of guest passengers of automobile in their action against school district for damages sustained in collision when driver of automobile attempted to pass school bus on hairpin curve, testimony of guest passengers and driver of automobile, that there was room to pass and that driver would have been able to complete pass safely had not bus driver swung to left of center of roadway, would be accepted as true.

9. Automobiles ⇐244(12)

In action against school district by guest passengers of automobile for damages sustained in collision which occurred when driver of automobile attempted to pass school bus on hairpin curve, evidence *held* to sustain finding that bus driver was negligent.

10. Evidence ⇐237

In action against school district by guest passengers for damages sustained in collision when driver of automobile was attempting to pass school bus on hairpin curve, statements of driver shortly after collision that he was in wrong *held* not binding on guest passengers who were not present when statements were made.

11. Evidence ⇐253(1)

One joint tort-feasor by his extrajudicial declaration cannot exculpate other joint tort-feasor from responsibility for tort, where responsibility of tort-feasors for injury is concurrent.

12. Automobiles ⇐243(1)

In action against school district and bus driver by guest passengers of automobile for damages sustained in collision with school bus, admission of testimony of driver of automobile as to facts tending to show animosity between driver of automobile and bus driver prior to accident *held* not error under evidence.

13. Automobiles ⇐247

In action against school district and driver of school bus by guest passengers of automobile for damages sustained in collision, bus driver, whose negligence concurred with that of automobile driver in causing accident, was not exonerated because driver of automobile was exonerated.

14. Automobiles ⇐247

Where there is concurrent negligence contributing proximately to happening of accident, exoneration of one tort-feasor, although without legal justification, does not exonerate other tort-feasor.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Actions by Benedict Ohlson, and by Belle Mayers and another, against Jack Frazier and others, which were consolidated for trial. Judgment for the plaintiffs. From orders granting the named defendant new trials in both actions, the plaintiffs appeal, and from the judgments and orders denying the rest of the defendants new trials, the rest of the defendants appeal.

Orders and judgments affirmed.

Albert J. O'Brien and Langton A. Madden, both of San Francisco, for appellants Walter Mott, Tamalpais Union High School Dist. and Trustees.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel), for respondents.

KNIGHT, Justice.

The defendant Jack Frazier, accompanied by the plaintiffs Benedict Ohlson, James B. Mayers, and Mrs. Belle Mayers, while driving over the Bolinas road toward Stinson Beach in Marin county in a sedan automobile owned and driven by Frazier, overtook and attempted to pass a school bus on the approach to a hairpin turn in the road; and about the center of the turn the two vehicles came in contact with each other, following which the sedan ran wild for a short distance and then plunged over the bank, injuring Ohlson and Mrs. Mayers. Claiming that the accident was proximately caused by the concurrent negligence of the drivers of the vehicles, Ohlson and Mrs. Mayers brought separate actions for damages against said drivers, and joined as parties defendant the school district which operated the bus, and the members of the school board. Frazier was charged with gross negligence, and Mott, the driver of the bus, with ordinary negligence. The two actions were consolidated for trial, and a jury awarded Ohlson $750 damages, and Mrs. Mayers and her husband, who joined as party plaintiff, damages in the sum of $3,250. Judgments were entered accordingly. Subsequently Frazier moved for a new trial in each action, and his motions were granted; the ground specified in the orders being insufficiency of the evidence. From such orders plaintiffs have appealed, urging as ground for reversal that the evidence establishes as a matter of law that Frazier was guilty of gross negligence. The remaining defendants also made a motion in each case for a new trial, which was denied; and they have appealed from the judgments, urging as main ground for reversal that the evidence not only fails to show any negligent act on the part of the bus driver, but on the contrary establishes as a matter of law that the sole proximate cause of the accident was gross negligence on the part of Frazier in attempting to pass the bus under the conditions there present. The four appeals are presented in one record. In our opinion the state of the evidence is such as to preclude interference on appeal with either the rulings of the trial court or the judgments.

The accident happened about 4 o'clock in the afternoon. All parties were thoroughly familiar with the road. Frazier and the other occupants of his automobile lived at Stinson Beach and traveled over the road frequently; and Mott had been driving the school bus over it for upwards of four years. It was a mountainous, dirt road with many grades and sharp curves. The hairpin turn was at the top of a grade and curved around the end of a ravine. At the approach to the turn, going toward Stinson Beach, the road followed a straightaway course for about 115 feet along one side of the ravine, then curved to the left around the end of the ravine, and followed along the other side in the opposite direction. The distance across the ravine at the ends of the hairpin turn was 73 feet, and the radius of the arc was 27 feet. The distance around the curve was about 100 feet. The roadbed of the straightaways leading up to the curve on either side was 19 feet wide, but the curve had been recently reconstructed and widened so that the roadway at the center of the curve was 70 feet wide; the traveled portion of the newly constructed road being about a foot higher in elevation than the traveled portion of the old road. The bus was 27 feet long, 7 feet 3 inches wide,

inclosed almost entirely with glass, with a seating capacity of 28 passengers; and at the time of the accident it was carrying 20 high school students. The sedan was about 6 feet wide.

The sedan overtook the bus about half a mile from the curve and then followed closely behind it, both vehicles traveling about 25 or 30 miles an hour. The bus caused considerable dust; and on one occasion, several hundred feet distant from the turn, Frazier sounded his horn, indicating he wanted to pass, but the bus held to the center of the road; the driver claiming he neither heard the horn nor knew of the presence of the sedan. Upon reaching the straightaway, the bus, in order to negotiate the turn, drew over to the right. As it did so Frazier shot ahead in an effort to pass it. He ran parallel with the bus until near the center of the turn, at which time, according to the testimony given by the occupants of the sedan, the bus drew back over toward and across the center of the road and then turned to the left directly into the sedan; the front of the bus striking the sedan just behind the engine. The sedan, then apparently out of control, plunged ahead and to the right, in front of the bus, for a distance of approximately 50 feet, struck a 10-foot embankment on the right side of the road, rebounded to the left side of the road, went through a wire fence, and over the bank into the ravine. It landed about 80 feet below the road, upside down, and in its descent down the bank turned over three times. The bus was brought to a standstill on the roadway within 10 or 15 feet of the point of the impact.

[1-7] It is evident, beyond doubt, from the foregoing, that Frazier was negligent in attempting to pass the school bus on the curve under the circumstances above described; but by virtue of the provisions of section 141¾ of the California Vehicle Act (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580), as it stood at the time of the accident, he was liable in damages to plaintiffs (who admittedly were guest passengers) only in case he was guilty of gross negligence, and the question of whether he was guilty of gross negligence was one of fact which the trial judge had the right to consider and determine in passing upon the motion for new trial, regardless of the finding thereon by the jury. Furthermore, it is well settled that in passing upon such a motion a trial judge is not bound, as the appellate tribunal is on appeal, by the rule of conflicting evidence. He must for himself weigh and consider the evidence for both parties, and draw his own conclusions therefrom; and if he is satisfied that the finding of the jury is contrary to the weight of evidence, he is warranted in granting a new trial. Even where the evidence is not conflicting the probative force and evidentiary value thereof is nevertheless a matter for the trial judge to determine in passing upon such a motion; and if there is any evidence in the record fairly supporting the inferences drawn by the trial judge, his decision in granting a new trial must be sustained. 2 Cal. Jur. 905; Malloway v. Hughes, 125 Cal. App. 573, 13 P.(2d) 1062. In the present case Frazier and the other occupants of his sedan testified in effect that when the bus reached the straightaway and pulled over to the right, there was room for the sedan to pass on the left side and that it would have been able to pass safely but for the fact that the bus driver upon nearing the center of the curve drew over toward and across the center of the road and then turned to the left, bringing the front end of the bus in collision with the side of the sedan about opposite the windshield. In view of such testimony, which on appeal must be accepted as true, it cannot be held as a matter of law and contrary to the implied finding of the trial judge that Frazier was guilty of gross negligence. The cases cited by plaintiffs on this branch of the case are not controlling for the reason that in none of them did the reviewing court reverse the conclusion reached by the trial judge in passing on such issue.

[8, 9] Likewise, in determining the appeals from the judgments it must be assumed that the testimony given by Frazier and his guest passengers is true; and that being so, such testimony in our opinion is legally sufficient to support the implied findings of the jury and the trial judge that the bus driver was negligent in the operation of the bus, because they all testified in substance that the curve was wide enough for both vehicles to make the turn safely, and that they would have done so if the bus had kept to the right of the center of the road. True, the bus driver and three of the students riding with him at the time (the others were not called as witnesses) testified in effect that the bus did keep on its right side of the road; that in order to negotiate the curve safely it was necessary upon reaching the center thereof for the bus to make a left turn; and that just as it was turning the sedan speeded ahead in an effort to pass, and collided with the front left fender of the bus. It may be conceded that such testimony would have been

legally sufficient to sustain a verdict in favor of the bus driver if a verdict had been returned accordingly; but the jury did not accept their version of the happening of the accident. It decided in conformity with the testimony given by the occupants of the sedan. Consequently the most that can be said on appeal for the testimony of the bus driver and said students is that it merely raised a conflict on the essential disputed facts.

It is contended on behalf of the bus driver that even though he did encroach upon the left side of the road near the center of the curve, such fact alone does not prove he was negligent because all the affirmative testimony given upon the subject shows that he did not know of the presence of the sedan, and that even though he was aware it was following him, he had the right to assume its driver would not attempt to pass him on this dangerous curve. As to whether or not the bus driver knew of the presence of the sedan at any time before it attempted to pass the bus, the evidence apparently presents a conflict. The bus driver and said three students all testified that they were not aware of the fact that the sedan was following them. But in apparent contradiction thereof it was shown that the bus was provided with a rear view mirror; and the occupants of the sedan testified that several of the students saw them through the rear window of the bus and were laughing at them, from which the jury had the right to infer, so plaintiffs argue, that the bus driver must have been aware of the presence of the sedan and of the intention of the driver thereof to attempt to pass the bus at an opportune time. However, regardless of the disputed question of whether the bus driver knew of the presence of the sedan at any time before it started to pass the bus, it was clearly established by the testimony of the bus driver and said three students themselves that they knew of its presence as soon as it speeded ahead in an effort to pass them. In this regard they stated that they heard and saw the sedan as it ran up along side of and parallel with the bus; that in so doing it scraped along the side of the bus and the horn of the sedan was sounded. Therefore, accepting as true the testimony of Frazier and the occupants of his car that despite such knowledge the bus driver drew over toward and across the center of the road and turned to the left as he neared the curve, thereby colliding with the sedan, it would appear that the implied findings of the jury and the trial judge that the bus driver was negligent are sufficiently supported.

[10, 11] Attention is called to the testimony given by the bus driver and two of the students to the effect that shortly after the happening of the accident Frazier admitted he "was in the wrong"; that he "had no business trying to pass the bus on the curve." But it is evident that whatever Frazier may have said at that time is not binding on these plaintiffs because admittedly they were not present when the declarations were made; and furthermore, so far as the rights of an injured plaintiff are concerned, one joint tort-feasor by his extrajudicial declaration may not exculpate the other from responsibility where as here the evidence at the trial is legally sufficient to establish a concurrent responsibility.

[12-14] There was no error in the ruling of the trial court permitting Frazier to testify to certain facts tending to show that a feeling of animosity existed between him and Mott prior to and at the time of the accident, particularly in view of the fact that afterwards Mott himself admitted having had a dispute with some man, whose identity at the time was unknown to him, about the same subject-matter. Nor was the bus driver exonerated by the trial court's ruling granting Frazier's motions for a new trial, the law being well settled that where there is concurrent negligence contributing proximately to the happening of an accident, the exoneration of the one tort-feasor, even without legal justification, does not operate to exonerate the other. Their respective liabilities are joint and several. Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999.

The order and the judgment appealed from in each action are, and each of them is, affirmed.

We concur: TYLER, P. J.; CASHIN, J.

3 Cal.App.2d 443

STURDEVANT v. STURDEVANT.

Civ. 8893.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

1. Trial ⇐391

Full findings, unless waived, are required in trial without jury on all material issues raised by pleadings and evidence (Code Civ. Proc. §§ 632, 633).

2. Appeal and error ⇐1071(6)

In action for money allegedly due on foreign judgment for separate maintenance, failure to make finding on defense of payment *held* prejudicial, where undisputed evidence negatived such defense and hence would not support implied finding, if any, of payment (Code Civ. Proc. §§ 632, 633).

3. Appeal and error ⇐1122(2)

In action for money allegedly due on foreign judgment for separate maintenance, where trial court failed to make findings on all material issues, on which evidence was substantially without conflict, and new trial was unnecessary, Court of Appeal would follow remedial statute and make fact findings and remand cause for judgment accordingly (Code Civ. Proc. § 956a).

Appeal from Superior Court, Los Angeles County; Oda Faulconer, Judge.

Action by Jessie Sturdevant against Ralph S. Sturdevant, who filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Findings and judgment set aside, and cause remanded, with directions.

Stoner & Gardner, of Los Angeles, for appellant.

George N. Foster, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

By a statement of facts in ordinary and concise language, appellant in her complaint herein stated a cause of action for recovery from respondent of the sum of $2,986.86 on a subsisting and unsatisfied judgment entered in favor of appellant and against respondent by a Nebraska state court on July 1, 1925, for separate maintenance, payable in monthly installments indefinitely. In his answer respondent admitted the making and entry of the judgment, but denied that it was valid, subsisting, and enforceable against him in Nebraska, as alleged in the complaint; admits that he ceased payments as required by the judgment, on September 1, 1928, but denies there is anything unpaid thereon. As a separate and distinct defense, respondent alleges in his answer that he had deeded certain real property in Nebraska to the mother of appellant under an agreement that such deed was made for the use and benefit of appellant, the mother to be and act as trustee for appellant as beneficiary, that said property was of the value of $12,000, subject to an incumbrance in the sum of $4,400, and that, in addition to such deed and in settlement of said judgment, respondent delivered to appellant all the furniture in the house on said real property, which furniture was reasonably worth the sum of $2,000. A second defense states that the judgment "has been fully paid and satisfied by the property turned over to the plaintiff by the defendant in settlement of the same and the rents and profits thereof."

A third defense relating to certain insurance policies was pleaded but at the trial, by stipulation, was eliminated from the case. In a cross-complaint, respondent alleges the making and entry of the judgment, that he deeded the real property to appellant's mother in trust for the use and benefit of appellant, and that appellant received from respondent such real property of the value of $12,000, subject to incumbrance in the sum of $4,400 and furniture of the value of $2,000 in settlement of said judgment, and that appellant has since said transfer received the rents and profits from said real property. He also set forth the matter relating to the insurance policies which was abandoned at the trial. He asks for an accounting of rents and profits, and that he be given credit for the value of the real property and furniture and rents and profits in the judgment. By her answer thereto, appellant put in issue the matter of transfer of the property in settlement of the judgment, and denied receipt of any rents and profits. After trial, the court signed findings, and caused judgment to be entered thereon in favor of defendant. From this judgment, this appeal is taken and brought here by the so-called alternative method, and the only question presented by appellant relates to the sufficiency of the evidence to show payment of the installments of the Nebraska judgment, accruing after September 1, 1928.

In its findings the lower court found that all the allegations of the complaint were true,

except that it was not true that defendant had not paid any installments since September 1, 1928, and that it is not true that the sum of $2,986.86 remains "wholly due, owing and unpaid from the defendant to the plaintiff" on said judgment, but finds that such judgment is not satisfied of record. The court then finds in this language: "The court finds generally upon the issues joined in favor of the defendant and against the plaintiff." As to the answer and cross-complaint, the court signed this finding: "The court refers to the answer and cross-complaint of the defendant, filed herein and the answer of the plaintiff to said cross-complaint and finds generally in favor of the defendant and against the plaintiff." Then the court follows with this finding: "The court further finds that after applying the rents and profits received by the plaintiff from the property located at 3260 South 31st Street, Lincoln, Nebraska, and the value of the household goods and furniture given by the defendant to the plaintiff and which the court finds to be of the reasonable value of about $2,000.00, there is nothing due to the plaintiff on said judgment sued upon by reason of the installments which have accrued and are delinquent under the terms of the foreign judgment and that the same is fully paid up to the date of trial, to-wit: October 7, 1932." The court then finds there is nothing due on account of the insurance policies and that a further accounting is unnecessary, and as its conclusion finds that plaintiff is entitled to take nothing by reason of her complaint.

[1, 2] Under the system of express findings provided for by the Code of Civil Procedure (sections 632, 633), full findings, unless waived, are required on all material issues raised by the pleadings and evidence. This applies, not only to issues raised by denials of the allegations of the complaint, but to issues raised upon affirmative defenses in the answer or upon a cross-complaint. It is patent, upon examination of the pleadings and findings herein, as exemplified by the foregoing synopsis thereof, that there is a failure to find on the affirmative defenses of settlement of the judgment by the deed, and the furniture as alleged in the answer. A failure to make a finding on a material issue results in prejudicial error entitling the complaining party to a reversal, provided it appears from the record that there was evidence introduced as to such issue, and the evidence was sufficient to sustain a finding in favor of such party. Herein there was evidence introduced in respect to the giving of the deed and the disposition of the furniture, and that evidence clearly shows, and respondent's own testimony reveals, that no deed was ever given by respondent to appellant's mother for the appellant's benefit or use, in trust or otherwise, and that no giving or receiving of the furniture in settlement of the judgment ever took place. If the general finding quoted above could under any circumstances constitute a sufficient finding in support of respondent's affirmative defense of payment, or if the so-called finding that "there is nothing due to plaintiff," coupled with the finding that the judgment "is fully paid up to the date of trial," be held sufficient to constitute a finding on the issue of payment, then it must be held herein that such finding is not supported by the evidence, but is contrary to the undisputed evidence. To substantiate this conclusion, it is sufficient simply to refer to the admission in respondent's answer herein and his uncontroverted testimony that he has made no payments on the judgment since September 1, 1928, and to the uncontradicted testimony of respondent and other witnesses concerning the execution of such deed, and the history of such furniture. Briefly stated, it is as follows: Respondent being in default on the loan on the property in question, he and appellant, his coowner, signed, acknowledged, and delivered a deed of the property to the mortgage holder. At the time of such transaction, respondent was in Reno, Nev., and appellant was in Lincoln, Neb. No communication or agreement was had between them in reference to this deed. It was signed and delivered to satisfy the mortgage, on threat of foreclosure, and to escape deficiency liability. After delivery of the deed to the mortgage holder, who was the grantee named therein, appellant's mother negotiated with the mortgage holder to buy the property, and did buy it, but, when it came to the transfer of the title by the mortgage holder to the mother, the expedient and short cut of erasing the grantee's name in the deed previously given and inserting the mother's name as grantee was adopted and used. Respondent knew nothing of this transaction at the time, and did not in any way participate therein. All the evidence clearly shows that his allegations in his affirmative defense in respect thereto were false. Diligent search through the reporter's transcript also discloses no evidence concerning the amount of any rents and profits received from the real property, except respondent's testimony that the property with the furniture had a rental value of $100 per month, despite the recitation in the court's findings, quoted above,

"that after applying the rents and profits received by the plaintiff from the real property."

It also appears from the evidence without contradiction that no agreement or discussion ever arose between appellant and respondent in respect to the disposition of the furniture. Respondent left his home and his wife in 1921, and the furniture was in the home at the time, and left in the possession of appellant, who has ever since retained such possession without any agreement as to its disposition. There was no evidence of its value given at the trial, except that of respondent, who said it had originally cost over $2,000 some years before, which amounted to no proof at all of its value at the time in question. It is clear from the evidence that, had the court made specific findings on the plea of payment by means of the deed and delivery of furniture, there was sufficient evidence—indeed undisputed evidence—to require a finding that the allegations in the affirmative defense and of the same matter in the cross-complaint were not true. Had such finding been thus made, appellant would have been entitled to judgment. The failure to find on this material issue or defense alone entitles her to a reversal. In re Estate of Pendell, 216 Cal. 384, 14 P.(2d) 506. We must therefore hold that it was prejudicial error to fail to make findings on these material issues, and that any implied finding of payment is not supported by the evidence.

[3] Inasmuch as the evidence adduced at the trial and here before us in the record on appeal is substantially without conflict on all material issues, and that in the interest of justice a new trial is not required, instead of reversing the judgment herein and remanding the cause for further proceedings in the trial court, we will follow the remedial and salutary provision of section 956a of the Code of Civil Procedure and make findings of fact herein as follows: (1) That all the allegations contained in paragraphs I, II, III, IV, V, and VII of plaintiff's complaint are true; (2) that, in respect to the allegations of paragraph VI of said complaint, we find the same are true except as to the amount alleged to be unpaid on the judgment sued upon, and as to that we find the amount which had accrued on said judgment from September 1, 1928, up to the commencement of the action, is the sum of $2,525, and that said sum or any part thereof has not been paid; (3) that the denials in defendant's answer to allegations of plaintiff's complaint, and the affirmative allegations thereof, and the allegations in the separate defenses therein, are not true; (4) that the allegations of defendant's cross-complaint are not true, except the allegations in paragraph I setting forth the entry and terms of the judgment of the Nebraska court. From these findings, the court concludes that defendant is entitled to no relief under his cross-complaint, and that plaintiff is entitled to a judgment against defendant for the sum of $2,525, together with interest on each deferred monthly payment from date of maturity to date of judgment, at the rate of 7 per cent. per annum.

It is therefore ordered that the findings and judgment made and entered by the court below be, and the same are hereby, vacated and set aside, and the cause remanded to the lower court, with directions to enter a judgment in accordance with the above conclusion.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 419

BARONI v. MUSICK.

Civ. 9175.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 27, 1935.

1. Pleading ⇐327

Bill of particulars must be regarded as an amplification of the complaint and as if it had been incorporated in an amended complaint.

2. Appeal and error ⇐1033(9)

Where different contracts for specific sums for professional services were alleged by plaintiff, and only one contract for specific sum was admitted by defendant, who denied that other contracts called for specific sums, verdict for plaintiff for less than aggregate amount claimed *held* not ground for complaint by defendant.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by D. N. Baroni against Howard L. Musick. From a judgment for plaintiff, defendant appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Dan M. Critchley, of Los Angeles, for appellant.

Hickcox & O'Connor, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Plaintiff's complaint, based on the common counts, alleged a balance of $6,350 due his assignor, an attorney at law, for professional services rendered defendant, and the sum of $31.50 laid out and expended by said assignor, at defendant's request, for costs of suit. A bill of particulars furnished defendant by plaintiff showed that the charges for legal services were based on fees allegedly agreed to be paid by defendant in six actions, viz., one of $5,000, one of $1,000, a fee of $1,000 agreed to be paid for three separate cases, and a fee of $250 allegedly agreed to be paid for the defense of an action against defendant. The jury returned a verdict of $5,000 in favor of plaintiff, upon which judgment was entered by the court. Defendant appeals.

Appellant urges that the "evidence received and the findings by the jury thereon" do not support the cause of action made by the pleadings. In other words, the contention is that, if the jury had found that fees in the sum of $7,250 and costs of $31.50, less payments of $900, as alleged in the complaint as exemplified by the bill of particulars, had been expressly agreed to be paid, the verdict should have been for the sum of $6,381.50, and that in consequence the jury must have impliedly found adversely to plaintiff's contention of agreed fees. If the complaint alleged, and the evidence showed, one agreed fee of $7,250, we believe such contention would be good. The complaint and bill of particulars allege, however, and plaintiff's evidence shows, four separate fees aggregating such amount. The defendant admitted that he agreed to pay plaintiff a fee of $1,000 for his services in the three separate cases, but denied that there was any fee agreed upon in the other three cases. Under the issues raised by the pleadings and the evidence, the jury might well have found for the plaintiff on the admitted $1,000 fee and for the defendant on the remaining $1,000 fee and the costs advanced. In such case, with the credit of $900, plaintiff would have been entitled to a fee of $5,100, or $100 more than the amount of the verdict. The verdict returned was in the sum of $5,000, exclusive of all former payments.

[1, 2] The bill of particulars must be regarded as an amplification of the complaint and as if it had been incorporated in the amended complaint. Treadwell v. Nickel, 194 Cal. 243, 263, 228 P. 25. Plaintiff's right to recovery was therefore limited to proof of an express contract for the payment of the fees alleged. Plaintiff's proof was in support of his complaint as amplified. Defendant's evidence was against the existence of any such contracts, with the one exception hereinbefore mentioned. He did attempt to show by an experienced attorney that the reasonable value of all of the services rendered by plaintiff was $500 and no more. It is evident, however, that such evidence was introduced as tending to show that defendant would not have expressly agreed to pay the large fees claimed by plaintiff. Plaintiff attempted to show by another attorney that the contracts were fair and reasonable, in view of the services rendered. An instruction was given by the court at defendant's request directing the jury to return a verdict in favor of defendant if they found the contracts did not exist or were not made as alleged by plaintiff, and an instruction given at the request of plaintiff directed a finding for plaintiff if the jury found that such contracts were made by the parties. All of the instructions offered by the parties indicate that the case was tried on the theory that recovery by plaintiff could only be had if such contracts were found to have been made. In view of the fact that the jury did not find for defendant under the instruction offered by him, we must assume that they found for plaintiff as to the existence of contracts in excess of the amount of the verdict, and therefore we fail to see how defendant has been injured because plaintiff has accepted a verdict for something less than he could have had.

After an examination of the record, including the evidence and proceedings as shown by the reporter's transcript, we see no merit in the contention that there was misconduct on the part of the court and respondent's attorney during the trial. Nor do we find any error in the giving, or refusing to give, certain instructions.

The judgment is affirmed.

I concur: CRAIL, J.

This opinion was prepared by Hon. HARRY ARCHBALD, Justice pro tem.

SQUIAR et al. v. McLEAN et al.

Civ. 8971.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 28, 1935.

1. Automobiles ⇐181(7)

Automobilist who proceeded into intersection at 25 miles per hour and collided with automobile which was first noticed by guest when automobilist was three car lengths from intersection and was approaching intersection at speed of 40 miles per hour *held* not guilty of willful misconduct so as to be liable to guest (St. 1931, p. 1693, § 141¾).

2. Costs ⇐154

In automobile collision case, allowance of $15 costs for deposition of plaintiff taken by defendant in whose favor judgment was rendered *held* not abuse of discretion because defendant who was insured was not personally bound to pay costs.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman and Lester W. Roth, Judges.

Action by Edith Squiar and another against Robert B. McLean and Oscar Johnson, the last-named of whom was dismissed from the action. From a judgment in favor of the first-named defendant, the plaintiffs appeal.

Affirmed.

R. J. Gresham and Montgomery G. Rice, both of Los Angeles, for appellants.

Chase, Barnes & Chase and Laurence A. Peters, all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

By the first amended complaint filed in the lower court, plaintiff Edith Squiar (hereinafter referred to as appellant) and W. A. Squiar, her husband, brought suit against the defendant Robert B. McLean (hereinafter referred to as respondent) and one Oscar Johnson, claiming damages by reason of injuries sustained by her in a collision between a car driven by respondent in which appellant was riding as a guest and a car driven by said Johnson. Defendant Johnson was not served with process and at the trial was dismissed from the action.

The appellant testified at the trial that the collision occurred at Stanley and Saturn streets in the city of Los Angeles at about 9 o'clock p. m. May 18, 1932; that she at that time was riding as a guest in the automobile of respondent; that respondent was driving the car; that they proceeded easterly on Saturn street approaching the intersection with Stanley street at a speed of about 25 miles an hour and that was the approximate rate of speed at which the car had been operated from the time she entered same; that just before reaching the intersection she noticed another car (the one driven by Oscar Johnson) south of the intersection going north on Stanley; that as near as she could judge respondent's car was about three car lengths from the intersection; that when respondent's car was about three car lengths west from the intersection, she noticed the other car (driven by Oscar Johnson); that she could not exactly tell how far away the other car was, but "it was farther than we were, I could tell that much, but I couldn't say just how far it would be"; that as she saw the other car approaching the intersection she said "look out" and testified she thought it was going about 40 miles an hour; that respondent did not do anything and did not apply the brakes and continued on into the intersection at approximately the same rate of speed; that she had barely said "look out" when the collision occurred in the intersection, the exact part of which she could not state, and that respondent's car was turned over resulting in injuries to her; that there was nothing unusual about the manner in which respondent drove his car or about the speed at which he drove the car which attracted her attention; that she did not pay any particular attention to the speed or the manner in which the car was being driven; that the accident occurred very suddenly; that after she saw the other car it was a matter of a few seconds.

The foregoing facts were not substantially altered by any of the testimony given by respondent.

The court found that at the time and place of the collision that respondent McLean and defendant Oscar Johnson and "each of them operated their respective automobiles in such a careless, negligent and dangerous manner as to cause them each to collide with the other, thereby causing the automobile of the defendant Robert B. McLean, in which the plaintiff Edith Squiar was riding as a passenger, to overturn injuring her," and then found "that at said time and place the defendant McLean was not guilty of any willful misconduct either by heedlessly or reck-

lessly or wantonly or wilfully or unlawfully driving his said automobile into the intersection * * * or otherwise"; and concluded, as a matter of law, that appellant was not entitled to recover. Judgment followed accordingly in favor of respondent Robert B. McLean, and from such judgment the plaintiffs Squiars have appealed.

[1] The principal question presented by this appeal is, From the aforementioned undisputed facts, was respondent guilty of misconduct within the purview of section 141¾ of the California Vehicle Act, as added by St. 1929, p. 1580, which provides that a guest rider cannot recover from the operator of a vehicle for injuries unless such injuries to such guest proximately resulted from the intoxication or willful misconduct of such driver? The section also provides that the burden shall be upon the plaintiff to establish that such intoxication or willful misconduct was the proximate cause of the injuries. In the case at bar there was no question whatsoever of intoxication.

Since the amendment to this section in 1931 (St. 1931, p. 1693), the Supreme Court, as well as the District Courts of Appeal in this state, have had numerous occasions to interpret the meaning of this section. But the facts as above delineated do not present any problem concerning the legal meaning of the term "wilful misconduct" as used in the statute nor is any explanation of that term or any other portion of the statute needed. Upon the facts the jury could well have found that no misconduct of any nature was attributable to the respondent.

[2] The plaintiffs have also appealed from the order taxing costs, claiming that the item of $15 for the deposition of appellant Edith Squiar, taken by respondent, should have been disallowed. The objection to this item is based upon the assumption by appellants that respondent, in whose favor the judgment was rendered, had a contract of insurance and therefore respondent personally was under no obligation to pay costs. The evidence does not disclose any such contract nor does it show any abuse of discretion on behalf of the court. Puppo v. Larosa, 194 Cal. 721, 230 P. 440.

Judgment affirmed.

I concur: CRAIL, J.

This opinion was prepared by Hon. Ruben Schmidt, sitting as a justice pro tem. of this court and is not signed by him for the reason that he is sitting in another county. We have taken the liberty of striking from the text several quotations from other opinions and of substituting therefor the paragraph stating that the facts of this case present no legal problem as to the meaning of section 141¾ of the California Vehicle Act, St. 1929, p. 1580, as amended, Deering's General Laws, No. 5128.



3 Cal.App.2d 299

REDONDO IMPROVEMENT CO. et al. v. CITY OF REDONDO BEACH et al.

Civ. 5260.

District Court of Appeal, Third District, California.

Dec. 22, 1934.

1. Pleading ⇐211

In civil action, demurrer must be presented in writing and cannot be presented orally (Code Civ. Proc. § 465).

2. Pleading ⇐428(4)

Objection to introduction of evidence on ground that complaint fails to state cause of action serves same office as general demurrer on that ground, and insufficiency of complaint may be raised by such objection, though demurrer is not first filed (Code Civ. Proc. § 434).

3. Pleading ⇐236(2)

Court must exercise liberality in permitting amendment of pleadings at all stages of proceeding.

4. Pleading ⇐406(7)

Mere uncertainties of allegations of complaint were waived by failure to demur on that ground.

5. Pleading ⇐428(4)

Sustaining objection to introduction of evidence on ground that complaint failed to state cause of action, without leave to plaintiffs to amend complaint to which no demurrer was filed, *held* abuse of discretion, since every uncertainty should be resolved in favor of sufficiency of complaint on objection on such ground, and it did not appear there would have been delay or inconvenience to parties by permitting plaintiffs to amend complaint within reasonable time (Code Civ. Proc. § 434).

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Action by the Redondo Improvement Company and others against the City of Redondo Beach, a municipal corporation, and another. From an order sustaining defendants' objection to the introduction of evidence on the chief issues of the case, and denying plaintiffs the privilege of amending their complaint, and from the judgment accordingly rendered, plaintiffs appeal.

Order and judgment reversed, with direction.

Gibson, Dunn & Crutcher and L. W. Butterfield, all of Los Angeles, for appellants.

Clyde Woodworth, of Inglewood, and Ray E. Nimmo, of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from that portion of a judgment which was rendered against them following an order of the court sustaining the defendants' objection to the introduction of evidence at the trial, on the ground that the complaint fails to state a cause of action. The plaintiffs' application to amend their complaint was denied.

This is a suit for injunction to prohibit the city of Redondo Beach from interfering with the sinking of an oil well within the boundary of that city. It is alleged that the plaintiff Redondo Improvement Company is the owner of 118 acres of land in the extreme southerly portion of the city of Redondo Beach, which land is subdivided into lots and blocks; that this land is remote from the business and residential portion of the city, and is occupied and used only for Japanese truck gardening, except that a few temporary gardeners' shacks have been constructed thereon; that an oil well was drilled on lot 24, block 10, of the Redondo Improvement Company's land in 1921, which well ever since its completion has, and now does produce 27 barrels of oil a day; that the owner of said property leased to the plaintiff Chanslor-Canfield Midway Oil Company lots 4 and 5 in block 11 of its property on December 19, 1922, for the purpose of sinking an oil well thereon; that the lessee of the last-mentioned lots is prepared to and is desirous of immediately sinking an oil well thereon, but that the city of Redondo Beach and its officers have prohibited it from doing so and threaten to enjoin the operations of the lessee and arrest its officers and employees if it attempts to proceed to sink the well; that the site of the proposed well is adjacent to the extreme southwesterly boundary of the city just beyond which other oil wells are located which are rapidly exhausting the plaintiffs' supply of oil and gas; that in October, 1931, the city of Redondo Beach adopted two ordinances, which are attached to the complaint as exhibits, prohibiting the future sinking of oil wells within the district in which the plaintiffs' property is situated, but that these ordinances "are invalid, unreasonable, arbitrary and discriminatory, * * * and are void and of no effect, * * * and each of them impair the obligation of the contract between the plaintiffs and deprive each of the plaintiffs of its property without compensation therefor and without due process of law." The complaint then alleges that plaintiffs are without speedy or adequate remedy at law, and asks the court to declare the invalidity of the zoning ordinances with respect to the plaintiffs' existing and proposed oil wells. An injunction is sought to prevent the defendants from interfering with the sinking of the proposed well.

Without filing a demurrer to the complaint, the defendants answered specifically, denying all of the essential allegations of the complaint, and affirmatively alleging that the city does intend to prevent the plaintiffs from proceeding to sink the proposed oil well under the authority vested in it pursuant to the zoning ordinances referred to in the complaint.

Upon the issues thus presented, the cause was set for trial for October 24, 1932, at which time respective counsel and the witnesses were present and ready for trial. Without warning, the defendants orally demurred to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. This demurrer was overruled. The defendants then objected to the introduction of any evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action. This objection was sustained without leave to amend, except that the court did overrule the objection in part and received evidence with respect solely to the 27-barrel a day well which has been operated since 1921, prior to the adoption of the zoning ordinance. The request of the plaintiffs to introduce evidence on the other issues of the case was refused. The plaintiffs then requested that they be granted permission to amend their complaint, which was promptly denied. The court then rendered judgment holding that the ordinances had no application to the oil well which was completed prior to the adoption of the ordinances and restrained the defendants from interfering with the operation of that particular well, but held that the plaintiffs should otherwise take nothing by their action. From the order sustaining defendants' objec-

tion to the introduction of evidence with respect to the chief issues of the case, and denying plaintiffs the privilege of amending their complaint, and from the judgment which was accordingly rendered, the plaintiffs have appealed.

[1-3] We are of the opinion the court abused its discretion in sustaining defendants' objection to the introduction of evidence on the chief issues of the case without granting them leave to amend their complaint. The court properly overruled the purported oral demurrer to the complaint. There is no such pleading recognized by our law as an oral demurrer. It is a mandatory provision of our statute that a demurrer in a civil action shall be presented in writing and filed with the clerk. Section 465, Code Civ. Proc.; Fletcher v. Maginnis, 136 Cal. 362, 68 P. 1015. It is true that an objection to the introduction of evidence on the ground that the complaint fails to state facts sufficient to constitute a cause of action serves the same office as a general demurrer on that ground, and that the insufficiency of the allegations of a complaint may be raised by an objection to the introduction of evidence, even though a demurrer is not first filed. Chapman v. Gillett, 120 Cal. App. 122, 8 P.(2d) 184; section 434, Code Civ. Proc.; 21 Cal. Jur. 250, § 175; Bell v. Thompson, 147 Cal. 689, 82 P. 327; Norton v. Bedell Eng. Co., 88 Cal. App. 777, 264 P. 311; Reid v. Thomas, 99 Cal. App. 719, 279 P. 226. But it is a well-established rule which is founded on justice and good reason that a court should exercise liberality in permitting the amendment of pleadings to adequately present the necessary issues, at any and all stages of the proceeding. Robertson v. Burrell, 110 Cal. 568, 42 P. 1086. In 21 California Jurisprudence 183, § 127, it is said in that regard:

"Great liberality should be shown by a court, at all stages, in permitting such amendments as will facilitate the production of all the facts bearing upon the questions involved in an action, where this can be done without working great delay and without jeopardizing the rights of an adverse party, and where the cause of action or the issues involved therein will not be radically changed."

[4, 5] In the present case it does not appear there would have been any delay or inconvenience to the parties by permitting the plaintiffs to amend their complaint, if the court deemed it necessary for them to do so. The respective parties were present with their witnesses in court ready to proceed with the trial. The defendants failed to previously demur to the sufficiency of the complaint. The plaintiffs had no warning that their complaint was considered defective in any respect. They had set up in elaborate detail all the facts of their case including both ordinances upon which the defendants rely. They might have proceeded with the trial with permission for the plaintiffs to file their amended complaint before the termination thereof. Their request to file an amended complaint was denied. Evidently the court assumed, without evidence, that the ordinances were valid and binding and absolutely prevented the plaintiffs from sinking an oil well in the prohibited zone within the city boundaries. The plaintiffs in good faith relied upon the asserted invalidity of the ordinances. It was specifically alleged that the ordinances were invalid and void. This raises the issues of the regularity of the adoption of the ordinances, the uniform application of their provisions and the reasonableness of the prohibitive measures with respect to the various zones of the city. Mere uncertainties of the allegations of the complaint were waived by failure to demur on that ground. The objection to the introduction of evidence merely serves to raise the one question of jurisdiction for failure to state any cause of action. Under such circumstances every uncertainty should be resolved in favor of the sufficiency of the complaint. If it may reasonably be said that the complaint does state a valid cause of action, even though it be deemed to be defective or uncertain, the objection to the introduction of evidence should have been overruled. At least, under the circumstances of this case, the plaintiffs should have been afforded a reasonable time within which to amend their complaint.

The judgment and order are reversed in so far as they apply to the issues which are involved, with the exception of that portion which affects the operation of the oil well which is maintained on lot 24, block 10, above referred to, and the court is directed to grant plaintiffs a reasonable time within which to amend their complaint.

We concur: PLUMMER, J.; PULLEN, P. J.

STUART v. PRESTON et al.

Civ. 9382.

District Court of Appeal, First District, Division 2, California.

Dec. 20, 1934.

1. Trial ⇐251(1)

Instruction submitting questions addressed to issues made by the evidence, not by the pleadings, *held* properly refused.

2. Trial ⇐244(2)

It is error for a court to single out certain issues or isolated portions of the evidence in instructions so as to intimate that special consideration should be given thereto.

3. Trial ⇐250

Refusal of instruction submitting question as to which there was no dispute *held* not error.

4. Trial ⇐194(1)

Refusal to submit instructions that erroneously attempted to withdraw questions of fact from jury *held* not error, particularly where subject was fully covered by instructions given.

5. Trial ⇐260(1)

Refusal of instructions is not error, where subject is fully covered by instructions given.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

On petition for rehearing.

Rehearing denied.

Prior opinion, 38 P.(2d) 155.

Hatch & Mahl and C. F. Rafferty, all of San Francisco, and Fitzgerald, Abbott & Beardsley, of Oakland, for appellants.

John Francis Neylan and Grove J. Fink, both of San Francisco, and Myron Harris, of Oakland, for respondent.

PER CURIAM.

The petition for a rehearing is denied.

The defendants asked the trial court to give four several instructions. It modified two and gave them as modified. The other two the trial court refused to give. On these rulings they predicate prejudicial error. They assert:

"The actual legal questions answered in the proposed instructions were as follows:

"(a) Did the complaint in Preston v. Herminghaus, [211 Cal. 1, 292 P. 953], state a cause of action before it was amended as a result of the respondent's suggestion?

"(b) What was the legal effect of the evidence given by the witness Brackenridge in response to a certain question; in other words, was the evidence in the Brackenridge deposition before this question was asked legally sufficient to support a verdict for the compensation claimed by the appellants?

"(c) Was there any material conflict in the evidence in the case of Preston v. Herminghaus, as the evidence was disclosed in the reporter's transcript which was in evidence in this case?

"(d) Was the written compensation contract involved in Preston v. Herminghaus, clear and unambiguous upon its face?"

[1, 2] Each question was addressed to issues made by the evidence and not by the pleadings. As to the propriety of refusing to give any one of the requested instructions, the proper rule has been settled by a long list of decisions. "It is undoubtedly error for a court to single out certain issues, or isolated portions of the evidence, thereby intimating that special consideration should be given thereto." 24 Cal. Jur. 843; Treadwell v. Nickel, 194 Cal. 243, 262, 228 P. 25; Still v. San Francisco, etc., Ry. Co., 154 Cal. 559, 572, 98 P. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177; Estate of Martin, 170 Cal. 657, 672, 151 P. 138; Boa v. San Francisco-Oakland T. Rys., 182 Cal. 93, 101, 187 P. 2; Estate of Clark, 180 Cal. 395, 399, 181 P. 639; Huyck v. Rennie, 151 Cal. 411, 417, 90 P. 929; Kauffman v. Maier, 94 Cal. 269, 283, 29 P. 481, 18 L. R. A. 124; Sullivan v. People's Ice Corp., 92 Cal. App. 740, 745, 268 P. 934. The same rule has been followed generally in the federal and state courts. 64 C. J. 686. The record in the instant case shows no reason for departing from that rule. The deposition of the plaintiff was taken before the trial, and on the trial he appeared as a witness in his own behalf and was examined and cross-examined. Each party called leading members of the bar and propounded to each witness its hypothetical question. Each of those witnesses was examined and cross-examined. No factor in the claim of the plaintiff was excluded when examining said witnesses. No error in ruling on evidence is claimed. If, as defendants now assert, certain services which the plaintiff claimed he rendered were of negligible importance and therefore of negligible value, the defendants had a full opportunity to develop the facts and obtain appropriate

rulings on the law when such witnesses were under examination.

[3-5] The first question (a) is not a correct statement of the question that was before the court. The plaintiff did not contend that the complaint in Preston v. Herminghaus before the amendment did not state a cause of action. He claimed that the amendment was pertinent for the purpose of more specifically defining the subject-matter for which the plaintiff Preston was claiming relief. As to the effect of the amendment, the record discloses that Judge Strother, who permitted the amendment, stated that it made no material change in the pleading. He was the one to decide the point, and his opinion was presumptively correct. The next question (b) was not a question of law, but was one of fact for the jury, and was answered by the testimony contained in the transcript in Preston v. Herminghaus which was in evidence for the information of the jury. Moreover, the subject was fully covered by instruction No. 12, which was given. The next question (c) was also a question of fact for the jury and not one of law. It was answered by the evidence introduced to the effect that Judge Strother, in Preston v. Herminghaus, granted a motion for a directed verdict, which may legally be done only when there is no "material conflict" in the evidence, and his judgment was affirmed on appeal. As to the last question (d) it was also answered by the same ruling.

For each of the foregoing reasons the trial court in the instant case committed no error in refusing to give any of the rejected instructions.



3 Cal.App.2d 207

BRIGGS v. MARCUS–LESOINE, Inc.

Civ. 9404.

District Court of Appeal, First District, Division 1, California.

Dec. 20, 1934.

1. Evidence ⇐357

Where letter, constituting sole authority to distributor for charging sales manager with cost of advertising, limited sales manager's share of cost to one-third, subsequent letter was inadmissible to show intention to fix liability at greater amount (Civ. Code, §§ 1636, 1639).

2. Evidence ⇐458

Circumstances surrounding execution of written contract and subsequent conduct of parties thereto may be invoked to interpret contract only where doubt exists upon face of writing (Civ. Code, §§ 1636, 1639).

3. Money received ⇐6(5)

Action for money had and received will lie where defendant, holding money for another, agrees, at other's request, to appropriate money to payment of plaintiff.

4. Money received ⇐18(1)

In action to recover money in defendant's hands which third party owner directed should be paid to plaintiff, defendant had burden of establishing legal or equitable grounds for retaining money.

5. Money received ⇐6(5)

That sales manager suing distributor for commissions, pursuant to agreement with manufacturer that commissions might be paid direct to sales manager, might have been in position to benefit indirectly from advertising expenditures made by distributor without sales manager's consent, did not authorize deduction of expenditures from commissions due, where actual benefit to sales manager was not shown.

Appeal from Superior Court, San Francisco County; George H. Cabaniss, Judge.

Action by Flora M. Briggs against Marcus-Lesoine, Inc. Judgment for plaintiff, and defendant appeals.

Affirmed.

McKinstry & Haber-Peirce Coombes, of San Francisco, for appellant.

Peter A. Breen, of San Francisco, for respondent.

JONES, Justice pro tem.

This is an action for money had and received. Judgment was given for the plaintiff in the trial court, and the defendant has appealed.

The plaintiff was employed as sales manager for a Mrs. Charest, a manufacturer of a ladies' hair tint or rinse, which was being sold under the trade-name of "Lovalon." As compensation, the plaintiff was paid by Mrs. Charest 25 per cent. of the amount which she received each month for Lovalon sold during the preceding month. Marcus-Lesoine, Inc., the defendant, was the sole distributor of the product under a contract with the manufacturer, and as such distributor paid the manufacturer an agreed price for all of the prod-

uct taken and then resold it to various merchandising houses and also direct to the consumer trade. In the beginning no relation, contractual or otherwise, existed between the plaintiff and the defendant in so far as handling the product is concerned. Owing to some dissatisfaction on the part of the plaintiff as to the manner in which Mrs. Charest was making payment of her commissions, a written authorization was made by the two directing Marcus-Lesoine, Inc., to withhold the 25 per cent. of the amount due to Mrs. Charest each month and to pay the same direct to Mrs. Briggs, the plaintiff. This authorization was accepted by Marcus-Lesoine, Inc., and they proceeded to make the authorized deductions, and deposit certain moneys to the credit of plaintiff in a savings account in the Crocker First National Bank, pursuant to her directions. At no time was any of the money paid directly to her.

Plaintiff claims that Marcus-Lesoine, Inc., withheld and failed to pay over to her a portion of the commissions due from Mrs. Charest on account of purchases made by the defendant. The defendant does not dispute the deductions, but claims that they were made under an agreement with the plaintiff that the deductions should be made and the money withheld. In this connection the defendant relies upon certain correspondence as constituting the agreement and upon the circumstances under which the letters were written and the conduct of the parties for an interpretation thereof. The deductions consist of (1) $1,200 on account of attorney fees paid in connection with certain litigation over patent rights relating to the Lovalon product; (2) cost of advertising in certain publications designated as the Tower Magazines; and (3) sums paid for advertising in other media.

No recovery is sought by the plaintiff for the amount of the deductions made for advertising in the Tower Magazines, and the appellant does not seriously contend that it was entitled to deduct more than one-third of twelve hundred, or four hundred dollars, as plaintiff's share of the attorney fees referred to.

As to the charges for advertising other than that done in the Tower Magazines, the appellant's position is that these deductions were in accordance with a contract between the parties, which, properly construed, permitted the deductions. Such agreement as was had between the parties centers upon a letter written by the plaintiff April 26, 1931, the salient portions of which are as follows: "In answer to your letter of April 18—the understanding you and Mr. Lesoine and myself had, was the radio advertising and such circulars as were asked for, was all we would do until I returned Aug first, then we would decide about the balance of the year, I think the most important item is the chain store cards, all chain stores in the West have asked for them, now you write you are ordering posters for beauty parlors, so this changes the advertising plans. If you will note on the enclosed Tower Group card, your copy must be in three months in advance. Mr. Lesoine and I talked over the space to be used and he said he would write you all the details so I suggest you two go over the matter together. You know I have always done my share and if the advertising appropriation will not cover the cost of the Tower Magazines, you can put me down for one-third. I feel sure it is a splendid medium, and our space should be as large as colo rinse. Am glad you are making a change in your add writer, I saw a copy of the *Canadian Modern* beauty magazine, and the *Lovalon* add is a mess, heavy black boarder looks like a death notice."

The testimony of the plaintiff is that this is the only authority which she ever gave for the expenditure of any of her money by the defendant for advertising purposes.

As to any other authority to make the deductions claimed, L. J. Marcus, president of the defendant corporation, testified as follows:

"Mr. Breen: Q. Have you any other letters authorizing deductions? A. What is that?

"Q. Have you any other letters authorizing deductions for advertising? A. No, I have all these communications certifying to them. There was no need for any other authorizations.

"Mr. Breen: I ask that that be stricken out.

"The Court: Granted.

"Mr. Breen: Q. Will you kindly produce any other letters you have from Mrs. Geldert authorizing advertising deductions? A. I doubt if I have any other authority for advertising.

"Q. You have no other authority for advertising? A. No written authority.

"Q. Have you any other authority for advertising? A. Not authority.

"Q. No other authority than that letter there? A. None.

"The Court: Putting it so that we will understand it better, probably,—Is it claimed by you that you received any consent or authority from the lady to make those deductions or

deduction other than found in the letter just referred to? A. That is all there was. That is all that is necessary.

"Mr. Coombes: I don't think the witness understands the question.

"The Court: Let the answer be stricken out and I will state it more simply if I can.

"Q. Now, it is your contention that the money sued for by this lady should not be recovered from you because she authorized the expenditure of all that you did expend? A. Right.

"Q. You say she authorized you to some extent so to do in the letter just read from. Now, the further question is, did she further consent to the payment of those moneys by you for advertising? Did she do it again in writing? You have no writing from her except the one just referred to? A. No, just carried on. There are none.

"Q. In other words, now, any authority which you may have had for the expenditure of those moneys in that manner and withholding them from her, am I to understand, is such as had in that letter?

"Mr. Coombes: Conversations.

"The Witness: You are asking for written authorities.

"The Court: Q. I was careful to say 'any authority.'

"Mr. Breen: Q. I asked you if you had any other authorization? A. We reviewed at our regular conferences our advertising mediums.

"Q. Only conferences at which Mrs. Geldert was present? A. Right.

"Q. Any conferences in which she was present, give the time, place and persons present. A. Mr. Lesoine, Mrs. Briggs and I were present.

"Q. When was that? A. Each time she would return from her visits.

"Q. I think we are entitled to something more definite than that.

"The Court: A little more definite, but not as definite as in some cases.

"Mr. Breen: Q. Were they before or after that letter? A. After; I would say approximately every two months; in the rough, about every two months.

"Q. Now referring directly to this advertising, relate any conversation or statement which Mrs. Briggs made to you authorizing further deductions than those mentioned in that letter. I want conversations, not your conclusions. A. I don't recall—it was just purely understood we were going on. She, in fact, was deducting the advertising.

"Q. You don't recollect her ever making any definite statement beyond that letter? A. There would be no need of it.

"Q. Answer my question. A. I don't recall any definite.

"Q. You recall no definite authorization beyond that letter? A. I recall nothing definite."

[1, 2] There is no conflict in the testimony given by the parties that the only authority for the deductions is to be found in the letter of April 26th. The intent to limit the deductions to one-third of the cost of the advertising in the Tower Magazines is clearly expressed in the letter of April 26th, and such intention so expressed and ascertainable is controlling. Civ. Code, §§ 1636, 1639.

For the purpose of showing the interpretation placed upon the agreement between the parties, as evidenced by the letter of April 26th, the appellant has produced another letter written by the plaintiff under date of November 2, 1931, and purporting to be in reply to a letter by L. J. Marcus under date of October 28th. This letter of October 28th is not in evidence, and there is nothing in the record to show that plaintiff's letter of November 2d relates in any way to any expenditure for advertising, other than in the Tower Magazines, as authorized in her letter of April 26th. Since the language of the letter of April 26th clearly expresses the intent to limit the expenditures authorized to one-third of the cost of advertising done in the Tower Magazines, the letter of November 2d can avail plaintiff nothing as evidence of the interpretation placed upon the agreement by the parties. The circumstances surrounding the execution of a contract in writing, and the subsequent conduct of the parties thereto, may be invoked to interpret it only in those cases where upon the face of the writing itself there is doubt. Purdy v. Buffums, Inc., 95 Cal. App. 299, 272 P. 770.

[3-5] The one other contention of the appellant is that it would be inequitable for the plaintiff to recover, and in this connection it is urged that the plaintiff benefited by the expenditures. Where the defendant consents or agrees to appropriate money in his hands belonging to another to the payment of the plaintiff at the owner's request, an action for money had and received will lie. When the fact is proved that the defendant has the money, if he cannot show a legal or equitable ground for retaining it, the law creates a promise on his part to pay it over to the plaintiff which will be enforced. Unless it otherwise appears from the evidence, the burden of

establishing such legal or equitable grounds for retaining the money rests upon the defendant. Whittle v. Whittle, 5 Cal. App. 696–701, 91 P. 170; 2 R. C. L. 780. Here the record is entirely silent as to how the plaintiff may have benefited by reason of increased commissions on account of the expenditures referred to, or otherwise, and we are of the opinion that the defendant has failed to meet the burden of proof cast upon it in this particular. The fact that plaintiff may have been in a position to benefit indirectly from expenditures made by the defendant, which she did not authorize, and to which she did not give her consent, is immaterial.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



3 Cal.App.2d 277

SMITH et al. v. HALE et ux.

Civ. 8090.

District Court of Appeal, Second District, Division 1, California.

Dec. 21, 1934.

1. Trial ⊂=251(8)

Instruction on unavoidable accident, not specially pleaded by defendants in personal injury suit, *held* not erroneous, where pleadings and evidence justified finding that neither plaintiffs nor defendants sustained burden of proving others' negligence.

2. Trial ⊂=251(8)

Instruction on law defining duties of driver of vehicle overtaking another vehicle as amended after accident, alleged to have been caused by violation of act as then existing, *held* erroneous (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540).

3. Appeal and error ⊂=1064(1)

Error in instructing jury as to duties of driver of automobile overtaking another car under law as amended after accident, resulting in injuries sued for by occupants of car overtaken by defendants' car, as well as under statute as existing at time of accident, *held* not prejudicial to plaintiffs (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540).

4. Trial ⊂=252(8)

Instruction founded on statute declaring conditions under which automobile must be equipped with rear-view mirror should not have been given in personal injury suit by occupants of automobile overtaken by defendants' car, in absence of evidentiary showing to which applicable (St. 1923, p. 546, § 97).

5. Appeal and error ⊂=1066

Instruction founded on statute declaring conditions under which automobile must be equipped with rear-view mirror *held* not to warrant reversal of judgment for defendants in personal injury suit by occupants of automobile overtaken by defendants' car, though not supported by evidence, where record disclosed no reasonable hypothesis for inference of resulting prejudice to plaintiffs (St. 1923, p. 546, § 97).

6. Trial ⊂=234(4)

Instruction, stating that, as defendants in action for injuries arising from their alleged negligent operation of automobile passed plaintiffs' automobile, driver of defendants' car was proceeding at lawful speed after giving audible and suitable signal, *held* not erroneous, where premised by language, "if you find from the evidence that" plaintiff "increased the speed of his car while he was being so overtaken."

7. New trial ⊂=6

Presiding judge is vested with broad discretion in passing on motions for new trials.

8. Appeal and error ⊂=977(1)

Presiding judge's order, disposing of motion for new trial, will not be disturbed by appellate court without clear showing of abuse of discretion.

9. New trial ⊂=102(1)

Parties to action must exercise high degree of diligence to discover and present at trial all evidence on which cause is to be determined.

10. New trial ⊂=99

Denial of plaintiffs' motion for new trial of action for injuries sustained in automobile accident on ground of newly discovered evidence of eyewitnesses not testifying at trial *held* not abuse of trial court's discretion.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by Martin W. Smith and another against Sam C. Hale and wife. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Griffith & Thornburgh and Clarence C. Ward, all of Santa Barbara, for appellants.

Coleman E. Stewart, of Santa Barbara, and C. A. Pinkham, of Los Angeles, for respondents.

SCHAUER, Justice pro tem.

An action for damages for personal injuries arising out of the alleged negligent operation of an automobile was tried before a jury, and from the judgment entered upon a general verdict in favor of defendants plaintiffs appeal, asserting that the trial court erred in the giving of certain instructions requested by defendants and in its denial of plaintiffs' motion for a new trial upon the ground of newly discovered evidence. No claim is made that the evidence is insufficient to support the verdict, but our attention is directed to the sharp conflict between the testimony of witnesses for the plaintiffs and that of those for the defendants; such witnesses, on the question of negligence, being equal in number and bearing substantially the same relationship to the case. Upon such conflict of testimony and balance in number and relationship of witnesses plaintiffs seek to establish prejudice in the asserted errors of law.

[1] 1. It is contended that the court erred in instructing the jury upon the subject of unavoidable accident, not for any imperfection in the given instruction as an abstract principle of law, but that it was inapplicable to the pleadings and proof. The complaint alleges that the defendants were negligent, and in their answer the latter deny negligence on their part and plead contributory negligence of the plaintiffs; they do not specially plead unavoidable accident as a defense. There has been cited to us no authority in California requiring that unavoidable accident be specially pleaded, but in any event upon the pleadings as they existed in this case, and the evidence, the jury could have found that neither plaintiffs nor defendants had sustained the burden of proving negligence upon the part of the other. Therefore, there was no error in giving the mentioned instruction.

[2, 3] 2. The accident forming the subject of the case occurred on July 21, 1929. The 1929 amendments to the California Vehicle Act did not go into effect until August 14, 1929; hence the provisions of that act as they existed subsequent to the amendments of 1927, but prior to the amendments of 1929, were controlling. At the request of plaintiffs the court correctly instructed the jury upon the duties of the driver of an overtaking vehicle under the provisions of section 122 of that act as the same existed at the time of the accident (St. 1923, p. 557, § 122), and at the request of defendants it also gave an instruction upon the law as amended in 1929 (St. 1929, p. 540). This was error, but such instructions under the evidence were applicable only to defendants and were so worded as to make the error beneficial to the plaintiffs rather than detrimental to them. The only reasonable effect of such dual instructions was to place upon the defendants, who operated the overtaking car, the necessity for complying with the law as it existed both before and after the 1929 amendments. In other words, the jurors were told that they "must find for the plaintiffs" upon the issue of defendants' negligence if they found that the defendants had violated the 1927 law and they were also informed as to the duty of the driver of an overtaking car as prescribed in the 1929 law. Under these instructions the jury was bound to find that the defendants were negligent if the evidence established violation of either law. Plaintiffs therefore suffered no prejudice from such error.

[4, 5] 3. At the request of defendants the court gave an instruction founded on section 97 of the California Vehicle Act (St. 1923, p. 546, § 97), declaring the conditions under which an automobile must be equipped with a rear-view mirror. There was no evidentiary showing to which such instruction was applicable and it should not have been given, but likewise the record fails to disclose any reasonable hypothesis from which resultant prejudice may be inferred.

[6] 4. Plaintiffs also complain that a formula instruction given at defendants' request contains a statement of fact to the effect that "as the defendants passed the plaintiffs, the driver of the defendants' car was proceeding at a lawful rate of speed and had given audible and suitable signal." A reading of the instruction discloses that it is hypothetical in factual content, being premised on the following language: "If you find from the evidence in this cause that Martin W. Smith * * * increased the speed of his car *while he was being so overtaken* * * *." (Italics ours.) Although rhetorically somewhat inapt, it was not error, and we think the jury was not misled.

[7-10] 5. Lastly, it is contended that the court erred in refusing to grant the plaintiffs' motion for a new trial on the ground of newly discovered evidence. Upon the hearing of such motion the plaintiffs presented affidavits purporting to show that since the trial they had discovered "at least seven eye witnesses to the accident who did not testify at the trial and whose evidence would be in favor of the plaintiffs."

It appears that the accident out of which this case arose occurred on July 21, 1929, on the state highway a few miles north and west of the city of Ventura. The action originally went to trial on October 9, 1930, and after the jury in that trial had failed to agree was again brought to trial in January, 1931, at which time the verdict for defendants was returned. The affidavits of three of the alleged newly discovered witnesses were before the court upon the motion; the statement as to the other four was upon information and belief in an affidavit of the plaintiff Martin W. Smith. For proof of diligence plaintiffs rely upon the affidavit of Mr. Smith, who states that on February 16, 1931, he went to the city of Ventura for the purpose of inserting an advertisement for witnesses in a newspaper and that upon handing his copy for such advertisement to a girl clerk in the newspaper office was informed by such clerk that she and two of her friends had seen the accident. Plaintiffs' information as to the other four witnesses was based upon a long-distance telephone call asserted to have been received by Mr. Smith on February 6, 1931, from one Ackerman. According to the hearsay statement in the affidavit, Ackerman and three of his friends, whose names were unknown to plaintiffs, had witnessed the crash, and, having read a newspaper account of the trial, had agreed that Ackerman should communicate with plaintiffs and volunteer to appear as a witness. Plaintiffs made some effort to personally contact these witnesses, but apparently had failed to do so as late as April 9, 1931, the date of the order denying the motion for a new trial. There was no satisfactory showing that the testimony of any of these four last-mentioned witnesses would be available in the event of a new trial.

In passing upon motions for new trials, the presiding judge is vested with a broad discretion, and his order in the premises will not be disturbed by an appellate court except upon a clear showing of an abuse of discretion. O'Rourke v. Vennekohl, 104 Cal. 254, 256, 37 P. 930; Jones v. Foster, 116 Cal. App. 102, 2 P.(2d) 582. The trial of an action is a formal and final proceeding; the welfare of society served by the court demands that the parties to litigation have convenient opportunity to fully present the evidence pertinent to their conflicting claims and then that such litigation be expeditiously terminated. To that end it exacts of the parties a high degree of diligence in discovering and presenting at the trial all the evidence upon which the cause is to be determined. In the case of Vertson v. City of Los Angeles, 116 Cal. App. 114, 120, 2 P.(2d) 411, 413, the court, in holding the granting of a motion for a new trial upon the ground of newly discovered evidence in a set of circumstances not substantially dissimilar to those of the instant case, to be an abuse of discretion, said: "It is therefore highly significant that for a period of more than two years following the accident, during which two trials of the action were had, evidence bearing on the important feature * * * should not have been discovered, but that within ten days subsequent to the date upon which an adverse verdict was returned it should come to light. Despite the emphatic avowals of diligent search for witnesses contained in the affidavits of the gentlemen who conducted the investigation * * * the bald facts indicate surprising lack of diligence."

Upon the record before us we cannot find that the trial court abused its discretion in denying plaintiffs' motion.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.



3 Cal.App.2d 167

HAMPTON v. ROSE et al.

Civ. 1548.

District Court of Appeal, Fourth District, California.

Dec. 19, 1934.

Rehearing Denied Jan. 14, 1935.

Hearing Denied by Supreme Court Feb. 14, 1935.

1. Partnership ⇐325(1)

In suit for accounting by alleged joint owner of business from which he had been excluded by defendant co-owner, trial judge *held* authorized to appoint receiver to operate business pending determination of suit (Code Civ. Proc. § 564; Civ. Code, § 2400).

2. Appeal and error ⇐781(7)

Defendant sued for accounting as joint owner of business could not appeal from order appointing receiver after defendant actively co-operated in procuring sale of property of business by receiver and in procuring confirmation thereof by court.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Wade E. Hampton against J. B. Rose, also known as Jacob B. Rosensweig, and another. From an order appointing a receiver, named defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

See, also, 39 P.(2d) 449.

David Schwartz, of Los Angeles, for appellant.

Mott, Vallee & Grant, A. L. Abrahams, and Frank H. Love, all of Los Angeles, for respondent.

MARKS, Justice.

This is a motion to dismiss the appeal on the grounds (1) that the questions on which the decision of the court depends are so unsubstantial as not to need further argument (section 3, rule V, Rules of the Supreme Court and District Courts of Appeal); and that appellant has accepted and benefited by the fruits of the order.

[1] The record discloses that a receiver was regularly appointed after a hearing on an order to show cause. The only documents in the record that were before the trial court at the hearing are the complaint and an affidavit of appellant. The complaint alleges that on June 20, 1932, plaintiff and defendant entered into a contract to conduct a business at 713 South Broadway in Los Angeles; that they would organize a corporation for such purposes; that plaintiff was the owner of a contract for a lease on the premises and that defendant was operating a business therein; that plaintiff would contribute the lease on the premises and defendant Rose the furniture, fixtures, equipment, improvements, and $1,300; that the business was to be conducted jointly; that plaintiff procured the lease in the joint names of himself and defendant Rose; that Rose took possession of the premises and business, excluded plaintiff therefrom, and appropriated large profits to his own use; that plaintiff demanded an accounting and a transfer of the business to the corporation which had been organized to take it over; that Rose refused both demands; that Rose had withdrawn large sums of money and property from the business and appropriated them to his own use. Plaintiff, among other things, sought an accounting and the appointment of a receiver to operate the business pending the determination of the suit.

The affidavit filed by Rose contradicted many of the allegations of the complaint. This merely created a conflict in the evidence which was resolved in favor of plaintiff by the trial judge.

Section 2400 of the Civil Code provides that "a partnership is an association of two or more persons to carry on as co-owners a business for profit." It is clear from the allegations of the complaint that it was the intention of the parties to enter into an association to carry on a business for profit. It is true that the parties contemplated the formation of a corporation to operate the business. Such a corporation was formed and defendant refused to transfer to it his contribution to the business. He cannot deprive plaintiff of his interest by refusing to carry out his contract. As far as the record before us on this appeal shows, the parties became joint owners in the business and would continue as such until the assignment of the assets to the corporation or the dissolution of the partnership.

Section 564 of the Code of Civil Procedure, in effect at the time the order was made, provided in part as follows: "A receiver may be appointed by the court in which an action is pending or by the judge thereof in an action * * * between partners or others jointly owning or interested in any property or fund." Under these provisions and on the record before us we conclude that there can be no question of the right of the trial judge to appoint the receiver.

[2] In addition to the formal record on appeal, appellant presented certified copies of numerous documents used in the court below. It appears that judgment in the action was rendered on October 4, 1933; that on October 16, 1933, Rose filed an affidavit setting forth that it was for the best interests of the parties that the receiver sell the property; that an order to show cause was issued on the same day ordering the receiver to show cause why he should not sell the property; that this proceeding was dismissed without prejudice on October 19, 1933, on stipulation of the parties; that on November 10, 1933, the receiver filed his report, account current, and petition for instructions; that Rose filed an objection to the receiver's report in which he set up that the receiver had received or would receive an offer to purchase the property; that on November 25, 1933, an order was made approving the receiver's report; that on December 29, 1933, the receiver filed his report of sale; that on the same day the attorney for Rose, as such,

filed an affidavit in which it was stated "that your affiant believes it is for the best interest of said receivership and the parties to this action that the sale herein made be confirmed. * * * Wherefore, affiant prays that the court make its order confirming said sale"; that on the return day the court asked for and received additional bids for the property and finally accepted the bid of David Schwartz (attorney for appellant), made in behalf of Brownie Rose Candies, Inc.; that the sale was confirmed.

The foregoing facts show that after this appeal was taken, Rose and his attorney actively co-operated in procuring the sale to be made by the receiver and its confirmation by the trial court. Under these circumstances, he should not be permitted to question the legality of the appointment of the receiver.

The appeal from the order appointing the receiver is dismissed.

We concur: BARNARD, P. J.; JENNINGS, J.



3 Cal.App.2d 170

HAMPTON v. ROSE et al.

Civ. 1549.

District Court of Appeal, Fourth District, California.

Dec. 19, 1934.

Rehearing Denied Jan. 14, 1935.

Appeal and error ⇐781(7)

Appeal from judgment dissolving partnership, ordering partnership assets sold, appointing commissioner to sell assets, and providing for disposition of proceeds of sale *held* not dismissible on ground that appellant had waived right of appeal by accepting benefits of judgment in that appellant had assisted operating receiver previously appointed by court in selling partnership assets and had urged trial court to confirm sale thereof, where money derived from sale remained in receiver's possession.

Appeal from Superior Court, Los Angeles County; Robert W. Kenney, Judge.

Proceeding by Wade E. Hampton against J. B. Rose, also known as Jacob B. Rosensweig, and another. From the judgment, named defendant appeals. On motion to dismiss appeal.

Motion denied.

David Schwartz, of Los Angeles, for appellant.

Mott, Vallee & Grant, A. L. Abrahams, and Frank H. Love, all of Los Angeles, for respondent.

MARKS, Justice.

This is a motion to dismiss an appeal from the judgment rendered herein on the ground that appellant has accepted the fruits, benefits, and advantages of the judgment, since taking this appeal, and has consequently waived his right of appeal. The particulars in which it is claimed appellant accepted the benefits of the judgment are set forth in our opinion this day filed in a separate appeal in this case from an order appointing a receiver, 39 P.(2d) 447. These facts need not be repeated here. The notice of appeal from the judgment was dated October 16, 1933, and was served and filed October 24, 1933.

Respondent relies upon the following cases in support of his motion: Moore v. Morrison, 130 Cal. 80, 62 P. 268; In re Estate of Shaver, 131 Cal. 219, 63 P. 340; Storke v. Storke, 132 Cal. 349, 64 P. 578; County of San Bernardino v. County of Riverside, 135 Cal. 618, 67 P. 1047; Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 P. 464; Manos v. Codina, 199 Cal. 243, 248 P. 916; Haggin v. Montague, 125 Ky. 507, 101 S. W. 893, 31 Ky. Law Rep. 123; Horton v. McNally Co., 155 App. Div. 322, 140 N. Y. S. 357. An examination of these cases shows that while they all support the familiar rule that a party who accepts the benefits of a judgment cannot attack it on appeal, they are so factually dissimilar to the instant case that they are of little benefit to us in solving the problems before us.

The judgment in this case provides that the partnership existing between Wade E. Hampton and J. B. Rose be dissolved; that the partnership assets be sold and that R. E. Allen be appointed commissioner to make the sale; that the proceeds of the sale be applied in a certain manner unnecessary to detail; that if the proceeds of sale be insufficient to pay respondent $7,232.43 after making other required payments, he have judgment against appellant for one-half of the deficiency; that Florence Rose has no interest in the partnership assets.

It should be observed that R. E. Allen was appointed by the judgment commissioner to

sell the partnership assets. There is nothing in the record indicating that he ever qualified as such commissioner or that he acted as such.

Allen had been appointed as an operating receiver under the order of the court involved in the case of Hampton v. Rose, supra. Both he and the parties evidently assumed that Allen also possessed the powers of a liquidating receiver. The parties, and especially appellant, assisted him in selling and urged the trial court to confirm the sale of the partnership assets. In so far as we are advised, the money derived from this sale still remains in the possession of the receiver except that portion used to defray some of the expenses of the receivership. These proceedings were all taken under the order appointing the receiver and not under the judgment. Under these circumstances, we have reached the conclusion that the case should be considered on its merits.

The motion to dismiss the appeal from the judgment is denied.

We concur: BARNARD, P. J.; JENNINGS, J.



3 Cal.App.2d 474

PEOPLE v. BRICKERT.

Cr. No. 2625.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1935.

1. Criminal law ⇐1023(3)

Where order denying motion for leave to withdraw plea of guilty was made prior to pronouncement of judgment, order was not appealable (Pen. Code, § 1237).

2. Criminal law ⇐1186(5)

Accused who selected his own counsel *held* estopped to claim on appeal that he was denied right of having adequate counsel.

3. Criminal law ⇐274

Where accused pleaded guilty to grand theft, on advice of counsel and in hope that he would be admitted to probation as theretofore, and district attorney advised accused to enter plea of not guilty, denial, before pronouncement of judgment, of accused's motion for leave to withdraw plea of guilty, *held* not abuse of discretion.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Edwin Brickert was convicted of grand theft, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

[1] The defendant, when arraigned upon the information charging him with the crime of grand theft, pleaded guilty. Thereafter he presented to the court a motion to set aside that plea. The motion was made and was denied prior to the pronouncement of judgment. Since the appeal from the order is not an appeal from an order made after judgment, the defendant has no right of appeal from that order. Pen. Code, § 1237.

[2] In support of his appeal from the judgment appellant relies upon only two points. These are that the court abused its discretion when it denied his motion to withdraw his plea of guilty, and that he was denied his right of having adequate counsel. The second point may be disposed of by noting the fact that defendant was represented by an attorney at law chosen by him for that purpose. If it were appropriate for us to inquire further, we would not be able to draw from the record any inference that the attorney did not intelligently and faithfully perform the duties for which he had been employed.

[3] With reference to appellant's contention that the court abused its discretion when it refused to allow defendant to withdraw his plea of guilty, the argument offered in support of that contention is not convincing. Apparently the plea of guilty was entered on the advice of counsel, and with the hope or belief of both counsel and client that the court would admit the defendant to probation, as had been done in two other cases wherein this same defendant had pleaded guilty. Not only was the district attorney entirely innocent of sharing in the advice given to appellant, but the district attorney in fact had advised him to enter a plea of not guilty.

The appeal from the order denying motion to set aside the plea of guilty is dismissed. The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3 Cal.App.2d 117

LESSER v. POMIN et al. (two cases).

Civ. 9109, 9111.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1934.

1. Evidence ⇐83(1)

Presumption obtains that executors' duty to give notice to creditors was performed in absence of allegation to the contrary (Probate Code, § 700).

2. Executors and administrators ⇐224

To recover from decedent's estate, landlord's claim for future payments of rent must be filed against estate.

3. Landlord and tenant ⇐208(2)

Where there is no covenant by assignee of lease to pay rent, he does not by mere acceptance of assignment impliedly agree to do so, and is liable therefor only so long as he remains in possession of premises.

4. Executors and administrators ⇐202(1)

At common law if covenantor covenanted for himself, his executors and administrators, his personal assets were pledged for performance of covenant, and to have this effect it was not necessary that executor or administrator be named.

5. Executors and administrators ⇐224

Although executor or administrator may become personally liable as assignee for rent accruing during his occupancy, no action can be maintained against him in his representative capacity except upon proper claim, duly presented, for rent under original lease.

6. Landlord and tenant ⇐209

No action at law can be maintained by original lessor against subtenant upon original lessee's covenant to pay rent, unless subtenant has assumed lease.

7. Descent and distribution ⇐119(1)

At common law obligation to be performed by covenantor and his heirs bound latter, provided they had assets of decedent.

8. Executors and administrators ⇐224

Where lands, as well as personal property of decedent, are liable for debts, claim for breach of his covenant must be presented in course of administration, and no action thereon will lie against heir, devisee, legatee, or next of kin on claim or demand which might have been recovered from estate.

9. Executors and administrators ⇐231

Executors of deceased lessee *held* not personally liable to lessor for anything in excess of rents and profits received from subtenant, where lessor failed to file claim against estate.

10. Courts ⇐120

Where total amount which plaintiff could recover under facts alleged in action for rent was less than $2,000, superior court was without jurisdiction; amount being within exclusive jurisdiction of municipal court.

11. Courts ⇐122

Complaint may be examined to ascertain jurisdictional amount involved notwithstanding prayer.

12. Husband and wife ⇐273(4)

Where wife of deceased lessee was not party to lease, distribution of community property to wife did not render her liable for rent, where lessor failed to file claim against estate (Civ. Code, § 161a).

Appeals from Superior Court, San Francisco County; James G. Conlan, Judge.

Actions by J. H. Lesser against Etta Bray Pomin, Bank of America National Trust & Savings Association, personally and individually as the executors of the estate of William C. Pomin, etc. From adverse judgments, plaintiff appeals.

Affirmed.

Silverstein & Silverstein, of Oakland, for appellant.

Edw. R. Solinsky, of San Francisco, for respondents.

PER CURIAM.

The plaintiff on February 17, 1927, leased to William C. Pomin a storeroom in Oakland for the term commencing April 1, 1927, and ending September 30, 1933, at the monthly rental of $850 payable on the first day of each month during the term. The lessee sublet a portion of the premises to J. Sevilla for the same period. On April 23, 1931, Pomin died testate, and the premises except the portion sublet were until November 28, 1931, occupied by the defendants, who were the special administrators of decedent's estate and are now the executors of his last will and testament. On the last-mentioned date they removed the property of the estate from the premises, discontinued the business theretofore conducted therein, and refused to accept further rent from the sublessee. The latter, however, continued in possession, and each month deposited in a bank to the credit of the defendant Pomin the rent payable under the sublease. The appraised value of de-

cedent's estate was about $98,000. Defendants listed in the inventory as part of the estate the lease and sublease mentioned, together with a promissory note for $750, executed by the sublessee to secure the rent payable under the sublease. These items were also listed in the petition for distribution as assets of the estate.

A decree was made by which all the property of the estate with the exception of minor bequests was distributed to defendant Pomin, who was the widow of decedent and his sole heir at law. The decree further provided, however, that the executors retain from the cash on hand the sum of $16,469 with which to pay any judgments arising from contingent liabilities due to the conduct by the executors of the business of the decedent and on account of the lease in question and other leases entered into by him.

The lease here involved contained the following provision: "This lease shall be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto. * * *" The lessor brought two actions against the executors as such and as individuals, one to recover the rent unpaid under the lease to March 30, 1932, amounting to $4,250, with attorneys' fees in the sum of $750; the other for a judgment declaring the rights and duties of the parties under the original lease and the sublease. A demurrer to the complaint in the first suit was sustained without leave to amend. In the second defendants answered, and later moved for a dismissal on the ground that the complaint failed to state a cause of action and that the judgment in the action for rent determined all questions under the lease.

[1, 2] It is admitted that no claim was filed by the creditor against the estate of decedent; and while it is not alleged that notice to creditors was given, such was the duty of the executor (Probate Code, § 700); and it will be presumed, in the absence of allegation to the contrary, that this duty was performed. Code Civ. Proc. § 1963, subd. 15; Gray v. Farmers' Exchange Bank, 105 Cal. 60, 38 P. 519; 11b Cal. Jur., Executors and Administrators, § 827. That it was necessary, in order to recover from the estate, that the claim for future payments be filed is clear from the following decisions: Shepperd v. Tyler, 92 Cal. 552, 28 P. 601; Verdier v. Roach, 96 Cal. 467, 31 P. 554; Maddock v. Russell, 109 Cal. 417, 42 P. 139; Tropico L. & I. Co. v. Lambourn, 170 Cal. 33, 148 P. 206; Miller v. Miller, 171 Cal. 269, 152 P. 728; Newman v. Burwell, 216 Cal. 608, 15 P.(2d) 511; Southern Pacific Co. v. Swanson, 73 Cal. App. 229, 238 P. 736.

[3] It is the lessor's contention, however, that in view of the quoted provisions of the lease the filing of a claim was unnecessary as defendants retained possession of the premises through the subtenant; further, that the executors as such are specifically bound by the above provision; and that defendant, Pomin being the heir at law of decedent and the distributee of his estate, is likewise personally obligated to pay the rent.

It has been decided that a covenant in a lease for the payment of rent runs with the property as an incident thereof. 7 Cal. Jur., Covenants, § 17, p. 730; Salisbury v. Shirley, 66 Cal. 223, 5 P. 104; Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; Baker v. Maier, etc., Brewery, 140 Cal. 530, 74 P. 22; Lopizich v. Salter, 45 Cal. App. 446, 187 P. 1075. But, as held in Treff v. Gulko, 214 Cal. 591, 7 P.(2d) 697, where there is no covenant on the part of the assignee to pay the rent he does not by the mere acceptance of the assignment impliedly agree to do so, and is liable therefor only so long as he remains in possession of the premises; and the same rule has been held to apply to the occupancy by the widow. Shepperd v. Tyler, supra; Bush v. Bastian, 112 Cal. App. 644, 297 P. 976.

[4] At common law if a covenantor covenanted for himself, his executors and administrators his personal assets were pledged for the performance of the covenant. Blackstone Commentaries, Cooley, vol. 1, book 2, p. 677. To have this effect it was not necessary that the executor or administrator be named (Rawle, Covenants for Title, [5th Ed.] § 312) as the personal property received by the executor or administrator was liable for all debts (Woerner, American Law of Administration, § 574). The English rule in such cases is found in Williams on Executors (12th Ed.) volume 2, p. 1150 et seq. There the executor can be sued in his representative capacity for rent accrued during the lifetime of the testator, and a judgment entered de bonis testatoris. As to rent accruing after the death of the testator, if the executor has not entered upon the demised premises he is not personally responsible, but he is nevertheless liable as executor, for he cannot waive the term so as not to be liable for the rent to the extent of the assets. If he enters upon the demised premises the lessor has an election either to sue him in his representative capacity or personally as assignee of the term. In the latter event he is liable for the actual value of the premises during the time he

holds the same as an assign. See, also, Addison on Contracts, § 448, p. 633.

[5] In other jurisdictions it has been stated as the rule that the landlord may collect the rents accruing after the death of his tenant from the latter's estate, or from the executor or administrator to the extent of the rents and profits of the premises received by him, and the balance, if any, from the estate. 24 Cor. Jur., Executors and Administrators, § 624, p. 147; Miller v. Knox, 48 N. Y. 232; Fessenden v. Gunsenhiser, 278 Mass. 213, 179 N. E. 603. It is the rule in this state that although the executor or administrator may become personally liable as assignee for the rent accruing during his occupancy, no action can be maintained against him in his representative capacity except upon a proper claim, duly presented, for rent under the original lease, as under his general powers he can make no contract which will bind the estate or authorize a judgment de bonis decendentis. Smiley v. Van Winkle, 6 Cal. 605; Sterrett v. Barker, 119 Cal. 495, 51 P. 695; Southern Pacific Co. v. Swanson, supra; Dugand v. Magnus, 107 Cal. App. 243, 290 P. 309. See, also, In re Estate of Hincheon, 159 Cal. 755, 116 P. 47, 36 L. R. A. (N. S.) 303.

[6-8] Under some circumstances a subtenant may be compelled in equity to make payments to the original lessor (City Investment Co. v. Pringle, 69 Cal. App. 416, 231 P. 355; Young v. Wyatt, 130 Ark. 371, 197 S. W. 575); but there being no privity of estate or contract between them no action at law can be maintained by the original lessor against a subtenant upon the original lessee's covenant to pay rent unless the subtenant has assumed the lease (35 Cor. Jur., Landlord and Tenant, § 111, p. 1002; 36 Cor. Jur., Landlord and Tenant, § 1244, p. 379; 16 R. C. L., Landlord and Tenant, § 384, p. 875); and although for certain purposes the possession of the subtenant is that of a lessee, according to the cases above cited an executor or administrator is only chargeable in respect of the rents and profits received. It was also the rule that an obligation to be performed by the covenantor and his heirs bound the latter provided they had assets of decedent (Cooley, Blackstone's Commentaries, book 2, p. 677; 15 Cor. Jur., Covenants, § 56, p. 1243; McDonald v. McElroy, 60 Cal. 484; Maynard v. Polhemus, 74 Cal. 141, 15 P. 451); and this liability was later extended in certain cases to devisees. 15 Cor. Jur., Covenants, § 90, p. 1263; Rawle, Covenants for Title (5th Ed.) § 311. But whatever the liability of heirs at common law upon covenants by the ancestor it is now the general rule, to which there are but few exceptions, that where the lands as well as the personal property of a decedent are liable for debts a claim for breach of his covenants must be presented in the course of administration, and no action thereon will lie against an heir, devisee, legatee or next of kin on a claim or demand which might have been recovered from the estate. Woerner, American Law of Administration, § 577, 8 Am. & Eng. Ency. of Law (2d Ed.) p. 162; 18 Cor. Jur., Descent and Distribution, § 308, p. 953; 11b Cal. Jur., Exrs. and Admrs., § 1168, p. 636; In re Estate of Crosby, 55 Cal. 574, 583; Woods v. Ely, 7 S. D. 471, 64 N. W. 531; Royce v. Burrell, 12 Mass. 395; C. W. Zimmerman v. Wilson, 147 Ala. 275, 40 So. 515; Gilchrist v. Filyau, 2 Fla. 94; Barnard v. Cox, 25 Ind. 251; Fowler v. True, 76 Me. 43; Hutchinson v. Stiles, 3 N. H. 404; Pearce v. Calhoun, 59 Mo. 271, 274; Collamore v. Wilder, 19 Kan. 67, 80.

[9-11] In the present case it appears that the executors kept possession of the premises and received rent from the subtenant for a time, but have since paid nothing to the lessor and accepted nothing from the subtenant. Whatever duties the executors owed the subtenant are matters of no concern to the plaintiff, as there is no privity between him and the subtenant, and the executors are not personally liable to him for anything in excess of the rents and profits received. He has lost all recourse against the estate, the heirs, and devisee, and has been paid all rent which became due under the lease to October 31, 1931. The executors, as stated, held possession during the month of November, 1931, and received rent from the subtenant for that month. For that month's rent so far as appears they are liable, but the trial court was without jurisdiction of this claim, the total amount which, under the facts alleged, the plaintiff could recover being less than $2,000. Williams Co. v. Superior Court, 97 Cal. App. 422, 275 P. 838; Architectural Tile Co. v. Superior Court, 108 Cal. App. 369, 291 P. 586. Notwithstanding the prayer, a complaint may be examined to ascertain the jurisdictional amount (Consolidated, etc., Co. v. Superior Court, 189 Cal. 92, 207 P. 552; Hammell v. Superior Court, 217 Cal. 5, 17 P.(2d) 101), which here is shown to be an amount within the exclusive jurisdiction of the municipal court.

[12] There is no merit in the claim that decedent's estate being community property, and the same having been distributed to his widow, who was one of the defendants, she

is consequently liable for the rent. Mrs. Pomin was not a party to the lease, and the obligation to pay the rent was that of her husband alone. Although community property is subject to payment of the husband's obligations, in order that it may be so applied following his death, creditors' claims with certain exceptions must be filed and allowed as claims against the husband's estate. Cutting v. Bryan, 206 Cal. 254, 274 P. 326, cited by plaintiff, contains nothing to the contrary, and section 161a of the Civil Code did not change the rule.

What has been said disposes of all questions involved in the action for declaratory relief. That this was the necessary effect of the suit for rent was the ground for its dismissal, and any error which might be urged in that connection was not in the circumstances prejudicial.

The judgments appealed from are affirmed.



3 Cal.App.2d 364

HAYDEL v. MORTON.

Civ. 9551.

District Court of Appeal, First District, Division 2, California.

Dec. 27, 1934.

1. Appeal and error ⇐422

Appeal will not be dismissed merely because notice of appeal inadvertently misstated page in book of judgments at which judgment appealed from was recorded where respondent was not misled.

2. Appeal and error ⇐417(1)

Notice of appeal must be read as a whole and liberally construed.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Lionel H. Haydel against Andrew Wade Morton. From a judgment for plaintiff, defendant appeals. On respondent's motion to dismiss appeal.

Motion denied.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

F. H. Dam and Thomas C. Ryan, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff and respondent, Lionel H. Haydel, moves to dismiss the appeal of defendant and appellant, Andrew Wade Morton, in the above-entitled cause. In support of said motion, respondent contends that appellant's opening brief does not consider or refer to the judgment from which the appeal was taken; that no brief has been filed in support of the appeal from said judgment; and that the time allowed for the filing of appellant's brief in support of the appeal from said judgment has expired.

In order to understand the point raised by respondent upon this motion, it is necessary to refer to the notice of appeal filed by appellant. Said notice reads as follows: "You and each of you will please take notice that the defendant above named hereby appeals to the District Court of Appeal of the State of California, First Appellate District, from the judgment made and entered in the above entitled action in favor of the plaintiff and against the defendant and from the whole and each and every part of said judgment. Said judgment is recorded and entered in Book 353 of Judgments of said court, at page 250 thereof."

At the time said notice of appeal was filed, there was but one "judgment made and entered in the above entitled action in favor of the plaintiff and against the defendant." The notice, however, erroneously stated the page at which said judgment was entered as page 250, whereas said judgment in favor of plaintiff and against defendant was in fact entered at page 219. There was another judgment entered on page 250, but said judgment was a "Judgment of Non-suit as to Third and Fourth Causes of Action of Plaintiff's Original Complaint," which judgment was a judgment in favor of defendant.

[1, 2] We find no merit in repondent's contentions in support of the motion to dismiss the appeal. Respondent proceeds upon the theory that appellant appealed from the judgment in appellant's favor appearing upon the page to which the erroneous reference was made and not from the judgment against appellant. In order to sustain this theory, it is necessary to give controlling effect to the page reference and to give no effect to the remaining portions of the notice of appeal. This should not be done. The notice of appeal should be read as a whole and it should

be liberally construed. As was said in Title Guarantee & Trust Co. v. Lester, 216 Cal. 372, at page 374, 14 P.(2d) 297, 298: "Notices of appeal are not strictly construed, and an appeal will not be dismissed because of a misdescription of the judgment or order to which it relates unless it appears that the respondent has been misled by such misdescription. Estate of Smead, 215 Cal. 439, 10 P.(2d) 462; Harrelson v. Miller & Lux, 182 Cal. 408, 414, 188 P. 800." Certainly respondent was not misled here as the appeal was taken from the judgment "in favor of the plaintiff and against the defendant," and there was only one judgment answering that description. It is impossible to assume that the error in the page reference could have led respondent or any one else to believe that appellant was appealing from a judgment of nonsuit in favor of appellant.

The motion to dismiss the appeal is denied.

We concur: NOURSE, P. J.; STURTEVANT, J.



3 Cal.App.2d 477

WALSH v. JACOBSON.

Civ. 8500.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1935.

1. Pleading ⊂⊃291(2)

Plaintiff's failure to file affidavit denying execution of instrument pleaded in defendant's answer admits genuineness and due execution of the instrument, but does not estop plaintiff from showing mistake, undue influence, fraud, estoppel, or any other defense that would be open if instrument were the basis of an action (Code Civ. Proc. § 448).

2. Release ⊂⊃50

Exclusion of evidence attacking, on ground of fraud, receipt in full, pleaded in defendant's answer and not denied in affidavit by plaintiff, *held* error (Code Civ. Proc. § 448).

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Daisy B. Walsh against C. E. Jacobson. From a judgment for defendant, plaintiff appeals.

Reversed.

J. E. Light, of Los Angeles, for appellant.

W. E. Lady, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Plaintiff appeals from a judgment in favor of defendant in an action brought upon a written contract for the payment of $3,000. Appellant in her brief asserts that the only question involved in this appeal is whether or not she had the right to offer evidence in rebuttal to controvert the effect of a written instrument bearing her signature which defendant set up in his answer as an affirmative defense to the action, and as to which receipt plaintiff did not file any affidavit denying its execution. As respondent has filed no brief, we shall consider alone the question as stated by appellant.

Plaintiff's action is based upon an agreement dated June 18, 1929, wherein defendant agreed, in settlement of a lawsuit then pending between them, to pay plaintiff $3,000. The agreement further provided that defendant would convey to plaintiff, as security for the payment of said sum, lot 21 of the Glen Eyrie tract. The complaint admits the payment of $500 on account of said indebtedness and prays judgment for $2,500, the balance remaining unpaid. The answer of defendant, in addition to certain denials, sets up as a separate affirmative defense, a satisfaction and discharge of all claims of the plaintiff against defendant arising out of said contract of June 18, 1929, by the defendant conveying to plaintiff on June 26, 1929, title to certain real property, which settlement was evidenced by a writing signed by plaintiff, which reads as follows: "Received of C. E. Jacobson, a deed and Guarantee of title to Lot forty (40) tract No. 1083, as per map recorded in book 17, page 84 of maps, in the office of the County Recorder of Los Angeles Co., in full settlement of all claims against said C. E. Jacobson, arising out of the New Brunswick Apt. House deal, including that certain contract agreement dated June 18, 29, and calling for a ($3,000) payment. Daisy B. Walsh."

No affidavit, as provided for in section 448 of the Code of Civil Procedure, denying the execution of said receipt, was filed by plaintiff.

In addition to other evidence supporting the allegations of her complaint, plaintiff testified that on or about September 17, 1929, defendant requested of her that she reconvey to him lot 21 of the Glen Eyrie tract, which he had conveyed to her as security for the payment of the $3,000 he owed her, and stated that, in place thereof, he would convey to her a lot and house in Burbank, which was lot 40 of tract 1083 referred to in the receipt pleaded in defendant's answer; that about June, 1930, almost a year after she received a deed to lot 40 of tract 1083, she found a buyer for the lot and asked defendant if it was all right to sell it and credit on his obligation to her the amount she received for the property. This she did, crediting the sum of $500, which she received for the lot, on the indebtedness owing her. With this evidence, plaintiff rested her case. Whereupon counsel for defendant made the following statement: "Now, if your Honor please, with the evidence that is before the court in the form of the testimony by Mrs. Walsh, the plaintiff, and the documents and the other evidence, by virtue of the failure on the part of the plaintiff to deny the authenticity and due execution—and I refer to a receipt set forth in the answer of the defendant—I ask at this time, your Honor, to enter judgment for defendant." Then followed an extended discussion between court and counsel as to the merits of the motion. Counsel for defendant all through the discussion insisted that plaintiff's failure to file an affidavit denying the execution of the receipt foreclosed to her any right to offer evidence to rebut the effect of the document set forth in the answer, and that the court was bound to accept the pleaded receipt as conclusive evidence that the obligation had been satisfied and discharged. Counsel for plaintiff argued that her failure to file an affidavit denying the execution of the receipt operated only to admit its genuineness and due execution, and that she had the right to offer evidence in rebuttal to attack it on any other grounds; that he desired to put on evidence for this purpose. At the close of the argument the following colloquy between court and counsel took place:

"Mr. Light (attorney for plaintiff): With regard to that receipt, while we admit the due execution of it, yet it may be explained that the thing was obtained by fraud, or that—

"The Court: You have to plead fraud in order to take evidence in regard to fraud, fraud has to be especially pleaded. * * * The law gives you a chance to come in and file your affidavit in which you set up fraud. It does not say what your affidavit must contain, it gives you a chance to set up an affidavit; when you have not fulfilled the law, it would not be within the province of this court to let you open up your case, if you have not complied with the law by filing this affidavit. It is just as though you did not have any answer. * * * Judgment for defendant will have to be entered."

[1] It is well established by decisions of our appellate courts that where an answer filed in an action sets up a written instrument as an affirmative defense to the suit, and the plaintiff fails to file an affidavit denying the execution of such instrument as provided for in section 448 of the Code of Civil Procedure, the plaintiff is estopped from attacking the instrument only upon the grounds of its "genuineness and due execution." The plaintiff may, without filing any replication, which under our practice is not required because all new matter set up in the answer is deemed denied, controvert the instrument by evidence of mistake, undue influence, fraud, estoppel, and any other defense that would be open if such instrument were the basis of an action. Moore v. Copp, 119 Cal. 429, 51 P. 630; Clarke v. Fast, 128 Cal. 422, 61 P. 72; McKenzie v. L. A. Life Ins. Co., 97 Cal. App. 659, 275 P. 1003; California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507, 92 P. 509; Garcia v. Calif. Truck Co., 183 Cal. 767, 192 P. 708.

[2] It clearly appears from the record that the trial court, in denying plaintiff's request to put on evidence to rebut the effect of the pleaded receipt, did so in the belief that plaintiff, having failed to file any affidavit denying the execution of the document, was foreclosed by section 448 of the Code of Civil Procedure from attacking the receipt on any ground. In this conclusion the court was in error. Plaintiff had a right to attack the receipt on the ground of fraud, which counsel in his argument indicated was the purpose for which he offered the refused testimony.

Judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

3 Cal.App.2d 401

WHEATON et ux. v. NOLAN et al.

Civ. 8867.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

1. Limitation of actions ⇐180(4)

Where several causes of action were not separately stated, and complaint showed that, if plaintiffs had exercised ordinary knowledge, they would have discovered defendants' alleged breach of contract in time to institute action within two-year limitation period, demurrer to complaint was properly sustained (Code Civ. Proc. § 339, subd. 1).

2. Notice ⇐5

Means of knowledge, especially where it consists of public records, is deemed in law to be "knowledge."

[Ed. Note.—For other definitions of "Knowledge," see Words & Phrases.]

3. Pleading ⇐225(1)

In absence of application for leave to amend further, order sustaining demurrer without leave to amend does not constitute reversible error.

4. Pleading ⇐225(2)

Where more than 2½ years elapsed after sustaining of demurrer to demurrable complaint, and plaintiffs did not apply for leave to file an amended complaint, judgment sustaining demurrer without leave to amend was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Walter S. Wheaton and wife against Edward J. Nolan and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Hickcox, Thomson & O'Connor and August J. O'Connor, all of Los Angeles (Bryan Woodson, of Los Angeles, of counsel), for appellants.

Freston & Files and James H. Howard, all of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for respondents.

WILLIS, Justice pro tem.

This is an appeal from a judgment after order in general terms sustaining general and special demurrers to a second amended complaint, without leave to amend. The record herein discloses no application by plaintiffs for leave to further amend. The main cause of action attempted to be stated consists in the alleged breach of duty of respondents, under contract as attorneys of appellants to diligently and promptly commence suit and attachment proceedings against the obligor on certain promissory notes, it being alleged that the negligent failure of respondents so to do resulted in loss of the contemplated attachment security. A large portion of the complaint is devoted to allegations patently made for the purpose of tolling of the statute of limitations applying to this cause of action, but which in turn contain partial statements of other causes of action, not separately stated. The contract of employment was alleged to have been made on June 13, 1925, and suit was not commenced and attachment process not levied until August 4, 1925, at which time it is alleged that other creditors had, in this interim, secured liens upon the property sought to be attached sufficient to cover all the "equities" of the defendant debtor therein, thus depriving appellants of such assets as security, to their damage in a specified sum. The instant action was not commenced until December 11, 1929, and the demurrer pleaded the two-year statute of limitations contained in subdivision 1 of section 339 of the Code of Civil Procedure.

[1, 2] There was no error in sustaining the demurrer. Without attempting to restate the allegations, we are satisfied that several causes of action appear therein, not separately stated, and that the allegations made to overcome the running of the statute of limitations were insufficient under the decisions of this state to accomplish that purpose. Means and sources of knowledge of the alleged breach and injury were at all times available to plaintiffs, and ordinary diligence on their part in consulting such means and sources would have furnished them with all the information sufficient to discover the breach and commence suit within the two-year period. Means of knowledge, especially where it consists of public records as is manifest in this case from the complaint itself, is deemed in law to be knowledge. Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268.

[3, 4] In the absence of request or application by plaintiffs for leave to amend further, the order sustaining the demurrer without leave does not constitute reversible error. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550. The demurrer herein was sus-

tained on February 18, 1930, and judgment entered on November 1, 1932. Between these two dates appellants had ample time to apply for leave to file an amended complaint. This they did not do, and therefore they cannot now complain of an abuse of discretion by the court in not granting leave to amend.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 21

COOK v. LA VINA LAND CO.

Civ. 5110.

District Court of Appeal, Third District, California.

Dec. 11, 1934.

1. Vendor and purchaser ⇐3(4)

Whether contract with property owner constitutes contracting party sales agent of property owner or an optionee is determinable by intent of parties as disclosed by contract and all facts and circumstances, including conduct of parties, and mere casting of intended agency contract in form of option will not reserve privileges and avoid responsibility of a principal.

2. Vendor and purchaser ⇐3(4)

To create relationship of vendor and vendee, rather than naked agency, one given power to buy or sell land must be given interest either in land or in proceeds of sale of land, such as he acquires if he is empowered to sell upon terms of his own choosing and is to receive all of proceeds above specified amount.

3. Vendor and purchaser ⇐3(4)

Where subdivision owner by contract gave vendor in subdivision nonexclusive "option" to buy parcels unsold when option was exercised, at price marked on sales map, less $500, which contract contained no agreement for services and easements in line with sales plan for subdivision, conduct of parties, including subdivision owner's active participation in sale by vendor and acceptance of purchaser's payments, constituted purported optionee sales agent, and made subdivision owner liable as principal to purchaser with reference to unrecorded map (St. 1907, p. 290, repealed by St. 1929, p. 1805, § 40; St. 1929, p. 1790).

An "option" is an agreement by which an owner invests another with the exclusive right to buy certain property at a stipulated price, within a limited time.

[Ed. Note.—For other definitions of "Option," see Words & Phrases.]

4. Vendor and purchaser ⇐334(1)

Purchaser *held* entitled to recover payments on land contracts made with reference to unrecorded plat, although map was subsequently filed and new contracts with reference to recorded map were executed thereafter, describing, without purchaser's knowledge or consent, different property from that described in original contracts, since later contracts were merely continuation of former contracts and vendor could not take advantage of changes made (St. 1907, p. 290, repealed by St. 1929, p. 1805, § 40; St. 1929, p. 1790).

5. Statutes ⇐274

Repeal of statute which gives cause of action generally destroys all accrued causes of action based thereon.

6. Vendor and purchaser ⇐39

Repeal of act prohibiting sale of land by reference to unrecorded map by revisory statute re-enacting same prohibition *held* not to destroy cause of action commenced thereafter to recover payments on land contracts made with reference to unrecorded map (St. 1907, p. 290, repealed by St. 1929, p. 1805, § 40; St. 1929, p. 1790).

7. Vendor and purchaser ⇐39

Provision in statute prohibiting sale of real property by reference to unrecorded map, to effect that nothing in act should require recordation of map showing property sold or contracted for sale by metes and bounds or by reference to unrecorded map prior to adoption of act as condition precedent to sale or contract of sale of whole or part thereof, *held* intended only to avoid interference with sales legally made, though by reference to unrecorded map (St. 1907, p. 290, repealed by St. 1929, p. 1805, § 40; St. 1929, p. 1790).

8. Appeal and error ⇐179(1)

Fact not pleaded could not be considered on appeal, although brought to attention of trial court, without contradiction, on hearing of motion for new trial.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by J. H. Cook against the La Vina Land Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

James E. Pawson, of Long Beach, for appellant.

John C. Packard, of Los Angeles, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

This action was brought by respondent to recover from the appellant the sum of $5,250, payments on account of seven contracts for the sale and purchase of land. A portion of that sum, $3,500, was a credit given for respondent's equity in a house and lot; the rest had been paid in cash. The action is based upon quantum meruit. It was alleged in the complaint and found by the court that a map which was exhibited to plaintiff, from which the description of the property sold was taken, had not been filed for record, and that therefore the original contracts were void; and that, although a map was filed subsequently and new contracts in which the property was described according to the recorded map were executed thereafter, they, too, were void as being merely continuations of the former ones. It was further alleged and found that the property which was described in the final contracts was not the same property as that described in the original contracts by reference to the same tract numbers as shown on the original plat. The court gave judgment to the respondent for the sum prayed for.

Appellant had subdivided a large tract of land. Its plan was to plant vineyards on the land as sold and care for them for a period of time. For that purpose it reserved in its contracts of sale such easements as were desirable, and also retained the right of possession for three years, and it agreed to transfer with the land a proportionate number of shares of stock in a mutual water company, so that the purchasers would be entitled to definite amounts of water for the irrigation of their vineyards.

Pursuant to the plan to sell the tracts, the La Vina Investment Company, a corporation subsidiary of the appellant, entered into a contract with Emmett Kadletz, whereby it granted to Kadletz for a period of one year "an option, but not an exclusive option, to buy such portion of the parcels of land hereinabove described and referred to, as may be unsold at the time this option is exercised, of (at) the price marked upon each parcel on the sales map of said parcels on file in the office of the Seller, less $500.00, it being understood and agreed between the parties hereto, however, that in the event the Buyer resells any of the said parcels within the period of one year from the exercising of this option, then in that event said parcels shall be sold only according to the prices shown on the parcels as marked on said map." The contract provided for installment payments, and contained the further agreement that the buyer "will and does at all times assume the responsibility and liability arising from any agreement or representation he or his agents may make on any transaction, wherein he resells any of the parcels upon which he exercises this option."

The property was exhibited to respondent by Kadletz and Rae, who was an officer of appellant corporation. He attended conferences at appellant's office and was handed a plat of the property. No plat had been filed for record, but respondent believed that the one which was given him was a copy of a recorded plat. Two prior contracts were canceled or transferred by appellant in order to make available for respondent seven tracts in one parcel. As directed by appellant, respondent conveyed to Kadletz a house and lot; his equity being agreed to be $3,500. It was shown at the trial that appellant was indebted to Kadletz in more than that amount. Respondent paid to appellant the sum of $70 (being $10 on account of the purchase of each parcel), and, as directed by appellant, executed with Kadletz seven "preliminary" contracts of purchase, each of which recited that a deposit of $510 had been made and provided for monthly payments of $10 until $675 should be paid. The respondent agreed that he would then, at the option of the appellant, execute a formal sales contract with appellant, containing terms set out on the reverse of the preliminary agreement. Those terms provided for the planting of a vineyard by appellant, for the care of the vineyard by appellant for three years as a matter of right, and thereafter, at the option of the buyer, for the cultivation of the vineyard by appellant on a share basis; also for a supply of water for irrigation, and for necessary rights of way. It was agreed in the preliminary sales agreement that it was "not binding on the La Vina Land Co."; that the seller "or his representative is solely responsible for any representation made to the buyer other than those set forth in the formal agreement of sale"; and that the "owner reserves the right to describe the property designated in the formal sales contract and deed by either metes and bounds or lot number and block number."

Respondent made installment payments, not to Kadletz, but to the appellant. After he had paid $675 on each of the seven con-

tracts, he executed new agreements with the appellant, all as contemplated by the original contracts, and made some further payments. Before the final contracts were executed, but without the knowledge of the respondent, the appellant had filed a plat for record, from which the descriptions were taken; but a comparison of that plat with the one given to the respondent at the time of the original transaction showed a difference in the size and location of the lots covered by the agreements. This fact was not, however, known to respondent.

Appellant contends that the sale of the land was made by Kadletz, that he was not an agent of appellant, and that therefore, if there was any illegality in the sale, it is Kadletz, and not the appellant, who is liable therefor. In support of that contention appellant cites the case of Robinson v. Easton, Eldridge & Co., 93 Cal. 80, 28 P. 796, 797, 27 Am. St. Rep. 167. In that case the Supreme Court had under consideration a contract by which the defendants were authorized "within five days from date hereof, and until this authority is canceled in writing by us, to sell for the sum of $10,000" certain property, and the owner agreed to pay "a commission of all over said sum of $10,000, net, for which they may sell said property with our consent. * * *" It was held that the relationship created was not one of mere agency but was that of vendor and purchaser; the court saying: "The relation of the defendant to the plaintiffs was not that of a mere agent. While its authority to sell the land was derived from the plaintiffs, yet the sale was to be made for its own account and benefit, as well as for that of the plaintiffs. Although the authority to sell was not so coupled with an interest as to create in the defendant an interest in the land, or to prevent the plaintiffs from revoking the authority, yet by the terms of the authorization the defendant acquired such a right to a portion of the proceeds of sale as to enable it to make a contract of sale upon terms of its own choosing. * * * The relation thus created between them was rather that of a vendor and purchaser under a contract of sale than one of principal and agent. * * *"

In Smith v. Blodget, 187 Cal. 235, 201 P. 584, 585, the Supreme Court construed the following instrument: "This agreement witnesseth that we herewith give to Frank H. Smith, Jr., an option on our land * * * to handle and sell for us at a net price to us of $100.00 per acre. This option good for 60 days from date except that it may be revocable by a 10 days' notice to him or to his last P. O. address." Holding that the instrument created an option, the court said that: "The case here presented is one where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous and requires interpretation. It was therefore permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. * * * Taking into consideration the dealings previously set forth, the various assignments of the option and the manner in which the sale was conducted by all the persons involved, the evidence must be held sufficient to support the finding of the trial court 'that the said instrument was acted upon and construed by the grantors thereof and all the parties to this action as an option, and not as a mere agency authorization.'"

In Tufts v. Mann, 116 Cal. App. 170, 2 P. (2d) 500, 503, the trial court had found that the plaintiff had obtained from the owner of certain property an exclusive thirty-day option to purchase it for $50,000 net to the owner. The court said: "An option is an agreement by which an owner invests another with the exclusive right to buy certain property at a stipulated price, within a limited time. * * * It is apparent that respondent held an option and right to purchase the property in question, and that such option was not merely a listing with authorization to sell the property as agent for the owner."

The foregoing decisions were reviewed in the opinion written in the case of Ruess v. Baron, 217 Cal. 83, 17 P.(2d) 119, 120. There the court had under consideration an instrument by which the owner of land granted to the plaintiff "the sole and exclusive right or option to buy or sell, on or before the 1st day of October, 1928," the said land for $100,000. The court said: "We think the line of cases last mentioned are controlling here, and that the writing here in question was much more than a mere agency agreement, and we are not privileged to interfere with the court's decree to this effect. The price of defendant's property, whether purchased by plaintiff or by another, was to be a net price to defendant. Plaintiff's profit or compensation, if any, was to be what he could sell the property for over and above that amount; whether he sold it for much or little above that amount would avail the owner nothing."

[1] It is clear from the foregoing authorities that the test of the relationship between the parties is the intent of the parties as disclosed by their agreement and all of the facts

and circumstances, including the conduct of the parties. Obviously one cannot by merely casting what is intended to be an agency contract in the form of an option reserve the privileges, but avoid the responsibility, of a principal.

[2, 3] To create a relationship of vendor and vendee, rather than a naked agency, the one who is given the power to buy or sell must be given an interest either in the land itself or in the proceeds of the sale of the land. He acquires such an interest if he is empowered to sell upon terms of his own choosing and is to receive all of the proceeds above a specified amount. But in the case at bar the price at which the land was to be sold was not fixed—it was to be such a price as the appellant should designate from time to time. Kadletz was not to receive the entire purchase price above a sum named—he was to get $500 flat for each parcel sold. By the very terms of the agreement his right to sell any parcel was not exclusive, and the agreement was not at all in line with the sales plan of the appellant, for it contained no provision for the planting of vineyards, the reservation of easements, and the furnishing of water. Furthermore, the conduct of the parties indicated that Kadletz was regarded as an agent by all of the parties.

"In order to charge the real principal, it is always competent, in whatever form a contract is executed by an agent, to ascertain by evidence de hors the instrument who is the principal, whether the contract purports to be that of an agent, or is made in the name of the agent as principal; and it is immaterial that the principal signed the instrument as a witness in order to disguise his real character as principal." Curran v. Holland, 141 Cal. 437, 75 P. 46.

It is true that in the case at bar the principal was not undisclosed. The appellant took an active part in the sale of the property, and, according to the testimony of the respondent, was regarded by him as the principal. Respondent executed the original contracts with Kadletz; but he did not, by that act, release the appellant from responsibility. In the case of Feeney v. Clapp, 126 Cal. App. 729, 15 P.(2d) 178, 179, where the court had under consideration a lease executed with an agent, the court, in holding the owner liable, said: "It is clear from the evidence that Mrs. Feeney did not extend credit exclusively to Clapp, notwithstanding that the lease was made in his name, and that she justifiably acted upon the belief that she was also dealing with his principals. Where such is the case, the rule is well settled that the principal is liable. Geary St., etc., R. R. Co. v. Rolph, 189 Cal. 59, 207 P. 539; Rubin v. Platt Music Co., 92 Cal. App. 203, 268 P. 396; Milonas v. Sarantitis, 109 Cal. App. 343, 292 P. 978. See, also, Pacific, etc., Homes, Inc., v. Seeber, 205 Cal. 690, 272 P. 579, where Ferguson v. McBean, 91 Cal. 63, 27 P. 518, 14 L. R. A. 65, cited by defendants, is criticized."

[4] After the execution of the preliminary sales agreement, respondent continued to make payments to appellant. The preliminary agreements required respondent, as soon as certain payments had been made, to execute with appellant new agreements, the terms of which were determined in advance. At the suggestion of the appellant, he did execute such new agreements. They did not, however, constitute new contracts, for they did not change the original contractual relationship between the parties. It is true that in the final agreements the tracts as described by reference to the recorded plat did not contain as much land and were not in precisely the same location as the tracts that were indicated on the plat that was given to the respondent at the time the original contracts were executed. But that change was made without the knowledge or consent of respondent and cannot be taken advantage of by appellant.

In view of the foregoing, we have a situation where a contract of sale is made with reference to an unrecorded plat which the vendee believes has been filed for record. Such contracts have uniformly been held to be void, and the vendee has been allowed to recover the consideration that he has paid. In Goodspeed v. Associated Almond Growers, 208 Cal. 121, 280 P. 530, 531, the rule is stated as follows: "The description itself, as it appears in the contract, calls for the use of some map or plat for identification of the property, without which said description is plainly unintelligible and perhaps void for uncertainty. In short, an examination of the evidence shows that it is ample to sustain the findings made by the court that the sale was made from an unauthenticated map or plat, and hence brings into operation the rule many times stated by this court, that a contract to sell lots described only by reference to an unrecorded map, contrary to the provisions of the statute hereinabove referred to, is void and unenforceable and the purchaser thereunder may recover the amount paid by him. Smith v. Bach, 183 Cal. 259, 191 P. 14; Smith v. Bach, 54 Cal. App. 236, 201 P. 611;

White v. Jacobs, 204 Cal. 334, 267 P. 1087; Hartzell v. Doolittle, 205 Cal. 17, 269 P. 527; Krause v. Marine Trust & S. Bank, 93 Cal. App. 681, 270 P. 246; Letteau v. Dumas, 99 Cal. App. 230, 278 P. 459. Further discussion is not required."

[5-7] Appellant contends, however, that, because the act which prohibited sales of land by reference to an unrecorded map and prescribed a penalty for making such sales (Stats. 1907, p. 290) was repealed in 1929 (Stats. 1929, pp. 1790, 1805, § 40), before this action was commenced, respondent's cause of action lapsed. As a general rule, the repeal of a statute which gives a cause of action has the effect of destroying all accrued causes of action that are based upon it. Willcox v. Edwards, 162 Cal. 455, 123 P. 276, Ann. Cas. 1913C, 1392; Callet v. Alioto, 210 Cal. 65, 290 P. 438; Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327; Coombes v. Franklin, 213 Cal. 164, 1 P.(2d) 992, 4 P.(2d) 157; the decision in the latter case being, however, reversed in Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866. But that rule obviously can have no application here, for the later statute is merely a revision of the laws relating to the filing of maps. The statute of 1929 also prohibits the sale of real property by reference to a map that has not been filed for record, and prescribes a penalty for making such sales, and it expressly declares void, at the option of the purchaser, any sale that is made in violation of the statute. Obviously, it was not the intent of the Legislature to validate all contracts that, under the pre-existing law, were void as being contrary to public policy. Nor can such an intent be inferred from the proviso that is contained in section 1 of the later act, to the effect "that nothing herein contained shall require the recordation of a map showing property sold or contracted for sales by metes and bounds or by reference to an unrecorded map prior to the adoption of this act as a condition precedent to the sale or contract of sale of the whole or part thereof." Under certain conditions, where the map is not relied upon for the description, but is merely referred to, the sale is not invalidated. Walbridge v. Richards, 212 Cal. 408, 298 P. 971. It was clearly the intent of the Legislature only to avoid interference with sales that had been legally made, though by reference to unrecorded maps.

[8] Respondent argues that in any event the contracts were void, for the reason that they contained, as an essential part of the consideration, agreements to transfer shares of stock in a mutual water company, contrary to the provisions of the Corporate Securities Act (St. 1917, p. 673, as amended). The record shows that, upon the hearing of a motion for a new trial, it was brought to the attention of the trial court, without contradiction, that a permit to issue such stock had not been obtained. It may be conceded that that fact would in itself entitle the respondent to recover all payments made by him, but, not being pleaded, it cannot be considered upon this appeal.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



3 Cal.App.2d 391

LANDGRAF v. UNRAU et al.

Civ. 9003.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1934.

Appeal and error ⇐1010(1)

Where bill of exceptions contains ample evidence to support trial court's findings, judgment must be affirmed.

Appeal from Superior Court, Los Angeles County; B. J. Scheinman, Judge.

Action by John C. Landgraf against Mrs. Roy M. Unrau and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Voltaire Perkins, of Los Angeles, for appellants.

Kiggens & Hoffman and Harold S. Kiggens, all of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

The automobile of defendants Unrau, driven by defendant Bennett with Unrau's permission, was involved in an accident with two other cars. The trial court found that the accident was caused by negligence of the driver of defendants' car and of the driver of one of the other cars, but that the latter's negligence was not to be imputed to plain-

tiffs May, King, Rentschler, and West, who were guests in his car. The other plaintiff, Landgraf, was driver of the third car, and was found to be not negligent. From judgment for plaintiff, the defendants appeal on the sole ground that the driver of their car was not negligent.

The evidence presented to this court in the bill of exceptions shows ample support for the court's findings. Judgment affirmed.

I concur: CRAIL, J.



3 Cal.App.2d 275

PEOPLE v. CARR.

Cr. 2611.

District Court of Appeal, Second District, Division 1, California.

Dec. 21, 1934.

Criminal law ⇐829(1)

Where instructions given by court sufficiently covered subjects referred to in requested instructions, refusal to give requested instructions *held* not error.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harold E. Carr was convicted of manslaughter, of failing to stop and render aid in violation of section 141 of the California Vehicle Act (St. 1929, p. 544, § 141), and of driving an automobile while under the influence of intoxicating liquor in violation of section 112 of California Vehicle Act (St. 1929, p. 537, § 112), and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem.

Defendant was informed against, and, after trial by jury, found guilty of three offenses: Manslaughter; violation of section 141 of the California Vehicle Act (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544), failing to stop and render aid; and violation of section 112 of the California Vehicle Act (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537), driving an automobile while under the influence of intoxicating liquor.

In support of his appeal, appellant urges that the evidence is insufficient to support any one of the several verdicts, and also that the court committed error in refusing to give certain instructions requested by him.

A reading of the transcript convinces us that there is abundant evidence in the record to support the verdict and judgment as to each count.

Nor is there merit in the contention that the court erred in refusing to give the instructions referred to. The instructions which the court gave to the jury sufficiently covered the subjects referred to in the refused instructions.

The judgment and order appealed from are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



EARL RANCH, Limited, v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 9888.

District Court of Appeal, Second District, Division 2, California.

Sept. 5, 1934.

Rehearing Granted Oct. 4, 1934.

On Rehearing Dec. 17, 1934.

Hearing Granted by Supreme Court Feb. 14, 1935.

Master and servant ⇐363

Farm laborer injured two months after employer had acquired ranch on April 1 *held* not entitled to compensation, where employer's pay roll for preceding calendar year was less than $500, though it exceeded that amount while employer operated ranch, and though neither party had rejected the Compensation Act; "calendar year" meaning period from January 1 to December 31 next inclusive (Gen. Laws 1931, Act 4749, § 8; St. 1927, p. 1681; St. 1931, p. 1962).

[Ed. Note.—For other definitions of "Calendar Year," see Words & Phrases.]

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 53 P.2d 154.

Petition under the Workmen's Compensation Act by the Earl Ranch, Limited, to set aside an award of the Industrial Accident Commission to Joe Anderson.

Award annulled.

Fred W. Heatherly and Joe Orloff, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Fred W. Heath, of Los Angeles, for respondent Joe Anderson.

PER CURIAM.

Petitions for writs of review are denied.

On Rehearing.

SCOTT, Justice pro tem.

Respondent Anderson was injured June 17, 1932, while working as farm laborer employed by petitioner. The latter had acquired the ranch property about April 1, 1932. An award was made to said employee for said injury, and petitioner seeks to have it annulled on the ground that the employer did not come within the terms of the Workmen's Compensation Act because its pay roll had been less than $500 for the preceding calendar year. It appears that it had no pay roll whatever embracing agricultural laborers until it took over the ranch on which Anderson worked. Between the time of acquisition of the property and the date of the accident—a period of about two months—petitioner's total pay roll exceeded by a substantial amount the sum of $500.

The Workmen's Compensation Act (General Laws 1931, Act 4749, § 8), in defining "employee," excludes agricultural laborers. Chapter 834, St. 1927, p. 1681, modifies the effect of such definition, and provides that both employer and employee shall be conclusively presumed to have accepted the compensation provisions of said Workmen's Compensation Act as amended, unless each takes affirmative action as therein prescribed rejecting its provisions. In 1931 (St. 1931, c. 955, p. 1962), section 1 of said chapter 834 was amended so that this presumption would not be operative so as to require such notice of rejection, "where the pay roll of such employer for the preceding calendar year has not exceeded five hundred dollars." No notice of rejection was given in this case.

We find no substantial support in the cases cited for respondent's contention that the term "calendar year" should be construed as synonymous with "year," and that such year could be calculated as the twelve months preceding the accident. The words "calendar year" mean from January 1 to December 31 next, inclusive. Brown v. Anderson, 77 Cal. 236, 19 P. 487; Shaffner v. Lipinsky, 194 N. C. 1, 138 S. E. 418; Byrne v. Bearden, 27 Ga. App. 149, 107 S. E. 782. Since petitioner's pay roll for the calendar year preceding the accident was less than $500, it was excluded from the compensation provisions of the Workmen's Compensation Act, even though no notice of rejection was given.

Award annulled.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 273

SMITH et al. v. ROTHSCHILD.

Civ. 9427.

District Court of Appeal, First District, Division 2, California.

Dec. 21, 1934.

1. Automobiles ⇐245(82)

Contributory negligence of driver of motorcycle, colliding with approaching automobile, which was crossing to opposite side of winding road, after motorcycle rounded curve obstructing view of both drivers, *held* for jury on conflicting evidence.

2. Automobiles ⇐245(50, 90)

Whether motorcyclist or automobile driver was guilty of negligence proximately causing collision as automobile was crossing to opposite side of road after motorcyclist rounded curve obstructing drivers' views *held* for jury on conflicting evidence.

3. Automobiles ⇐244(36, 57)

Evidence *held* to sustain jury's implied findings for plaintiffs in action for injuries, in collision between motorcycle and automobile, as warranting conclusions that plaintiff operated motorcycle lawfully and prudently and acted with reasonable prudence in sudden emergency and that defendant operated automobile in unlawful and negligent manner proximately causing accident.

4. Appeal and error ⇐699(4)

Whether court erred in giving instructions complained of by appellant need not be considered, where record does not disclose

at whose request such instructions were given.

5. Trial ⇐28(3)

Refusal to permit jury to leave courtroom and inspect motorcycle similar to one ridden by plaintiffs at time of collision with automobile driven by defendant *held* not abuse of trial court's discretion.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Louis E. Smith and another against Cora Rothschild. Judgment for plaintiffs, and defendant appeals.

Affirmed.

See, also (Cal. App.) 34 P.(2d) 1050.

John H. Black and J. M. Wallace, both of San Francisco, and Ross & Ross, of Redwood City, for appellant.

Norman S. Menifee, of Redwood City, for respondents.

SPENCE, Justice.

This action for damages for personal injuries was tried before a jury and resulted in a judgment in favor of plaintiffs for the sum of $7,500. Defendant appeals from said judgment.

[1-3] Appellant's main contention is that "plaintiffs were guilty of contributory negligence as a matter of law and the alleged negligence of the defendant did not proximately cause the accident." In support of this contention appellant argues the facts at length, but cites no authorities to sustain her position. The essential facts may be briefly stated. Respondents were riding on a motorcycle coming down the grade in an easterly direction on a winding road running from Woodside toward Redwood City in San Mateo county. Appellant was driving an automobile in a westerly direction along said road. The parties approached a curve in the road at about the same time. At this point the road was about 19 feet wide with a bank on the south side thereof which obstructed the view of the parties as they approached said curve. There was a white line along the center of the road, respondent's side of the paved highway being approximately 9 feet in width and appellant's side of the highway being approximately 10 feet in width. There was a conflict in the evidence on several points and particularly regarding the speed and relative positions of the vehicles. According to the testimony offered on behalf of respondents, they were at all times on their right-hand side of the center line of said highway, and as they rounded said curve at about 15 miles per hour, appellant's automobile was approaching about 40 to 50 feet away on the wrong side of the road. In the brief time which elapsed, respondent Louis Smith testified that he thought of crossing to the left side of the road in an attempt to avoid the accident. He did not do so, but put on his brakes as appellant turned her machine to the right. The motorcycle collided with the left side of appellant's automobile as said automobile was traveling at an angle in crossing over to the north side of the road.

As we view the conflicting evidence in the record, the issues of contributory negligence and proximate cause were questions for the jury's determination rather than questions of law for the court. From the evidence above set forth, the jury could properly conclude that respondent Louis Smith was operating his car in a lawful and prudent manner, that appellant was operating her car in an unlawful and negligent manner, that respondent Louis Smith was confronted with a sudden emergency and acted as a reasonably prudent person in such emergency, and that the negligence of appellant was the proximate cause of the accident without any negligence on the part of respondents. Such evidence therefore sustains all of the implied findings in favor of respondents and the judgment may not be disturbed on appeal.

[4] Appellant also complains of certain instructions given to the jury. It would be a sufficient answer to state that the record does not disclose at whose request said instructions were given (Walters v. Evick, 93 Cal. App. 1, 16, 268 P. 1061), but we have reviewed the charge of the jury and find no prejudicial error therein.

[5] It is further urged that the court erred in not permitting the jury to view a motorcycle similar to the one ridden by respondents. Appellant concedes that the trial court had a wide discretion in determining whether the jury should be taken from the courtroom to make such an inspection, and we find no abuse of discretion here. We may further state that our attention has not been called to any place in the record where the trial court made any ruling refusing to permit such an inspection.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

3 Cal.App.2d 140

LIVESAY v. DEIBERT.

Civ. 8364, 8492.

District Court of Appeal, Second District, Division 1, California.

Dec. 18, 1934.

Rehearing Denied Jan. 8, 1935.

Hearing Denied by Supreme Court Feb. 14, 1935.

1. Appeal and error ⇐933(4)

If nunc pro tunc order was ineffectual to show that new trial had been granted for insufficient evidence, it would be presumed on appeal from original order granting new trial that it was not granted because of insufficient evidence (Code Civ. Proc. § 657).

2. New trial ⇐163(1)

Court cannot review order duly made and entered granting or denying new trial and make different order, but order may be amended to correct inadvertence or clerical mistake (Code Civ. Proc. § 657).

3. New trial ⇐163(1)

Trial judge's failure to state in order written out by himself to clerk that new trial was granted for insufficient evidence *held* mere inadvertence which could be corrected by nunc pro tunc order (Code Civ. Proc. § 657).

4. Appeal and error ⇐934(1)

All presumptions not contradicted by or inconsistent with record are in favor of correctness of judgment.

5. Appeal and error ⇐933(4)

On appeal from order granting new trial, it would be presumed that trial court entering nunc pro tunc order stating that new trial was granted for insufficient evidence, found mistake in original order to be court's own clerical error, and his determination of fact is conclusive (Code Civ. Proc. § 657).

6. New trial ⇐163(1)

Trial court's jurisdiction to correct clerical errors in order granting new trial so as to state that new trial was granted for insufficient evidence continued after time had expired within which original order could have been made and after appeal had been taken (Code Civ. Proc. § 657).

7. New trial ⇐163(1)

Trial court could make nunc pro tunc order correcting clerical error in order granting new trial ex parte as against contention that court could do so only on motion after notice, since court has duty, on its own motion, to correct mistakes when they are called to court's attention (Code Civ. Proc. § 657).

8. Appeal and error ⇐1015(2)

Order granting new trial for insufficiency of evidence would not be reviewed, where evidence was conflicting (Code Civ. Proc. § 657).

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by Charles Livesay, by his guardian ad litem, Leona E. Livesay, against Harry I. Deibert. From an order granting a new trial after judgment on verdict had been rendered for plaintiff, plaintiff appeals.

Affirmed.

Leo E. Anderson and Meserve, Mumper, Hughes & Robertson, all of Los Angeles, for appellant.

Walter F. Keen and Fred O. Reed, both of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff was awarded damages by verdict of a jury in an action for personal injuries. After entry of judgment on the verdict, defendant gave notice of intention to move for a new trial. This notice was given August 24 and the time expired on October 23 within which the court could grant a new trial. Hon. K. Van Zante, judge of the superior court of Kings county, presided at the trial. The motion was presented and submitted September 3, 1931. On October 17, 1931, the trial judge himself wrote and signed a letter to the county clerk of Los Angeles county reading as follows: "Superior Court Chambers. K. Van Zante, Judge. Hartford, Kings County, California, Dept. 4. Hanford, Cal., Oct. 17th, 1931. Mr. L. E. Lampton, County Clerk, Room 500, Hall of Records, Los Angeles, California. Dear Sir: In the case of Charles Livesay etc. v. Harry I. Deibert, No. 304137, please enter in your minutes order granting motion for new trial, and notify parties thereof. Yours truly, K. Van Zante." On October 23, 1931, the clerk entered a minute order pursuant to said letter, as follows: (title of court and cause) "Letters being filed, defendant's motion for a new trial, heretofore submitted, is now by court granted." On November 2, 1931, the trial judge personally wrote, signed, and mailed a letter to a deputy county clerk, as follows: "Superior Court Chambers. K. Van Zante, Judge. Hanford, Kings County, California. Hanford, Cal., Nov. 2nd, 1931. Mr. R. F. Gragg, Deputy County Clerk, Room 500, Hall of Records, Los Angeles, California. Dear Sir: Through inadvertence the order heretofore made granting a new trial in the case of Charles Livesay, etc., v. Harry I. Deibert, No. 304137, the

grounds were not stated therein and it is therefore ordered that said order be and the same is hereby amended nunc pro tunc as of date made, to read: It is ordered that defendants' motion for a new trial herein be and the same is hereby granted on the ground of the insufficiency of the evidence to sustain the verdict rendered in the action. Yours truly, K. Van Zante." This letter was received by the clerk November 3, 1931, and on November 7 he entered a minute order, as follows: "(In the Superior Court of the County of Los Angeles, State of California. November 4, 1931, by Hon. K. Van Zante, judge of the Superior Court of Kings County, California, in chambers at Hanford, under designation of the chief justice, as chairman of the Judicial Council. (Title of Court and Cause.) As per letter from Judge Van Zante of November 2, 1931 (filed November 4, 1931), minute entry of October 20, 1931, is now amended nunc pro tunc as of October 20, 1931, to read, 'It is ordered that defendant's motion for a new trial herein be and the same is hereby granted on the ground of the insufficiency of the evidence to sustain the verdict rendered in the action.'"

On the 27th day of October, 1931, plaintiff appealed from the order entered October 23, 1931. A second appeal was taken from the nunc pro tunc order and a third from an order incorporating the nunc pro tunc order in the transcript on appeal. The several appeals are submitted upon the same record. We shall discuss the appeal from the order granting the new trial upon the facts shown by the entire record.

The first matter to be determined is the effect to be given to the order of November 2 entered by the clerk on November 7. It is contended by plaintiff that the court was without jurisdiction to make the nunc pro tunc order because the first order was final and reviewable only on appeal. Jurisdiction is further denied because at the time of the second order, the time had expired within which a new trial could be granted and also because plaintiff had appealed from the original order.

[1] If the second order was effective, the order, as amended, designated insufficiency of the evidence as the ground upon which a new trial was granted; if it was ineffectual for that purpose, it will be presumed upon the appeal from the original order that it was not granted because of the insufficiency of the evidence. Section 657, Code Civ. Proc.; Wilkinson v. United Railroads of San Francisco, 195 Cal. 185, 232 P. 131; Yoakam v. Hogan, 198 Cal. 16, 243 P. 21.

Appellant claims that the order of November 2 "does not appear to be an order made for the purpose of correcting a clerical misprision but is an attempt to correct an alleged judicial error." This statement presents the principal inquiry.

[2] The court cannot review an order duly made and entered granting or denying a new trial and make a different order. The rule is not violated, however, when the order is amended to correct an inadvertence or a clerical mistake.

A very satisfactory statement of the rule applicable is that of Chief Justice Beatty in Holtum v. Greif, 144 Cal. 524, 78 P. 11, 12, as follows: "The decisions of this court are numerous and uniform to the effect that a judgment or order once regularly entered can be reviewed and set aside only in the modes prescribed by statute. If they have been entered prematurely or by inadvertence, they may be set aside on a proper showing, * * * and, if the order as entered is not the order as made, the minutes may be corrected so as to make them speak the truth, * * * but, subject to these exceptions, the order is reviewable only on appeal, and, the decision of the trial court having been once made after regular submission of the motion, its power is exhausted. It is functus officio."

The situation shown by the record in the present case seems to be not an unusual one. Similar orders have been under review in a number of recent cases. Brush v. Pacific Electric Railway Co., 58 Cal. App. 501, 208 P. 997; King v. Emerson, 110 Cal. App. 414, 288 P. 1099, 294 P. 768; Beall v. Erickson, 113 Cal. App. 36, 297 P. 960; Dalley v. B. & H. Transportation Co., 114 Cal. App. 320, 299 P. 748, 749; and Lauchere v. Lambert, 210 Cal. 274, 291 P. 412. In each of these cases an order granting a new trial was amended by a subsequent order so as to state as the ground therefor the insufficiency of the evidence. These orders correcting the record were sustained on appeal.

In Brush v. Pacific Electric Railway Co. it was assumed that the court, in announcing the order, directed the clerk to specify in the original minute order, or otherwise communicated to the clerk, that insufficiency of the evidence was the ground for the order, and that the mistake was made by the clerk in failing to follow the directions of the judge.

In King v. Emerson a motion for a new trial was urged solely upon the ground of in-

sufficiency of the evidence. The court announced from the bench that it would grant the motion, but made no statement of the grounds for the order and none were entered by the clerk. In upholding an order thereafter made by the court upon its own motion, the court said (page 421 of 110 Cal. App., 288 P. 1099, 1102, 294 P. 768): "Under these circumstances the court had the right to assume that the minute order would be entered by the clerk to the effect that the motion was granted upon the insufficiency of the evidence, that being the only point urged at the hearing. Upon discovering that the clerk had not made the proper entry, and that the minute order did not express the true ruling, the court had the power to correct its order. The act of the court in omitting to orally state the grounds for his ruling was an inadvertence under the authorities cited, and it cannot be said that the court, in correcting and amending its original order, was correcting a judicial error."

In Beall v. Erickson a similar situation was presented; the original order granting a new trial failed to state the grounds, and thereafter, by minute order in terms practically identical with the order here involved, the former order was corrected to specify the ground of insufficiency of the evidence. The order was upheld on appeal upon authority of Brush v. Pacific Electric Railway Co. It was assumed in this case as in the Brush Case that the inadvertence was that of the clerk in entering the order, the record failing to show the contrary.

Two similar orders were involved in Dalley v. B. & H. Transportation Co. It did not appear, except by inference from the terms of the second order, that the amendment was being made for the correction of a clerical error. The court said: "But, in the absence of evidence to the contrary, it may rightly be presumed that the court was not attempting to change any judicial action in the premises—in other words, was not assuming to exceed its authority."

In Lauchere v. Lambert, 210 Cal. 274, 291 P. 412, the trial court, in granting a new trial, stated in open court that the evidence was insufficient to justify the verdict; the order, as entered by the clerk, failed to state any grounds upon which it was made. Thereafter the court, of its own motion, made an ex parte order which recited the foregoing facts and ordered the entry nunc pro tunc of an amended order particularly stating the insufficiency of the evidence as the ground for granting the new trial.

These cases show how easily an insufficient record may be made of a ruling granting a new trial where, through forgetfulness or carelessness, the true reasons for the order are not stated or recorded. It is the order which is made that governs; not the order that is recorded. Where the error is made by the clerk, it is necessarily a clerical one. Where it is made by the judge, it may be either a clerical or a judicial error; if it is a clerical error, it is undoubtedly as open to correction as though it were an error of the clerk.

[3] In the present case the order was written by the judge at Hanford and mailed to the clerk at Los Angeles. The decision of the motion, which necessarily embraced a determination of the grounds therefor, was a judicial act of the court. Its reduction to writing was a clerical act. If a mistake was made in writing the order, then the amending order added nothing to the original order, but it did add to the record the statement of fact existing when the original order was made but which had been inadvertently omitted therefrom. The omission of the judge to state the grounds for the order was held in King v. Emerson, supra, to be an inadvertence which could be corrected. The failure to state the grounds in the written order under review was likewise an inadvertence upon the part of the judge. There was, of necessity, a reason for granting the motion. That reason was known to the judge and is shown by the record to have been insufficiency of the evidence. Upon the record before us, we believe that the recital in the second order of inadvertence in the making of the first order is conclusive as to that fact. It appears from that recital that the judge made a mistake of some sort, either in deciding what to put into the order or in writing into it the complete terms of his decision. There is no evidence in the record to contradict the recital of the amending order to the effect that a mistake had been made.

[4] The later order must be taken as the decision of the judge that the error was clerical and not judicial. The situation calls for the application of the rule that "all presumptions not contradicted by or inconsistent with the record are in favor of the correctness of the judgment." Lyons v. Roach, 84 Cal. 27, 23 P. 1026. And, as stated in Davis v. Lezinsky, 93 Cal. 126, 28 P. 811, "however this may be, the presumption is that the judgment is correct until proved otherwise, and the burden of overcoming this presumption is upon the appellant. He does not shift or dis-

charge the burden by merely showing an apparent inconsistency in the recitals which may as well be reconciled in favor of the judgment as against it. In others words, if the recitals, read together, are as susceptible of a construction which will sustain the judgment as of a construction which will defeat it, the presumption in favor of the judgment requires that the former construction be adopted."

[5] It was for the trial judge to determine whether the order was complete and all that he intended it to be or whether it was deficient. If the mistake was clerical, it could be corrected. If it was judicial, it could not be. It must be presumed that he found it to be his own clerical error; otherwise he would have had no right to make the second order. The facts were completely and solely within his own knowledge. He alone knew whether a mistake had been made and how it had been made. He had a right to rely upon his own memory (King v. Emerson, supra), and his determination of the fact is conclusive (People v. Curtis, 113 Cal. 68, 45 P. 180; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am. St. Rep. 139; Harman v. Cabaniss, 207 Cal. 60, 276 P. 569). This disposes of the claim that the second order was an afterthought or an attempt to correct a judicial error. It follows that the fact was as stated in the amending order and that that order attempted to do no more than correct the record to make it speak the truth.

[6] For these reasons, the court retained jurisdiction to amend the original order, limited, however, to its right to correct clerical errors therein. This jurisdiction continued after the time had expired within which the original order could have been made and after an appeal had been taken. Lauchere v. Lambert, 210 Cal. 274, 291 P. 412, and cases cited.

It may be added that this holding conforms with the requirements of justice in the case, since to hold otherwise would deprive the defendant of a right to a new trial on the ground of insufficiency of the evidence, which right would have been clearly shown by the record in the first instance had it not been for the mistake in question.

[7] Appellant makes the further claim that the court could not make the order ex parte, but only on motion after notice given. This view, however, is contrary to the settled rule that the court not only has the power but is also under the duty, upon its own motion, to correct such mistakes when they are called to its attention. Robson v. Superior Court, 171 Cal. 588, 154 P. 8.

From the foregoing conclusions, it results that defendant's motion for a new trial was granted upon the ground of insufficiency of the evidence to justify the verdict and the appeals must be considered upon that basis.

[8] The action arose out of a collision between a motorcycle ridden by plaintiff and an automobile driven by defendant. We have examined the record and find that there was a conflict in the evidence upon the material points in issue. Under familiar rules, the order granting a new trial cannot be disturbed. It is unnecessary to decide whether a new trial might properly have been granted upon any of the other grounds discussed in the briefs.

The views herein expressed are determinative of the several appeals and the orders are therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.



3 Cal.App.2d 489

KERSTENS v. PACIFIC GAS & ELECTRIC CO.

Civ. 9517.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1935.

Rehearing Denied Feb. 2, 1935.

Hearing Denied by Supreme Court March 4, 1935.

1. Negligence ⇐136(9)

Only where no fact is left in doubt and no deduction or inference other than negligence can be drawn by jury from the evidence can the court say as matter of law that contributory negligence is established, and, even where facts are undisputed, question is for jury, if reasonable minds might draw different conclusions.

2. Electricity ⇐19(12)

In action against electric company, contributory negligence of ironworker injured by electric shock when iron rods, which had been hoisted to third floor of building under construction and which the ironworker was pulling into building, came in contact with charged wires strung near side of building, *held* for jury under evidence.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by E. Kerstens against the Pacific Gas & Electric Company, in which there was a verdict for defendant. From an order granting plaintiff's motion for a new trial, defendant appeals.

Affirmed.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellant.

Reisner & Deming, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff sued to recover damages for personal injuries. The action was tried before the court sitting with a jury. A verdict was returned in favor of the defendant. The plaintiff made a motion for a new trial specifying all of the statutory grounds. Thereafter an order was made that the motion be granted. From that order the defendant has appealed under the alternative method.

In its brief it makes only one point, and that is that the evidence showed the plaintiff was guilty of contributory negligence as a matter of law. In that connection it concedes that in instructing the jury the trial court erroneously gave an instruction which in part was as follows: "Before the plaintiff can recover against the defendant he must prove by a preponderance of the whole evidence * * * that the plaintiff was himself not guilty of negligence contributing to the accident and the resulting injuries." Continuing, it asserts that because of said error the trial court granted a new trial. Although the record does not show the fact, we will assume the statement of the defendant is correct. Further continuing, the defendant asserts the evidence showed that the plaintiff was guilty of contributory negligence as a matter of law. Thereupon it argues that, in giving the erroneous instruction, the error became immaterial. If, as contended by the defendant, the plaintiff was guilty of contributory negligence as a matter of law, the order appealed from should be reversed, otherwise it should be affirmed. We therefore pass to a consideration of the facts recited in the defendant's brief on which it is asserted that the plaintiff was guilty of contributory negligence as a matter of law.

The accident occurred on August 7, 1929, at about 10 o'clock in the morning. The plaintiff was an experienced iron worker who had been working at his trade in San Francisco for ten years or more. He was familiar with electric power lines and knew the dangers in working about them. On that day he and two assistants were sent by their employer to install some metal rods in a new hotel building which was being constructed on the east side of Fillmore street near Fulton street in San Francisco. On arriving he found that the framework of the building six stories high had been installed. Floor joists 18 inches apart were in place. A power line extended north and south on the east side of the building. The distance between the wall of the building and the wires was about 9 feet 6 inches. The power line consisted of poles 25 or 30 feet long. At the extreme top of the poles were crossbars, and attached to those crossbars were two wires owned and operated by the defendant and which the evidence discloses carried 11,000 volts. Below those wires were others which were the property of the Market Street Railway Company and which were a part of the power line for the operation of its cars. A hoisting pulley was already in place. A beam had been placed on the top of the building extending out into Fillmore street 2 or 3 feet. At the end of the beam a pulley was attached and a rope ran through the pulley. The device was operated by attaching the weight to one end of the rope, and by hand power the weight was raised to the desired height. The plaintiff went to the third floor. While standing there he observed the power line and the poles. He noticed the crossbeams, but the evidence was conflicting as to whether they were painted or whether they were painted brown or painted yellow. He saw no danger sign on the crossbeams. He took a position near the front of the building, and one of his assistants tied the rope on a bundle of rods 4 or 5 feet from the end. The bundle weighed about 80 pounds, and the rods were about 20 feet long. The helpers on the ground raised the bundle until the lower end was slightly above the third floor. At that time the plaintiff reached out with his right hand, grabbed the bottom of the bundle, and rapidly pulled the lower end into the building on the third floor. As he did so, the helpers slacked the rope. As the bundle was thus brought into place, the outer end either touched the wires or came in such close contact therewith that part of the electric current passed down the rods and through the body of the plaintiff, causing the injuries complained of. When observing the wires, as mentioned above, he noticed that

they were insulated. However, other wires around which he had worked were also insulated. No other portions of the record are cited to us, and, from our examination of the record, the foregoing statement seems to be full and complete.

[1, 2] As to what might be said of the foregoing story, if the attack were made that the plaintiff was guilty of contributory negligence as a matter of fact, we are not called upon to express any opinion. When, as here, the attack is that the facts show contributory negligence as a matter of law, the rule in this state is well settled. In Zibbell v. Southern Pacific Co., 160 Cal. 237, at page 241, 116 P. 513, 515, the court quoted with approval from Johnson v. Southern Pac. R. Co., 154 Cal. 285, 97 P. 520, 525, as follows: "'It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury.'" Applying that rule to the facts which we have recited above, we think it is perfectly evident that reasonable minds might draw different conclusions from those facts.

It follows that the order appealed from should be affirmed. It is so ordered.

We concur: NOURSE, P. J.; SPENCE, J.

3 Cal.App.2d 224

MORRIS v. CANTLAY & TANZOLA, Inc.

Civ. 9005.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1934.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Automobiles ⇐244(10)

Evidence *held* sufficient to sustain verdict for defendant in action for death of occupant of automobile which, while being towed, became detached and ran onto wrong side of highway, colliding with defendant's truck.

2. Appeal and error ⇐1064(4)

Court's inadvertent use of word "plaintiff" in referring to deceased in instruction on last clear chance doctrine *held* not prejudicial error in action for death.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Action by George H. Morris against Cantlay & Tanzola, Inc. Judgment for defendant, and plaintiff appeals.

Affirmed.

H. C. Millsap, of Los Angeles, for appellant.

George P. Kinkle and John S. Hunt, both of Los Angeles, for respondent.

CRAIL, Justice.

The plaintiff was the father of Vincent Morris, a fourteen year old boy, who was killed in an automobile collision when the boy and several of his companions were returning to Los Angeles from a trip to Dry Lake, or near there, where they had intended to go for the purpose of testing the speed of a certain Chevrolet roadster which had been stripped and "hopped-up." The deceased was riding in the roadster at the time of the accident. He had contributed his share to the expenses of operating the automobile on the trip. The roadster required towing by a touring car on certain parts of the way. The towed car became detached from the tow car and ran over onto the wrong side of the highway a distance of 2½ feet when only about 30 feet from the approaching truck of the respondent. The respondent's truck was at all times on its own side of the highway. A collision occurred, resulting in the death of appellant's son. The jury returned a verdict in favor of the respondent, and judgment was entered thereon.

[1] Appellant contends that the verdict is without support in the evidence. We have reviewed the evidence, and cannot agree with this contention.

[2] Appellant further contends that certain instructions were erroneous and prejudicial, and in this regard he particularly complains of an instruction which sets forth the elements of the last clear chance doctrine. In this instruction the court inadvertently used the word "plaintiff" on three or more occasions where it should have used the word "deceased" or "injured person." Appellant admits the correctness of the instruction in cases where the party injured and the plaintiff are identical, but contends that where, as

here, the plaintiff was not the party injured, but his father, the instruction was prejudicial. We do not believe the jury was misled as to the person intended, for the same instruction refers to the plaintiff as the one "who has been injured," and again says that the defendant is not liable under the doctrine of the last clear chance, "unless he has a clear chance to avoid injuring plaintiff." Otherwise it was an instruction which is frequently given and correctly states the law on the subject. Other instructions are complained of, but we find no merit in appellant's contentions with regard to them.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



3 Cal.App.2d 389

HICKEY PIPE & SUPPLY CO. v. FITZGERALD.

Civ. 9036.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1934.

1. Guaranty ⇐6

Where notice of acceptance was waived, extension of credit to third person in reliance on offer of guaranty *held* sufficient acceptance of such offer.

2. Guaranty ⇐10

Where notice of acceptance was waived and obligee accepted offer of guaranty by extending credit to third person in reliance on such offer, obligee's signature was not essential to validity of guaranty contract (Civ. Code, §§ 2787, 3388).

3. Guaranty ⇐27

Contract of guaranty must be considered as a whole.

4. Guaranty ⇐6

Under instrument reading that in consideration of extension of credit to third person at guarantor's request payment was guaranteed, notice was waived, and that guaranty should be a continuing one and remain in force until revoked in writing, instrument constituted a request and where instrument was accepted by extension of credit, no other requests by guarantor were essential to liability.

Appeal from Superior Court, Los Angeles County; Ellis A. Eagan, Judge.

Action by the Hickey Pipe & Supply Company against Gerald Fitzgerald, also known as Gerald C. Fitzgerald. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hickcox, Thomson & O'Connor, of Los Angeles, for appellant.

Frank Lober, of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of plaintiff against defendant, the appellant, for goods furnished to a third person upon an alleged guaranty. The appellant signed and delivered to respondent an instrument in writing, which for brevity's sake is set out herein in substance only, as follows: (1) In consideration of your extending credit at our request to San Vicente Oil Company, in which company I am financially interested, and for value received I guarantee the payment to you of all its indebtedness, now, heretofore, or hereafter incurred; (2) I waive notice of acceptance of this guaranty, notice of sales, and/or indebtedness incurred, and notice of credit given; (3) this guaranty is a continuing one and shall remain in force until written revocation is received by you; (4) such revocation shall only affect indebtedness thereafter incurred.

[1, 2] Appellant's first contention is that this instrument constituted a mere offer and of itself imposed no obligations on appellant. Nevertheless, when the respondent acted upon it and extended the credit, it became a completed contract. The acceptance by respondent was evidenced by the furnishing of goods on credit, and the instrument expressly waived notice of acceptance. Herron Co. v. Flack, 46 Cal. App. 374, 189 P. 294. Neither was it an essential to the validity of the contract that it be signed by respondent. Civ. Code, §§ 2787 and 3388; Gelfan v. Bessolo, 125 Cal. App. 214, 13 P.(2d) 793.

[3, 4] Appellant's second contention is that a fair construction of the words "at our request," as used in the instrument, is that appellant would thereafter make requests of respondent to furnish goods to the oil company and, if and when said requests were

made, upon respondent's furnishing the goods he would be bound. We do not think so. The whole contract must be taken together; and to adopt such construction would be to ignore and violate subdivisions 2, 3, and 4 of the guaranty as set out above. A fair construction in the light of the entire contract is to hold that the "request" was being acknowledged in the same way and in the same sentence that "value received" was acknowledged.

Appellant's last contention is that since he never requested respondent to supply any of the goods after executing the instrument, he is not liable under its tenure. This contention falls, however, with appellant's second contention.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



3 Cal.App.2d 422

HAHN et al. v. WILDE et al.

Civ. 8943.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Rehearing Denied Jan. 30, 1935.

1. Evidence ⇐417(1)

In action to recover purchase or exchange price of stock, which defendants were to deliver as part of exchange agreement, parol evidence of value of stock *held* admissible, where no value had been placed on stock in written contract.

2. Exchange of property ⇐13(1)

Where stock, which defendants were to deliver as part of exchange agreement, had been sold pursuant to assessment before delivery to plaintiffs, plaintiffs' recovery of purchase or exchange price of stock could not be defeated on theory that assessment was void.

3. Exchange of property ⇐13(1)

Where defendants failed to transfer good title to shares of stock as part of exchange agreement, as agreed, plaintiffs were entitled to receive back consideration paid, though complete transaction was in nature of exchange rather than being broken up into number of separate purchases.

Appeal from Superior Court, City and County of Los Angeles; H. Parker Wood, Judge.

Action by Cliff Hahn and others against Frances E. Wilde and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Ewell D. Moore, of Los Angeles, and James Farraher, of San Francisco, for appellants.

W. A. Alderson, Frank J. McCarthy, and L. M. Phillips, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This appeal is from judgment for plaintiffs upon second trial of the case. An appeal from judgment for plaintiffs on the first trial resulted in reversal (211 Cal. 52, 293 P. 30).

The questions presented on the first appeal and at this time are substantially the same, with one exception. Plaintiffs sued to recover $7,000 as the purchase or exchange price of 70 shares of stock which defendants were to deliver to them as part of the terms of an exchange agreement. The title to said shares was so imperfect by reason of a prior sale of them pursuant to an assessment that it constituted to that extent a failure of consideration. On the first appeal the Supreme Court declared that, if there was proof that said shares "had been turned into the exchange at their par value, as alleged," it "would have definitely fixed respondents' loss to $7,000 and would have warranted judgment for that amount." On the second trial competent and persuasive evidence was presented establishing that very element in the case, and the trial court found (VIII) "that all of said shares of stock and the certificates representing them were delivered by the defendants to the plaintiffs at and for their par value, and were accepted and purchased by the plaintiffs from the defendants at and for their par value;" and (IX) "that the plaintiffs gave and paid to the defendants as the purchase price of said shares of stock a consideration equal to the par value of said shares of stock, to wit: $7,000.00."

[1] Appellants protest that it was error to admit parol evidence as to the value of the stock, because there was a written contract which set out the terms of the agreement. No value was placed on the stock in the written contract, however, and, when appellants failed to deliver good title, it was obviously necessary and proper to determine that matter by oral testimony. Such a course was

clearly indicated by the language quoted from the opinion on the earlier appeal.

[2] The suggestion is made that the assessment under which the shares of stock in question were sold was void, and therefore no recovery should be had by respondents. What appellants actually offered to respondents was not good title to said shares of stock but a right of action of dubious value which would require legal proceedings to enforce. Since that was not what respondents had agreed to take, appellants had failed in their part of the bargain.

[3] The further point that the contract was not divisible and that the "attempted rescission was unavailing" ignores the inferences which naturally flow from the language used in the opinion cited. Respondents were not rescinding the contract but were merely seeking to recover the purchase price of seventy shares of stock which they had agreed to take at a value of $7,000 and title to which they never received. Not having received that for which they had contracted, respondents were entitled to receive back the consideration paid therefor, even though the complete transaction was in the nature of an exchange rather than being broken up into a number of separate purchases.

Judgments affirmed.

I concur: CRAIL, J.

This opinion was prepared by Hon. ROBERT H. SCOTT, Justice pro tem.

3 Cal.App.2d 377

Ex parte WESTREICHER.

Cr. 2653.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

Habeas corpus ⇐30(1)

Fact that, in prosecution on information charging defendant with petty theft and with previous conviction of same offense, defendant, pleading not guilty on arraignment, was not at that time asked whether he had suffered such previous conviction and that such question was deferred to the beginning of trial proceedings, when defendant admitted such conviction, *held* at most irregularity not affecting jurisdiction and not reviewable on habeas corpus (Pen. Code, § 1025).

Proceeding on the application of Fred Westreicher for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

Robert Ashton and Harry Keeler, both of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and A. H. Van Cott, Deputy Dist. Atty., both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Information was filed in the superior court of Los Angeles county charging petitioner with the crime of petty theft and a previous conviction of the same offense. On October 11, 1934, he was arraigned and entered a plea of "not guilty." This had the effect of putting in issue both the theft and previous conviction. The case was regularly called for trial in another department on October 30, 1934. Prior to actual trial, in open court, petitioner admitted the previous conviction as charged in the information. Trial was then had before a jury, which returned a verdict of guilty of petty theft as charged in the information. In due course and on November 14, 1934, the court pronounced judgment as follows: "Whereas the said Fred Westreicher having been found guilty in this court of the crime of petty theft with a prior conviction of petty theft, a felony, as charged in the information, defendant having admitted the prior conviction of petty theft, convicted on or about May 4, 1934, in the Justice court of Huntington Beach, Orange County, State of California, and having served a term of imprisonment therefor in a penal institution, it is therefore ordered, adjudged and decreed that the said Fred Westreicher be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law."

Petitioner contends that he is illegally confined and imprisoned because he was permitted to admit his prior conviction of petty theft in a manner not provided by law.

Section 1025 of the Penal Code provides that, when a defendant charged in an information with having suffered a previous conviction pleads either guilty or not guilty of the offense for which he is informed against, he must be asked whether he has suffered such previous conviction. Apparently this was not done on the arraignment here when

the plea of not guilty was entered. However, it was done at the beginning of trial proceedings, and defendant answered and admitted the previous conviction. The verdict of the jury indicates that the issue of previous conviction was not brought to its attention and was not passed upon by them. The judgment entered on the verdict and admission is strictly in conformity with law, and contains all the essentials to make it self-sustaining, in the absence of any other showing herein of excess or lack of jurisdiction. The unusual procedure in deferring the asking whether defendant had suffered such previous conviction from the time of arraignment to the time of trial was at most but an irregularity or mere error of procedure which did not affect the question of jurisdiction, and is reviewable only on appeal.

The writ is discharged, and petitioner remanded.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 415

In re NUTTLE'S ESTATE.

BABCOCK v. WOOD.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. NUTTLE.

Civ. 9964.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 28, 1935.

1. Courts ⇐200½

Petition by legatee, given government bonds by testator's will, for determination of her interest in government bonds claimed by corporation whose stock was admittedly wholly owned by testator, *held* within jurisdiction of probate court, since there was no question of title to be tried (Probate Code, §§ 1080–1082).

2. Wills ⇐570

Legatee given $50,000 in government bonds and notes by will *held* properly awarded bonds owned by corporation to make up balance due from estate, where corporation's stock was admittedly wholly owned by testator (Probate Code, §§ 1080–1082).

3. Executors and administrators ⇐314(12)

Failure of probate court to determine rights of legatees or devisees other than petitioner in proceedings to determine heirship and interest in estate *held* not to require reversal of order fixing petitioner's interest (Probate Code, §§ 1080–1082).

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

In the matter of the Estate of J. T. Nuttle, also known as John T. Nuttle, deceased. Petition by Juana M. Wood, opposed by Leota Babcock, by the Security First National Bank of Los Angeles, executor, and by A. E. Nuttle, for an order to determine heirship and interest in the estate. From an order entered in petitioner's favor, the executor and the objector, Leota Babcock, appeal.

Affirmed.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Richard J. O. Culver, of Los Angeles, for appellant Leota Babcock.

A. J. Verheyen, of Los Angeles, for appellant Security-First Nat. Bank of Los Angeles.

Joseph Scott and T. C. Heyl, both of Los Angeles (C. J. Scott, of Los Angeles, of counsel), for respondent Juana M. Wood.

PER CURIAM.

The day after the court had made an order of partial distribution, which became the subject of an appeal decided by us October 31, 1934 [Estate of Nuttle, 37 P.(2d) 200], respondent therein, Juana M. Wood, filed a petition in the probate court of Los Angeles county designated "Petition for Order to Determine Heirship and Interest in Estate" (under sections 1080, 1081, and 1082, Probate Code), which alleged, in addition to certain jurisdictional facts, that petitioner was a "devisee and legatee of said deceased and is a party interested" in the/his estate, and as such claimed $50,000 par value of United States government bonds and United States of America Treasurer notes and other property described; that there are various persons who claim an interest in $22,000 par value of such government bonds and Treasurer notes "specifically left to your petitioner"; that it is the contention of such persons that said bonds and Treasurer notes are assets of the J. T. Investment Company, a Kansas corporation, "all of the stock of which corporation was owned by the deceased herein at the time

of his death"; and that the stock of said corporation is an asset of said estate, and petitioner is not entitled to receive said bonds and notes as a part of the specific bequest made her in decedent's will—praying that the "respective claims of heirship, ownership or interest in said estate and in said bonds and notes" be set forth, and that the court "ascertain and declare the rights of all persons to said estate and determine the rights of all persons to said estate and determine who is entitled to distribution" of said $22,000 bonds and notes. Notice of the hearing of said petition was served on the attorneys for the executor A. E. Nuttle, a creditor, and appellant Leota Babcock, and a notice was posted by the clerk advising of the filing of said petition "praying for an order of court *ascertaining and declaring the rights of all persons to said estate, and determining who is entitled to distribution of the $22,000.00 par value of U. S. Government bonds and U. S. Treasurer notes*" (italics ours), as set forth in the petition, and fixing the date upon which cause should be shown why the prayer of said petition should not be granted.

In its decree after such hearing the court found, among other facts, that the executor held all the stock of the J. T. Investment Company, a Kansas corporation, and that said corporation was organized during the lifetime of decedent "for the purpose of facilitating the handling of his business, and was his personal corporation and alter ego"; that "all of the capital stock of said corporation was owned by the deceased herein at the time of his death"; that said executor "now has in his possession the following U. S. Government bonds," describing Fourth Liberty Loan bonds of the par value of $29,500 and one United States of America Treasurer note of the par value of $10,000, none of which was included in the partial distribution of $20,000 worth of bonds made to respondent Wood nor in the inventory of the estate. Said order further found that said bonds were claimed by said Kansas corporation, and that the latter "has no debts or liabilities except current bills, and that it has other assets of great value," and adjudged and decreed that petitioner, Juana M. Wood, "is entitled to receive and is now vested with the title to" $22,000 par value of the $39,500 worth of securities described in the order, subject to administration.

[1, 2] Both the executor and said objector, Leota Babcock, appeal from such order, contending that the probate court was without jurisdiction to pass upon the question of title involved in the conflicting claims to the $22,000 worth of bonds asserted by petitioner and by the corporation J. T. Investment Company. If these were really conflicting claims, the points would be well taken, but the inventory of the estate was before the court at the time of the hearing, and showed that every share of stock of said corporation, 1,000 in all, belonged to deceased, a fact that is admitted by all parties in interest. It appears, therefore, that there was no question of title to be decided upon this hearing, but rather a determination under section 1080 of the Probate Code as to whether petitioner would be entitled to take a distributive share of the estate, and, if so, a specification under section 1081 of the Probate Code of just what that interest would be. The court decided, since the inventory showed that $28,000 worth of securities belonged to the estate, never having been included among the assets of the corporation, that, in order to fulfill the wish of the testator that petitioner be given "Fifty Thousand Dollars ($50,000.00) par value of United States Government Bonds, now in my safety deposit box," it would be just, as well as necessary, to vest petitioner with the right, subject to administration, to take $22,000 of bonds (the balance of $50,000) from the $39,500 of bonds in the safe deposit box, legal title to which had been acquired by the "one-man" corporation. 6a Cal. Jur. p. 85; 6 Cal. Jur. p. 594. Since petitioner's legacy is a specific legacy, the order seems altogether proper.

[3] Appellants contend that the court did not by its order determine the rights of Leota Babcock, or of any of the legatees or devisees under the will other than respondent Juana M. Wood, and this is true, except to deny any other right than respondent's in the $22,000 worth of bonds. We do not feel, however, that this or other claimed deficiencies in the order furnish ground for reversal, since the way is still open to any interested party to file another petition to determine heirship and to specify interests not heretofore passed upon.

Order affirmed.

This opinion was prepared by Hon. WALTER DESMOND while a member of this court.

CRAIL, J., not participating.

3 Cal.App.2d 410

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9938.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Rehearing Granted March 2, 1935.

Insurance ⇐435

Where employer operated hardware business and owned truck used on commission basis by person who was not employee in hardware business and who was hauling lumber under contract with third person when truck broke down, and employee was injured while towing such truck pursuant to employer's orders, there was no evidence to justify accident commission's finding that employee was doing work in connection with hardware business when injured, and hence insurer was not liable on policy covering only hardware business.

Petition by the National Automobile Insurance Company for a writ of review as to an award by the Industrial Accident Commission in a proceeding under the Workmen's Compensation Act by Elmer E. Smith, claimant, opposed by Joe Keller, employer, and by petitioner as insurance carrier.

Award annulled as to petitioner.

C. W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

STEPHENS, Presiding Justice.

Respondent Keller operated a hardware business, and petitioner was insurance carrier of compensation coverage for the employees of that business. Respondent Smith worked for Keller and was injured while carrying out his employer's orders. Petitioner contends that its policy of insurance did not render it liable because Smith was hurt while doing work outside of the hardware business and not covered by the policy. Respondent commission found that "at said time said employer's insurance carrier was the defendant National Auto Insurance Company, a corporation." We construe this finding to mean that petitioner's policy covered the injury here in question.

Keller was owner of a truck and trailer which was used by one Hight, not an employee in the hardware business, on a commission basis. The latter made a contract with a third party to haul a load of lumber, and while so engaged the truck driven by Hight broke down. Keller told Smith to take a light truck and tow the other truck to Hight's home. During the towing operation the light truck driven by Smith went off the road, injuring him.

It is conceded that the insurance policy covered only the hardware business. There was no evidence upon which respondent commission could predicate a finding that the employee was doing work in connection with the hardware business when injured, and petitioner is therefore not liable. Western Indemnity Co. v. I. A. C., 43 Cal. App. 487, 185 P. 306.

Award annulled as to petitioner.

I concur: CRAIL, J.



3 Cal.App.2d 754

LOS ANGELES COUNTY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10086.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

Master and servant ⇐364

Person receiving aid as county welfare case who was given work order by county charities department *held* not "employee" of county under Workmen's Compensation Act and not entitled to award of compensation for injury sustained while engaged under work order (St. 1917, p. 831 et seq., as amended).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Petition by Los Angeles County to review an award of the Industrial Accident Commission in favor of Mike Munguia.

Award annulled.

See, also, 38 P.(2d) 828.

Everett W. Mattoon and Fred M. Cross, both of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

STEPHENS, Presiding Justice.

On November 22, 1933, respondent Munguia, who was at that time receiving aid as a county welfare case, was given a work order by the charities department of petitioner, and while thus engaged suffered injury for which award was made.

The questions here presented are identical with the case of County of Los Angeles v. Industrial Accident Commission & Jones, 38 P. (2d) 828, in which we concluded that such an award was improper because the injured party was not an employee under the Workmen's Compensation Act (St. 1917, p. 831 et seq., as amended).

Award annulled.

We concur: SCOTT, Justice pro tem.; CRAIL, J.



3 Cal.App.2d 481

PEOPLE v. BANTY.

Cr. 1411.

District Court of Appeal, Third District, California.

Jan. 2, 1935.

Criminal law ⇐1182

Where transcript on appeal was filed November 20, and no brief was filed for accused and cause was regularly placed on calendar for oral argument on January 2, and no appearance was made for accused when case was called for hearing, judgment and order would be affirmed (Pen. Code, § 1253).

Appeal from Superior Court, Yolo County; Neal Chalmers, Judge.

Thomas J. Banty was convicted of violation of the narcotic laws, and he appeals.

Affirmed.

Thomas J. Banty, in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of Yolo county of a felony, to wit, violation of an act entitled "An act to regulate the sale, possession, distribution and use of habit forming, narcotic and other dangerous drugs and substances" (St. 1929, p. 380, as amended), and specifically with the possession of opium.

The transcript on appeal was filed in this court November 20, 1934. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on January 2, 1935. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.



3 Cal.App.2d 310

HULL v. LAUGHARN et al.

Civ. 8801.

District Court of Appeal, Second District, Division 2, California.

Dec. 24, 1934.

1. Landlord and tenant ⇐90(3), 94(1)

Tenant who went into possession under written lease for term of one week and continued thereafter to hold over from week to week, paying rent as provided in lease, *held* to be occupying premises under tenancy for years, and was entitled to one week's notice before ouster (Civ. Code, § 1946).

"Tenancy by sufferance" exists where one enters by lawful lease and wrongfully holds over without consent, and is distinguishable from "tenancy at will" which is always by right and by permission.

[Ed. Note.—For other definitions of "Tenancy at Sufferance" and "Tenancy at Will," see Words & Phrases.]

2. Landlord and tenant ⇐90(1)

"Tenancy for years" resulting from holding over by consent of landlord rests upon implication only, but, when parties have made express agreement relating to new tenancy, new lease comes into existence.

[Ed. Note.—For other definitions of "Tenancy for Years," see Words & Phrases.]

3. Landlord and tenant ⇐161(1)

Act of landlord in removing from premises personal property of tenant, without giving tenant required week's notice to quit, and placing property in storage to tenant's use subject to his order with subsequent no-

tice thereof, thus placing burden of paying charges upon tenant, constituted conversion, notwithstanding subsequent offer to restore property to tenant without tenant's consent (Civ. Code, §§ 1946, 3336, 3337).

"Conversion" consists in unwarranted interference by defendant with dominion over property of plaintiff from which injury to plaintiff results, and "dominion" is defined as perfect or complete property or ownership in a thing; complete ownership; absolute property; and ownership or right to property.

[Ed. Note.—For other definitions of "Conversion" and "Dominion," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Clarence H. Hull against Hubert F. Laugharn, as trustee for the Ocean Park Realty Corporation, bankrupt, substituted for the Ocean Park Realty Corporation, and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Smith & Dunn, of Santa Monica, for appellants.

William T. Kendrick and W. T. Kendrick, Jr., both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

Respondent filed an action in the lower court against appellants wherein the complaint was denominated "Complaint for Trespass and Damage." He alleged actual and peaceable possession and right to possession of certain real property, and ownership and possession of certain personal property located thereon, of a certain value, with which he was operating on said real property a licensed game as a business, the good will of which was of a certain value; that on March 29, 1931, appellants entered upon said real property without the consent of respondent and forcibly broke down the wall inclosing the building thereon containing said personal property, took possession of said personal property, and carried it out of said building, and "thereby converted the same to the use of defendants, and since said time plaintiff has not had the use or possession of said property or any part thereof"; that by reason of said acts respondent's business and good will were "wholly broken up and destroyed, and no less than $5,990.98 will compensate plaintiff for the detriment approximately (sic) caused by such acts." The prayer is for judgment for the amount above stated.

Appellants in their answer admitted the location of the personal property in the building on the premises described, and that they removed a wall in said building and took therefrom the personal property and stored the same with the Union Transfer & Storage Company for the disposition of respondent, of which fact respondent was so advised. As an affirmative defense appellants alleged that on or about March 6, 1931, Ocean Park Realty Corporation, one of the appellants herein, permitted respondent to occupy said premises from day to day only, in consideration of a percentage of daily receipts of said game; that respondent stated to said appellant that he could and would remove said personal property from said premises within one hour's notice from appellant that it so desired; that relying on this statement said appellant permitted respondent to take possession of said premises to occupy the same only until appellant secured a tenant therefor; that on March 26, 1931, and on March 27, 1931, said appellant in writing notified respondent that it desired him to remove before a time certain; that on March 29, 1931, respondent not having removed his personal property from said premises, said appellant caused said property to be removed and placed in storage with appellant Union Transfer & Storage Company, at the will and disposition of respondent; that on April 1, 1931, said appellant, Ocean Park Realty Company, notified respondent in writing of said removal and storage, and that said property was available for respondent's disposition; that said property ever since its removal was and now is located in the storeroom of said storage company subject to the control and disposition of respondent.

After trial in the court below the court found that all the allegations of the complaint were true, except as to value and amount of detriment. As to the value of the personal property, the court found it to be the sum of $1,090.98, and no more; and, as to detriment, the court found that respondent's business and good will were not wholly destroyed by reason of appellants' acts, and found that the good will had no value whatever. The court further found that the allegations in the affirmative defense were untrue, except that it is true that appellants removed said personal property from said building and caused the same to be placed in storage as alleged, and on April 1, 1931, notified respondent in writing of said facts; that said property was available for respondent's disposition, and that it was and now is located in said storage place subject to the control and

disposition of respondent. On these findings the court made its conclusion that respondent was entitled to judgment for $1,090.98, with legal interest from March 29, 1931, as against all appellants herein. Judgment was accordingly entered, and from it this appeal is taken.

Appellants present two points only, the first relating to the sufficiency of the evidence to support the finding adverse to their affirmative defense in respect to the nature or character of respondent's tenancy, and the second contending that, regardless of the nature or character of such tenancy, no conversion of the personal property was had by appellants or any of them.

[1, 2] In view of the record showing that this case was tried and decided as a case of conversion, the question of the nature and character of respondent's tenancy would become irrelevant as a proposition of law. However, it would still remain a factor in the case, as evidentiary matter relevant and material to the question of appropriation or conversion by force. In that connection we so consider it, and address ourselves to appellants' first proposition, which, stated in another form, is that under the evidence respondent was a tenant at sufferance and not entitled to any notice to quit before the landlord could lawfully enter and dispossess him. Without attempting to state the evidence it must suffice to say that an examination thereof reveals that respondent, at the time of the acts complained of, was occupying the real property in question under what is denominated a "tenancy for years." He went into possession under a written lease for the term of one week and continued thereafter to hold over from week to week, paying, and the landlord receiving, the rent as provided in the lease until he was ousted on March 29, 1931. There is substantial evidence to support this implied finding and to support the negative finding respecting the affirmative defense of a subsequent oral day to day lease. Respondent was therefore entitled to one week's notice. Section 1946, Civ. Code.

On the other hand, undisputed evidence herein negatives the claim of appellants that the tenancy was one of sufferance. Such a tenancy is when one comes into possession of land by lawful title, but keeps it afterward without any title at all. Gartlan v. C. A. Hooper & Co., 177 Cal. 414, 170 P. 1115. Such tenant is not entitled to notice to quit. Hauxhurst v. Lobree, 38 Cal. 563; Moore v. Morrow, 28 Cal. 552. A tenant by sufferance is one who enters by a lawful lease and wrongfully holds over. This is distinguishable from a tenancy at will, which is always by right and by permission. Tiffany, Landlord and Tenant, Vol. 1, pp. 141–142. The distinguishing feature of a holding by sufferance is the absence of consent. Jones on Landlord and Tenant, § 220. The tenancy for years resulting from a holding over by consent of the landlord rests upon implication only. But, when the parties have made an express agreement relating to the new tenancy, then there is no room for implication to operate, but a new lease comes into existence which will determine the rights of the parties. Blumenberg v. Myres, 32 Cal. 93, 91 Am. Dec. 560. Herein appellants pleaded such new lease. On conflicting evidence the trial court found against such plea and this court is bound thereby.

[3] Appellants' second point is that no conversion occurred. The claim of conversion herein rests entirely upon the taking of respondent's property by a landlord and placing the same in storage to respondent's use, subject to his order and disposition, with a subsequent notice thereof which the evidence shows carried with it the burden of payment of storage charges by respondent. Conversion consists in the unwarranted interference by defendant with the dominion over the property of plaintiff, from which injury to the latter results. Poggi v. Scott, 167 Cal. 372, 139 P. 815, 51 L. R. A. (N. S.) 925; Edwards v. Jenkins, 214 Cal. 713, 7 P.(2d) 702. Dominion is defined in law lexicons as "perfect or complete property or ownership in a thing" (Bouvier's Law. Dict.); "complete ownership; absolute property" (Anderson's Dict. of Law); and "ownership or right to property" (Black's Law Dict.).

The findings of the court on appellants' affirmative defense, both express and implied, support the conclusion that appellants unlawfully interfered with the dominion, as thus defined, over respondent's property, in defiance of his rights. This constituted conversion, and the presumption of detriment resulting therefrom, arising under the provisions of section 3336 of the Civil Code, could not be repelled by appellants' subsequent action in offering to restore the property to respondent without his consent (section 3337, Civ. Code). It must be held, therefore, that the findings that appellants converted the property in question to their own use, as alleged in the complaint, find support in the evidence, and that the judgment based thereon is sustained.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 382

HORNE et al. v. RAINEY, Superintendent of Banks.

Civ. 8945.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

Hearing Denied by Supreme Court Feb. 25, 1935.

1. Banks and banking ⇐80(6)

Sum withdrawn from depositors' commercial checking account when bank charged it with amount of depositor's check for purchase price of loan and marked check canceled became impressed with trust in bank's hands as in effect special deposit, which maker had right to trace into and reclaim as preference out of bank's assets in bank superintendent's hands.

2. Banks and banking ⇐80(3)

Allowance of interest on amount of deposit, for which depositors recovered judgment on preferred claim against closed bank's assets, from date of deposit, was improper, where depositors had received interest up to later date.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. W. Horne and another against Edward Rainey, Superintendent of Banks of the State of California. Judgment for plaintiffs, and defendant appeals.

Modified and affirmed as modified.

Sullivan, Roche, Johnson & Barry, of San Francisco, for appellant.

Fred W. Heatherly, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Plaintiffs maintained a commercial checking account with the Ocean Park Branch of the Marine Bank of Santa Monica. On December 18, 1931, the bank was taken over by Edward Rainey, as Superintendent of Banks. Plaintiffs recovered judgment against defendant for $4,000, plus interest, payable as a preferred claim out of the bank's assets. Defendant appeals on the ground that plaintiffs are not entitled to have their claim paid on a trust or preferential basis.

Respondent Horne had been informed by the branch bank manager in December of 1928 that the latter had a loan made by one Isabella Brown, secured by a lien on certain premises on Montana avenue in Santa Monica, and that the loan, bearing 8 per cent. interest, was a suitable investment for Horne. The latter looked at and approved the property and agreed to purchase the loan. He then drew a check on his account in the bank payable to the latter, dated December 3, 1928, and delivered it to the bank, and it was charged to his account December 11, 1928. Respondent believed he was purchasing the Brown loan and did not inspect the documents relating to the transaction, merely leaving them with the branch for collection as payments became due. Instead of the transaction agreed upon, the bank transferred the money thus charged to respondent's account to the credit of one Heinickle, and received from him a note executed by said Isabella Brown on which a balance of $4,000 remained unpaid and which was secured by a collateral pledge of a note payable to said Brown secured by a trust deed on certain real property in San Diego county. This note and security just described was held by the bank for benefit of respondents as a collection account. Heinickle meanwhile drew out the funds thus credited to him. In the latter part of 1930 Horne learned for the first time what the bank had done in this regard. He refused to accept the note and security and demanded an adjustment of the matter, which was never made.

The trial court found that "plaintiffs deposited with the said bank the sum of $4,000" in escrow under conditions as contained in the agreement above set out. It is conceded that there were no written escrow instructions and that respondent Horne, other than with respect to the specific terms of the oral agreement above outlined, "just trusted the bank."

[1] When the bank charged the account of respondents with the amount of the check and marked the check canceled, the sum thus withdrawn from respondents' account became impressed with a trust which remained in the hands of the bank in that condition, being in effect a special, as distinguished from a general deposit. Not being applied to the purpose for which it was placed in the hands of the bank, it equitably belonged to respondents and not to the bank, and the former had the right to trace and reclaim their property. Bank of America Nat. Trust & Sav. Ass'n v. California Sav. & Commercial Bank, 218 Cal. 261, 22 P.(2d) 704. It was not necessary for respondents "to enact the idle and useless ceremony of receiving the money on their check and immediately passing it back to the bank in order to have impressed the fund with a trust."

People v. California, etc., Trust Co., 23 Cal. App. 199, at page 209, 137 P. 1111, 1115.

[2] Judgment for interest at 8 per cent. was allowed from date of deposit, which was fixed as December 3, 1928, although the findings showed that respondents had already received interest on their money up to March 11, 1930. The allowance of interest was improperly made and must be excluded from the judgment. Anderson v. Pacific Bank, 112 Cal. 598, 44 P. 1063, 32 L. R. A. 479, 53 Am. St. Rep. 228; Bank of America v. California Bank, supra.

The judgment is reduced to $4,000, and as so modified it is affirmed. Costs are assessed against respondent.

We concur: CRAIL, J.; WILLIS, Justice pro tem.



3 Cal.App.2d 492

COPE v. STECKEL et al.*

Civ. 9032.

District Court of Appeal, Second District, Division 2, California.

Jan. 4, 1935.

Rehearing Denied Jan. 25, 1935.

Municipal corporations ⇐185(1)

On hearing of complaint against policeman setting out criminal charges made against him, and alleging unbecoming conduct and unfitness for office, police board of inquiry was not bound by policeman's acquittal of criminal charges.

Appeal from Superior Court, Los Angeles County; Caryl Sheldon, Judge.

Petition by Samuel G. Cope for a writ of mandate against R. E. Steckel and others. From an adverse judgment, petitioner appeals.

Affirmed.

Paul Taylor, of Los Angeles, for petitioner.

Ray L. Chesebro, F. Von Schrader, and Arthur Loveland, all of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Petitioner sought a writ of mandate in the superior court to compel respondents to reinstate him as police officer and pay his salary since date of removal. The trial court found against petitioner, and from such adverse judgment he appeals.

March 21, 1931, petitioner was charged with one count of rape and three counts of violation of Pen. Code, § 288. March 26, 1931, he was served with notice of suspension. The charge of rape was dismissed, and petitioner was acquitted on the other counts. After conclusion of the criminal case, on August 26, 1931, he was served with notice of dismissal, from which he appealed, and requested appointment of a board of inquiry under section 202 of the charter of defendant city. August 29, 1931, petitioner was served with complaint made against him by the acting chief of police setting out the said criminal charges and alleging conduct unbecoming an officer, showing his morals were questionable, and alleging that he was not a fit and proper person to be a police officer. September 3, 1931, a hearing was conducted by said board of inquiry, at the conclusion of which said board found petitioner guilty of the charges, certified its findings to chief of police, and recommended that petitioner be dismissed. On September 8, 1931, the chief of police, after considering the decision and recommendation of said board, affirmed his former order of removal; notice of such affirmation being served on petitioner September 15, 1931. Two days later, September 17, petitioner appealed to defendant board of police commissioners from said order of affirmation, and on October 13, 1931, the board confirmed the order of the chief of police and recommendations of said board of inquiry. December 1, 1931, petitioner filed claim for salary alleged to have accrued since date of first suspension, and January 25, 1932, filed petition for writ of mandate herein in the lower court.

Appellant first contends that the police board of inquiry erred in refusing to admit in evidence at the hearing before it the transcripts of the preliminary examination and trial of appellant on the felony charges. He does not assert that testimony of any witness produced on his behalf was excluded, nor does it appear from his brief what evidence was thus omitted or in what manner it would be material. It is not suggested that said board was unaware of appellant's ac-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 40 P.(2d) 901.

quittal; but, even if these transcripts were offered for the purpose of establishing such fact, they would not be binding upon the board with regard to its conclusion at the hearing which it was then conducting. Tapley v. Abbott, 111 Cal. App. 397, 295 P. 911.

Appellant next asserts that the chief of police failed to affirm the board's action within the five days provided by section 202 of the charter. The record above cited clearly negatives this suggestion.

The final point on appeal is "refusal of the Los Angeles city police commission to hear appellant's appeal from said dismissal." The cited section of the charter provides for such a "review of the entire proceedings upon the records" and the filing of a written decision of the said board within thirty days of filing of such application. As above noted, appellant filed his appeal, which was heard and determined by the board on the record, as contemplated by the charter, without the necessity of their considering any new evidence; and their decision was timely.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

KINCHLOE v. RETAIL CREDIT CO., Inc., et al. (two cases). *

FINK v. SAME.

Civ. 9384.

District Court of Appeal, First District, Division 1, California.

Dec. 21, 1934.

Hearing Granted by Supreme Court Feb. 18, 1935.

1. Release ⇐29(4), 37

Document wherein automobile passengers, injured in collision with another automobile, covenanted not to sue their driver or driver's insurer and agreed to hold driver and insurer harmless from any claim arising from accident, it being further agreed that passengers did not relinquish any claim against "other" persons than those specifically named, *held* "release" rather than "covenant not to sue," and hence extinguished passengers' cause of action against owner and operator of second automobile; the word "other" meaning additional or a different person or thing from the one in view.

[Ed. Note.—For other definitions of "Covenant not to Sue," "Other" and "Release," see Words & Phrases.]

2. Release ⇐37

Covenant not to sue constitutes no defense to covenantor's action against covenantee and other joint tort-feasors; covenantee's remedy being suit for breach of covenant, although, if covenantee is sole tort-feasor, to avoid circuity of action, covenant is deemed bar to action against him.

3. Release ⇐7

In determining whether document constitutes release or covenant not to sue, court under statute must if possible ascertain parties' intention (Civ. Code § 1636).

4. Pleading ⇐350(3)

On defendant's motion for judgment on pleadings, court ordinarily looks only to complaint.

5. Pleading ⇐349

Where defendants, having amended answers by attaching copies of alleged releases, moved for judgment on pleadings, which court granted before sufficient time had elapsed under statute to warrant conclusion that plaintiffs admitted genuineness and due execution of releases, plaintiffs *held* to have conceded due execution thereof by appearing in response to action and making no objection in trial court or on appeal (Code Civ. Proc. §§ 448, 462).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Three separate actions by Newton Kinchloe, by Newton M. Kinchloe, Jr., and by Philo Fink, against the Retail Credit Company, Incorporated, and another. Defendants' motion for judgment on the pleadings in each case having been granted, each plaintiff appeals; the actions being consolidated for the purposes of appeal.

Affirmed.

Byrne, Lamson & Jordan, of San Francisco, and Lucius Powers, Jr., of Fresno, for appellants.

Francis V. Keesling and Garton D. Keyston, both of San Francisco, for respondent Retail Credit Co., Inc.

Harry G. McKannay, of San Francisco, for respondent Philip Adams.

HELD, Justice pro tem.

Three actions were brought against defendants Retail Credit Company, Inc., a cor-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 46 P.2d 971.

poration, and Philip Adams. The plaintiffs were, respectively, Newton Kinchloe, Newton M. Kinchloe, Jr., and Philo Fink. The motion of defendants for judgment on the pleadings in each case was granted and judgments entered accordingly. Each plaintiff has appealed, and the parties have stipulated that inasmuch as the same question is involved in each case, the three actions may be consolidated for the purposes of appeal; that a transcript in the case of Newton Kinchcloe only need be filed in this court; and that each of said appeals may be determined upon said transcript.

It appears that the plaintiffs herein were occupants of an automobile operated by one N. Lindsay South (also referred to in the pleadings as N. Lindsey South) at a time when the same collided with an automobile alleged in the complaint to have been then owned and operated by the defendants. In their answers the respondents pleaded as a defense that each appellant had settled with and accepted satisfaction from said N. Lindsay South and his insurance carrier, Universal Automobile Insurance Company. Attached to the answers are copies of a document alleged to have been executed by each appellant, one of which copies reads as follows: "Covenant not to sue. Whereas, on or about April 13th, 1932, the undersigned, N. N. Kinchloe, of the County of Fresno, State of California, was riding in an automobile owned and driven by N. Lindsey South, and, Whereas, the said automobile was involved in an accident with an automobile driven by Philip Adams, and owned by Philip Adams &/or Retail Credit Company &/or John Doe, which said accident happened and occurred at on Highway between Tulare and Tipton, State of California, and, Whereas, the undersigned sustained certain injuries on or about his body and has suffered disability from said injuries, and, Whereas, the said N. Lindsey South and the Universal Automobile Insurance Company, desire from the undersigned an agreement and covenant not to sue them or either of them. Now, therefore, for and in consideration of the sum of $130.00, one hundred thirty dollars, the undersigned, hereby promise and agree that he will not sue or litigate any claim, or claims, of any nature or description against N. Lindsey South and the Universal Automobile Insurance Company, or either of them, for or on account of any injuries or damages which I now have, or may hereafter have, or have had on account of the injuries sustained in the accident above mentioned, and I do hereby covenant and agree to hold said N. Lindsey South and Universal Automobile Insurance Company and each of them, and all of them harmless from any liability, claims, demands, costs, charges, and expense incident to any claim or claims, arising out of said accident, or the injuries sustained by me therein. It is further agreed, that the undersigned does not in any manner or respect waive or relinquish any claim, or claims, against any other persons, firms, or corporations, than are herein specifically named, and it is further understood by me that said N. Lindsey South and the Universal Automobile Insurance Company do, and neither of them does, in any manner, or to any extent, admit any liability or responsibility for the above accident, or the consequences thereof, and that the execution of this document shall not be in any manner construed contrary to the provisions of this paragraph as herein specified. In witness whereof, I have hereunto set my hand this 17th day of August, 1932. (Signed) N. N. Kinchloe. Witness to signature: Notary certificate attached. Lucius Powers, Jr."

[1, 2] The sole question presented by the appeals here is as to the construction to be placed upon the above document. If the document be a release of N. Lindsay South and Universal Automobile Insurance Company named therein, it would also operate as a bar to an action against respondents, although not named therein. Blackburn v. McCoy (Cal. App.) 37 P.(2d) 153. The reason for the rule is set forth in Bee v. Cooper, 217 Cal. 96, 17 P.(2d) 740, 742, where the Supreme Court quotes with approval from an earlier case (Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704) as follows: " 'While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. By his withdrawal, plaintiff announces that he has received satisfaction for the injury complained of, and it would be unjust that he should be allowed double payment for the single wrong. It matters not either whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action

against the one, it is in law, a satisfaction of the claim against them all.'" In the same case it is held that a purported reservation of plaintiff's rights against the remaining joint tort-feasors is nugatory and of no effect, being repugnant to the legal effect and operation of the release itself. If, on the other hand, the document is merely a covenant not to sue, then the cause of action is not thereby extinguished. If the covenantor sues the covenantee and other joint tort-feasors, then the covenantee may not plead the agreement not to sue as a defense, but must resort to his suit for breach of covenant, and the other joint tort-feasors cannot invoke the covenant as a bar to the action against them. Of course, in the case of a sole tort-feasor, a covenant not to sue is considered in law a discharge and a bar to an action against such sole tort-feasor. This is to avoid circuity of action. Hawber v. Raley, 92 Cal. App. 701, 268 P. 943.

[3] This court, in construing the document in question, must if possible ascertain and give effect to the mutual intention of the parties. Civ. Code, § 1636. The appellant here promises and agrees "that he will not sue or litigate any claim or claims" against South and his insurance carrier, and also that he will hold them "harmless from any liability, claims, demands," etc., arising out of the accident. If appellant is obligated to hold South and his insurance carrier harmless in the particulars referred to, he certainly cannot be said to still have intact a claim or demand against these parties. This obligation to hold them harmless is inconsistent with the continued existence of his claim or demand. By his agreement to "hold harmless" he concedes he has no further claims or demand against the parties to the agreement, or in other words that he has received satisfaction for his injury and releases them from further responsibility. Having so released South and the insurance carrier, the other tort-feasors are also released. That this was the intention of the parties is made still more clear by the concluding paragraph of the document. Thereby appellant stipulates that he "does not in any manner or respect waive or relinquish any claim, or claims against any *other* persons, firms, or corporations, *than are herein specifically named.*" (Italics ours.) This language implies a reservation from that which has gone before. It forces the conclusion that it was the intention of the parties that the language which preceded it should constitute a waiver or relinquishment of appellant's claim against certain designated individuals, and that the parties intended to make it definite and certain that none other were to be released. That the agreement was not to release any other persons than those specifically named, implies that the parties intended by the preceding language to release those specifically named, and that they so construed that preceding language. If it was not the intention of the parties to release those "specifically named," there is no purpose served by the reservation. It is said in State of Arkansas v. Blumenthal, 133 Ark. 584, 203 S. W. 36, 37, L. R. A. 1918E, 482, that "the word 'other,' as defined by the Century Dictionary, means a different person or thing from the one in view or under consideration or just specified; additional."

It is our conclusion that the document in question constitutes a release, and not a mere covenant not to sue, and operates as an extinguishment of the cause of action of each of the appellants.

[4, 5] This case comes before the court in a somewhat unusual form. Respondents, defendants below, set up in their answers the documents relied upon by them as a bar to the actions. The defendants then moved for a judgment on the pleadings. Ordinarily on such a motion by defendants, the court looks only to the complaint. Bates v. Escondido U. H. School Dist., 133 Cal. App. 725, 24 P.(2d) 884. Respondents on October 16, 1933, each filed an amendment to the answers herein, by which amendments the copies of the agreements were first attached to or set forth in any pleading in the case. Such matter in the answer is deemed controverted by plaintiff. Section 462, Code Civ. Proc. Notwithstanding this, a motion for judgment on the pleadings was heard by the court on October 19, 1933, and the motion was granted on October 26, 1933. Sufficient time had not elapsed to warrant a conclusion that plaintiff admitted the genuineness and due execution of the instrument. Code Civ. Proc. § 448. Appellants have not challenged the authority of the trial court to render judgment on the pleadings on the state of the record, and by their appearance in response to the action and their failure to make any objection in the trial court or on appeal, they must be held to have conceded the due execution of the agreements.

The judgment in each of the actions, so consolidated, is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

3 Cal.App.2d 538

AXELSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 10083.

District Court of Appeal, Second District, Division 2, California.
Jan. 10, 1935.

Depositions ⇐8

Where defendant wife, in action for annulment of marriage, filed cross-complaint alleging she was legal wife of plaintiff and other facts entitling her to separate maintenance and division of properties acquired while parties were living together as husband and wife, defendant was entitled to take deposition of plaintiff relating to plaintiff's income and property.

Petition by Jule C. Axelson for writ of prohibition against the Superior Court of the State of California in and for the County of Los Angeles and another.

Alternative writ dissolved, and peremptory writ denied.

Leslie S. Bowden and Frank Mergenthaler, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, of Los Angeles, for respondents.

CRAIL, Justice.

This is a petition for a writ of prohibition against the Superior Court of Los Angeles County to restrain that court from ordering the petitioner to answer certain questions on the taking of a deposition. The questions relate to petitioner's income and properties. Petitioner is plaintiff in an action against Gladys R. Axelson, No. D 125762 of said court, in which he seeks to have a marriage between them annulled on three grounds, that defendant had a husband, that she lacked capacity to enter into the marriage state, and fraud in procuring the contract of marriage. Before an answer was filed the defendant undertook to take the deposition of the petitioner. The petitioner refused to answer questions upon the subjects above stated, and when the superior court indicated it would require him to answer the questions, he obtained from this court an alternative writ of prohibition. In the meantime the defendant has filed her answer and she also has filed her cross-complaint in which she alleges that she is the legal wife of petitioner and other allegations which, if true, entitle her to separate maintenance and to a division of properties acquired during the period they were living together as husband and wife and in which she prays for such relief. The questions which are sought to be propounded in the deposition are proper under the issues as now joined, and it becomes unnecessary to decide whether they were proper at the time the alternative writ was issued.

The alternative writ is dissolved, and the peremptory writ is denied. Judgment for costs against petitioner.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



3 Cal.App.2d 316

JONES et al. v. NOBLE et al.

Civ. 8832.

District Court of Appeal, Second District, Division 2, California.
Dec. 24, 1934.

1. Compromise and settlement ⇐22

Positive denial in answer of allegations in complaint respecting execution of compromise agreement by defendant's attorneys of record in personal injury action created issue as to attorneys' authority.

2. Attorney and client ⇐101(1)

Mere employment of attorney to represent client in litigation does not give power to compromise such litigation.

3. Attorney and client ⇐86

Agreement of attorney in matters pertaining to conduct and management of suit must be filed to be valid and binding on client (Code Civ. Proc. § 283).

4. Attorney and client ⇐86

Rule that, where court has acted on attorney's agreement not directly connected with court's procedure or with conduct of trial, presumption exists that client authorized agreement, attaches only to executed agreements not filed with clerk or entered on minutes.

5. Attorney and client ⇐72

Where want of attorney's authority to compromise litigation is put in issue, there must be evidence showing authority or consent thereto or ratification thereof by client.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

6. Compromise and settlement ⇐4
Agreement of one defendant compromising litigation *held* not binding on other defendants, in absence of proof of consent thereto or approval thereof.

7. Judgment ⇐17(1)
Judgment against defendant who was not served with summons and who did not appear or answer *held* void and appealable.

8. Compromise and settlement ⇐18(1)
Rescission or abandonment of agreement by consent may be implied from acts of parties.

9. Compromise and settlement ⇐18(1)
Rescission of agreement by consent is implied by refusal to comply with agreement in which other party acquiesced.

10. Contracts ⇐352(6)
Whether contract has been abandoned presents mixed question of law and fact.

11. Compromise and settlement ⇐16(1), 18(1)
Originally valid compromise agreement to settle all claims in pending action remains in force until performed in full or rescinded, and, if not rescinded, such agreement is bar to such action.

12. Compromise and settlement ⇐16(1)
Making of valid compromise agreement to settle claims in pending action extinguishes cause of action; the compromise agreement becoming its successor or substitute therefor.

13. Insurance ⇐579
Executory compromise agreement made by plaintiffs with insurer of some defendants did not extinguish cause of action nor constitute bar to its prosecution, in absence of evidence that defendants had authorized or ratified agreement.

14. Insurance ⇐579
Plaintiffs' conduct in prosecuting action and bringing it on for trial *held* not proof of consent to repudiation of compromise agreement made with insurer of some defendants nor proof of abandonment thereof by plaintiffs, in absence of evidence that defendants ratified or authorized compromise.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Glen W. Jones and another against William B. Noble, the Capistrano Beach Sales Company, the Wailes-Smith Company, the Frank Meline Company, the Petroleum Securities Company, and the Union Indemnity Company. From an adverse judgment, defendants appeal. During the pendency of the appeal, the judgment was satisfied of record by plaintiffs as to the Capistrano Beach Sales Company, the Wailes-Smith Company, and the Petroleum Securities Company.

Judgment against William B. Noble and the Frank Meline Company reversed, and judgment against the Union Indemnity Company affirmed.

Kidd, Schell & Delamer and Walter H. Hewicker, all of Los Angeles, for appellant Frank Meline Co.

Francis D. Adams, De Forrest Home, and Robert Clifton, all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an action to recover on a compromise agreement made by the attorneys of record representing appellants in an action previously commenced by respondents against appellants, other than Union Indemnity Company, for damages for personal injuries alleged to have been caused by such appellants. Appellant Union Indemnity Company, which it was stipulated was public liability carrier for appellants the Frank Meline Company and Wailes-Smith Company, in its answer admits that it accepted respondents' offer to compromise such personal injury litigation for $5,000, but alleges that it accepted such offer under a mistaken belief that the driver of the automobile who was charged with the direct negligence in that action was an employee of the other appellants named as defendants therein. As a special defense, this appellant alleges that such compromise agreement was later canceled, rescinded, and abrogated by it, and that respondents consented to and acquiesced therein; that thereafter respondents proceeded to bring the personal injury action on for trial, and asked and received leave to file an amended complaint therein, and that said cause is still pending upon said amended complaint.

The remaining appellants, other than Noble, filed answers and denied in positive manner that they or either of them offered or agreed to pay the sum of $5,000 to respondents in compromise or settlement of said action, and allege as a special defense that, if any such agreement was made, it had been canceled, rescinded, and abrogated by mutual consent of the parties. As a further defense, they allege that, if any such contract was made, it was made under mutual mistake as to the employer of the driver, Noble, at the time of the accident complained of. As a fur-

ther defense, they plead the subsequent conduct of respondents in proceeding with the trial of the personal injury case as above stated.

The undisputed facts in the case are that during the pendency of the personal injury action the attorneys appearing of record for and representing all defendants therein, and who are appellants herein except Union Indemnity Company, made an offer in writing over their firm name and signature to the attorney appearing for plaintiffs therein, respondents herein, to compromise the case for $5,000, which offer the latter attorney accepted on December 8, 1930. On December 9, 1930, the Union Indemnity Company delivered to appellants' attorneys a draft for $5,000 payable to respondents and their attorney. Within a day or so respondents' attorney called on appellants' attorney, in response to request to call and receive the draft, but on arriving was informed that the claim agent of the indemnity company had told the attorneys not to pay and that the draft would not be delivered. On December 11, 1930, the draft was returned to the indemnity company. On January 9, 1931, respondents filed a motion to advance on the calendar and set for trial the personal injury action, which motion was granted and the cause set for trial. Thereafter continuances were had and amended pleadings filed, until by stipulation the case went off calendar on February 15, 1932. In the meantime, on June 10, 1931, coincident with the filing of their second amended complaint in the personal injury case, respondents filed their complaint in this action, which came on regularly for trial on April 5, 1932, while the other case was still pending in court in the status of "off calendar."

After trial of the instant case, the court below found, on conflicting evidence, that respondents had executed and delivered to appellants a dismissal with prejudice of the personal injury action upon acceptance of the compromise offer. The court further found that appellants, and each of them, had agreed to pay $5,000 in full settlement and compromise of such action, that there was no mistake as alleged in the answers, and that the compromise agreement had not been canceled, rescinded, and abrogated by mutual consent; that subsequent to the compromise agreement respondents proceeded to bring the personal injury action on for trial; that they amended their complaint therein, and that said action is now pending on the amended complaint; that such conduct did not constitute an abandonment or rescission of the compromise agreement, and that appellants had in their possession said dismissal with prejudice at all times since said compromise agreement had been made; and that it was always within their power to file said dismissal and terminate said action.

On this appeal only one point is presented by appellants in their opening brief; namely, that the evidence fails to support the finding that the compromise agreement had not been canceled, rescinded, and abrogated by mutual consent. In a supplemental brief filed by leave of court, they present the additional point that an attorney, simply by virtue of his general employment in a case and without special authorization from his client, cannot bind the latter by an offer of settlement accepted by the other party to the litigation.

[1] By the positive denial in the answers of the allegations in the complaint respecting the execution of the compromise agreement, the authority of the attorneys of appellants was placed in issue, and the burden was cast on respondents to present proofs in support of their allegations. None was presented, except the written offer of the attorneys of record of the parties defendant in the personal injury case, and the letter of Union Indemnity Company approving such offer, coupled with its answer herein admitting execution of such agreement.

[2-6] It is settled law in California that the mere employment of an attorney to represent a client in litigation does not carry with it the power to compromise such litigation. Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Trope v. Kerns, 83 Cal. 553, 23 P. 691; Burns v. McCain, 107 Cal. App. 291, 290 P. 623; Woerner v. Woerner, 171 Cal. 298, 152 P. 519; Knowlton v. Mackenzie, 110 Cal. 183, 42 P. 580. Section 283 of the Code of Civil Procedure provides that an attorney shall have authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise. This recognizes authority of the attorney in a case to bind his client in all matters pertaining to the conduct and management of the suit, by agreements made either en pais or in facie curiæ, by filing such agreement with the clerk or its entry on the minutes. This is indispensable to its validity. Merritt v. Wilcox, 52 Cal. 238. In those agreements of an attorney that are not directly connected with the procedure of the court in which the cause is pending or with the conduct of the trial, but which have been made and acted upon by the court, the only ground upon which it is held—in order to uphold the court as well as to protect

the other litigant—that a client is bound by such agreement of his attorney, is the presumption that the client has given authority to his attorney to make such agreement. Knowlton v. Mackenzie, supra. But this rule attaches only to executed agreements of the attorney not filed with the clerk or entered on the minutes, not to executory agreements not so filed or entered on the minutes, of which our Supreme Court has said: "Of such agreements, therefore, there can be no specific performance." Borkheim v. North British & M. Ins. Co., 38 Cal. 623; Smith v. Whittier, 95 Cal. 279, 30 P. 529. When such authority is challenged and want of authority put in issue in an action to enforce such an agreement for breach of performance, there must be evidence showing the giving of such authority to compromise, or of consent thereto or ratification thereof by the client, or of execution of a compromise agreement by the client himself, which will support a finding that the client made the agreement. Herein no such evidence was given relating to authority or ratification, except in respect to appellant the Union Indemnity Company. Nor was any evidence offered or received to show that the other defendants ever authorized Union Indemnity Company to make or bind them with any compromise agreement. Its agreement, therefore, was not binding on the other defendants, in the absence of proof of consent thereto or approval thereof by them. Commercial Union Assurance Co. v. Insurance Co., 68 Cal. 430, 9 P. 712. It follows that the finding of the court that the other appellants promised to pay said $5,000 is not sustained.

[7] Since the filing of this appeal and appellants' opening brief, it is made to appear to this court by counsel for both the appellants and respondents that the judgment appealed from has been satisfied of record by respondents as to appellants Capistrano Beach Sales Company, Wailes-Smith Company, and Petroleum Securities Company. Also it is conceded that appellant William B. Noble was neither served with summons nor appeared or answered in the court below. Hence it follows that no judgment now exists against the appellants as to whom satisfaction has been entered and that the judgment against Noble is void and is appealable and he is entitled to have it set aside. Merced Bank v. Rosenthal, 99 Cal. 39, 31 P. 849, 33 P. 732; Faias v. Superior Court, 133 Cal. App. 525, 24 P.(2d) 567. This leaves Noble, Union Indemnity Company, and the Frank Meline Company as surviving appellants herein.

[8-10] Inasmuch as the judgment against William B. Noble and the Frank Meline Company must be reversed for the reasons above given, there remains for consideration only the contention that the compromise agreement as made and approved by Union Indemnity Company was thereafter canceled, rescinded, and abrogated by mutual consent. A rescission or abandonment by consent may be implied from the acts of the parties. Newell v. E. B. & A. L. Stone Co., 181 Cal. 385, 184 P. 659, 9 A. L. R. 993; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Tompkins v. Davidow, 27 Cal. App. 327, 149 P. 788. And a rescission by consent is implied by the refusal to comply with the contract, in which the other party acquiesced. Mettler v. Vance, 30 Cal. App. 499, 158 P. 1044; Carter v. Fox, 11 Cal. App. 67, 103 P. 910. The facts in this case more nearly describe a case of an abandonment of the contract by one party, followed by alleged acquiescence of the other. Whether a contract has been abandoned presents a mixed question of law and fact. Ross v. Tabor, 53 Cal. App. 605, 200 P. 971. Herein the lower court found that the acts and conduct of the respondents in prosecuting the personal injury action after the execution and repudiation of the agreement of compromise, which we hold herein was made by appellant Union Indemnity Company only, "did not constitute an abandonment or rescission of the agreement."

[11-14] An originally valid compromise agreement to settle and discharge all claims in a pending action for money remains in force until performed in full or rescinded, and, if not rescinded, such an agreement is a bar to such action. Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667. It is well understood that the making of a valid compromise agreement to settle claims for money which are stated in a cause of action in a pending suit in court extinguishes the cause of action; the compromise agreement becoming successor to or substitute therefor. Armstrong v. Sacramento Valley R. Co., 179 Cal. 648, 178 P. 516. This, however, occurs ordinarily where parties to the action make the agreement. Herein we have a case where the agreement was made by plaintiffs in the action with an insurance carrier of some of the defendants; the insurance carrier not being a party to the action. There being no privity of contract or duty between the plaintiffs and the insurance carrier in relation to the cause of action sued upon, and no evidence whatever that the defendants in the action had authorized or ratified any com-

promise agreement of the carrier, such an agreement, while still executory and unperformed, would not extinguish the cause of action nor constitute a bar to its prosecution. The acts and conduct of plaintiffs in such pending action in prosecuting the same and bringing it on for trial cannot, therefore, be said to constitute proof of consent to the repudiation of the compromise agreement by the insurance carrier, nor proof of abandonment thereof by such plaintiffs. The finding and conclusion of the trial court that the compromise agreement had not been rescinded by mutual consent is sustained by the evidence and is correct under the law.

Judgment against William B. Noble and the Frank Meline Company is reversed. Judgment against Union Indemnity Company is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 226

Ex parte ROTH.

Cr. 2615.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1934.

Hearing Denied by Supreme Court Jan. 17, 1935.

1. Contempt ⇐40

"Contempt of court" is specific criminal offense and not civil action either at law or in equity, but is separate proceeding of criminal nature and summary character in which court exercises limited jurisdiction.

[Ed. Note.—For other definitions of "Contempt," see Words & Phrases.]

2. Contempt ⇐54(2), 58(1)

In prosecution for constructive contempt, affidavit on which citation is issued constitutes "complaint" and affidavits of defendant constitute "answer" or "plea."

[Ed. Note.—For other definitions of "Answer," "Complaint" and "Plea," see Words & Phrases.]

3. Contempt ⇐61(1)

In prosecution for constructive contempt, hearing must be had on issues joined by affidavit on which citation is issued and affidavits of defendant, at which hearing competent evidence must be produced.

4. Contempt ⇐60(3)

Prosecution for constructive contempt is of such specific criminal nature that mere preponderance of evidence is insufficient to convict.

5. Witnesses ⇐293½

Defendant in prosecution for constructive contempt cannot be compelled to be sworn as witness.

6. Contempt ⇐60(3)

Defendant in prosecution for constructive contempt cannot be convicted on uncorroborated testimony of accomplice.

7. Contempt ⇐54(4)

Affidavit charging commission of contempt need be no more specific in its averments of facts constituting contempt than complaint charging crime.

8. Contempt ⇐55

Where acts or omissions are charged as contempt under summary process, affidavit of facts is required in cases of constructive contempt on which attachment or order to show cause may be issued, and, where same matter is charged as misdemeanor, complaint under oath is required on which warrant of arrest may be issued (Code Civ. Proc. §§ 1209–1222; Pen. Code, §§ 166, 1426).

9. Contempt ⇐54(3)

In initiating misdemeanor prosecution such as prosecution for contempt, complaint may be made and based on information and belief (Pen. Code, § 1426).

10. Contempt ⇐54(3)

Affidavit based solely on information and belief without stating any authentic source of such information is not "affidavit of fact" prescribed by statute relating to contempt proceedings, and is insufficient as basis of jurisdiction to support warrant or order to show cause or judgment in proceedings in constructive contempt (Code Civ. Proc. §§ 1211, 1212, 1222).

11. Affidavits ⇐3

Affidavits made solely on information and belief are ordinarily unavailing for any purpose, since such affidavits, especially where no source of information is therein stated, are hearsay in so far as they attempt to convey any proof of facts stated therein.

Application of Irwin H. Roth for a writ of habeas corpus in which petitioner seeks his release from commitment for constructive contempt.

Petitioner discharged, and bail exonerated.

Richard H. Cantillon, of Los Angeles, for petitioner.

Philbrick McCoy, W. E. Simpson, Everett W. Mattoon, S. V. O. Prichard, Buron Fitts, Tracy Chatfield Becker, and A. H. Van Cott, all of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The petitioner seeks his release under habeas corpus from two separate commitments for constructive contempt, issued on the same day after hearing of two consecutive contempt proceedings. The matter has been submitted on the petition, the return thereto, the traverse thereof, and the reporter's transcript of proceedings at the hearing.

From the record it appears that each proceeding was instituted on July 9, 1934, as ancillary to a civil action or proceeding in the superior court of Los Angeles county, in each of which petitioner appeared as attorney of record, by the filing of an unverified document in each case entitled, "Suggestion of Special Local Administrative Committee No. One of The State Bar of California for the County of Los Angeles." In such document the attorney for said committee and the attorney for the State Bar of California, appearing as amici curiæ, suggest to the court that an order to show cause why petitioner herein and others named therein should not be adjudged guilty of contempt be issued upon the basis of an affidavit of James R. Burdge, an investigator for said committee, filed therein pursuant to section 1211 of the Code of Civil Procedure and attached to and made part of the "Suggestion," and upon the basis of which the committee and counsel "advise the court in their opinion" that the parties named therein have been guilty of contempt of the authority of the superior court. The affidavit of the investigator in each case is based wholly on information and belief, excepting the allegation of his own status as investigator. Each recites a series of acts and transactions in which the several contemners participated and of which the affiant had been informed, but no source of any of such information is stated therein. Upon this "Suggestion" and the accompanying affidavit an order to show cause was issued in each case on July 9, 1934, and hearing was had in consecutive order, over objections of petitioner herein to jurisdiction of the court, on August 13 and 14, 1934, at the conclusion of which the court entered its two separate judgments adjudging petitioner guilty of contempt and imposing a county jail sentence and fine in each case.

Petitioner bases his right to release in each case on two general propositions: (1) That the initial affidavit does not state facts sufficient to constitute contempt; and (2) that the order of commitment was in excess of the jurisdiction of the court because the record does not disclose that any contempt was committed. The first proposition is subdivided into two parts: (a) That the initial affidavit is not sufficient to confer jurisdiction because the statement of facts therein is based wholly on information and belief; and (b) that the facts stated do not constitute contempt.

The law in this state on the subject of the sufficiency of an initiating affidavit filed under the provisions of section 1211 of the Code of Civil Procedure, which sets out the facts constituting a constructive contempt on information and belief, may be characterized as being in a state of flux. Before entering upon a discussion of this subject, the general rules governing contempt and proceedings to prosecute charges thereof, with their relation to prosecution for misdemeanors, should be stated.

[1-8] Contempt of court is a specific criminal offense, and is not a civil action either at law or in equity, but is a separate proceeding of a criminal nature and summary character, in which the court exercises but a limited jurisdiction. In a prosecution for constructive contempt, the affidavits on which the citation is issued constitute the complaint, and the affidavits of the defendant constitute the answer or plea. A hearing must be had on the issues thus joined, at which competent evidence must be produced. The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient, the defendant cannot be compelled to be sworn as a witness, and he cannot be convicted upon the uncorroborated testimony of an accomplice. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127. And the affidavit charging the commission of a contempt need be no more specific in its averments of the facts constituting the contempt than a complaint charging a crime. Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652. Contempt is an offense which, generally speaking, may be classified as a misdemeanor under the definition given in section 17 of the Penal Code. Section 1209 of the Code of Civil Procedure defines the acts or omissions which constitute the thirteen kinds of contempt of the authority of a court of

justice. Section 166 of the Penal Code declares every person who is guilty of any contempt of court of either of the eight kinds defined therein to be guilty of a misdemeanor. Upon comparison of the two sections we note many duplications of acts or omissions which are therein defined as contempts; these, therefore, being the subject of two distinct methods of procedure toward punishment. The thirteenth subdivision of section 1209, relating to the unlawful practice of law, is not found in section 166 of the Penal Code but is embraced in sections 47 and 49 of the State Bar Act (St. 1927, p. 45, §§ 47, 49), wherein such act is declared a misdemeanor. If the acts or omissions are charged as contempts under the summary process set up in the Code of Civil Procedure (sections 1209–1222), an affidavit of the facts is required in cases of constructive contempt, on which an attachment or order to show cause may be issued. If the same matter is charged as a misdemeanor as defined by section 166 of the Penal Code or by the provisions of the State Bar Act, a complaint under oath in accordance with section 1426 of the Penal Code is required, upon which a warrant of arrest may be issued.

[9] In the matter of initiating a misdemeanor prosecution, it appears to be the accepted rule that the complaint described in section 1426 of the Penal Code may be made and based on information and belief. Ex parte Blake, 155 Cal. 586, 102 P. 269, 18 Ann. Cas. 815. In arriving at a decision establishing this rule, the court in the cited case first distinguished the methods of procedure in instituting a prosecution of a felony charge, as set forth in sections 811–813 of the Penal Code and those for prosecuting misdemeanors under sections 1426 and 1427 of that Code. In the one the magistrate may examine as many witnesses as he desires before issuing the warrant, while in the other he is limited to the complaint itself as a basis for his action in signing a warrant. But section 1427 makes it his duty to issue a warrant of arrest upon the filing of the complaint under oath if he "is satisfied therefrom that the offense complained of has been committed." The court, on this distinction and this peculiar language of section 1427 of the Penal Code, held that a complaint verified on information and belief, charging a misdemeanor, was sufficient and conferred jurisdiction of the subject-matter.

[10] The provisions of the Code of Civil Procedure presenting the method of prosecuting a charge of constructive contempt, which correspond with those of the Penal Code for prosecuting misdemeanors, are found in sections 1211 and 1212 thereof. Section 1211 provides that "an affidavit shall be presented to the court, or judge, of the facts constituting the contempt," and section 1212 provides that "when the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted." From this comparison we note that the peculiar language, "is satisfied therefrom," etc., used in the provisions for commencing misdemeanor prosecutions in the Penal Code and made the basis of the decision in the Blake Case, supra, is absent from the form prescribed for prosecuting contempts under the summary procedure set up in the Code of Civil Procedure, and the rule announced in the Blake Case cannot, therefore, be controlling in a case of contempt initiated and prosecuted under the methods prescribed by the Code of Civil Procedure.

With the foregoing as a background, we may now revert to the first point presented. The question of sufficiency of an affidavit based on information and belief to confer jurisdiction of a charge of constructive contempt appears to have first been considered by the appellate courts of this state in the case of Ex parte Acock, 84 Cal. 50, 23 P. 1029, 1030, wherein the petitioner contended in a proceeding on habeas corpus that the judgment of conviction for constructive contempt was void because "material allegations of the affidavits are made upon information and belief." In deciding the point, the court said: "Whatever the rule may be with respect to the rights of persons held for examination under an attachment which has been issued upon an affidavit made on information and belief *alone*, we do not think that, after a full and fair hearing, in which the prisoner has been given full opportunity to present his defense to the charge made against him, a judgment of conviction can be held to be void because *some* of the charges are made on information and belief. It would be impossible, in many cases of contempt committed out of the presence of the court, to secure the apprehension or conviction of the guilty parties if *every* fact essential to sustain the judgment were required to be stated in positive terms." (Italics ours.)

In Hughes v. Moncur, 28 Cal. App. 462, 152 P. 968, 971, in a proceeding on certiorari, the

petitioner claimed that the affidavit on which his conviction of contempt was founded was based upon information and belief and was insufficient to support the judgment. The court quoted the same language as above quoted from Ex parte Acock, and said: "But we think that the charges against Mr. Hughes were not *wholly* made on information and belief, and such as were so made had some foundation to build upon. * * * We think there were circumstances sufficient to justify affiant in averring on information and belief that: 'L. H. Hughes took the said children and kept them away at the request and with the consent of said Emma D. Storie, for the express purpose of preventing affiant from getting the said children at the time fixed by the court and for the purpose of violating said order.' These statements were of matters peculiarly within the knowledge of the accused. His intent or purpose in what he did could not reasonably be supposed to be within the personal knowledge of affiant. His outward acts and the information given affiant by his client in the very matter then in issue and at the moment the issue arose constituted ground for the statements made on information and belief." (Italics ours.) The next reference to this subject is found in the case of In re Selowsky, 38 Cal. App. 569, 177 P. 301, 306, a proceeding on habeas corpus, wherein, among many other positive averments of facts in the affidavit charging contempt, two were based on belief of cohabitation on two successive days. Concerning these averments, the court said: "It is, of course, to be conceded that the *belief* of the affiant that the Ponta woman cohabited and had illicit relations with the two men cannot be accepted as evidence of that fact, but that allegation in the affidavit may be eliminated and still there remain sufficient facts to show that the building was then being conducted for the purposes of prostitution," etc. This same matter later came before the Supreme Court in the case of Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652, 654, on certiorari, wherein the same averments were pointed out by petitioner as being insufficient in that no specific act of lewdness, assignation, or prostitution was alleged except upon the belief of the affiant, and that the grounds upon which that belief was based were not set forth. The court disposed of this point as follows: "Conceding that there may be no sufficient allegation of any specific act of lewdness, assignation, or prostitution, we are nevertheless of the opinion that the affidavit as a whole was sufficient to institute the contempt proceedings and to support the judgment. Ex parte Selowsky [38 Cal. App. 569], 177 P. 301."

In the case of In re Kolb, 60 Cal. App. 198, 212 P. 645, 646, in deciding and discharging a writ of habeas corpus in a contempt case, the court said: "It was assumed by counsel that the affidavit praying for the issuance of an order to show cause was made by the wife's attorney, and that *at least a part* of it was made on information and belief. Thereupon it was argued that such a paper is not in legal effect an affidavit. Gay v. Torrance, 145 Cal. 144, 78 P. 540. However, that rule is one that has exceptions. One of the exceptions is that line of cases where the terms of a court decree have been violated and proceedings are being taken to terminate the violation or to punish therefor. Hughes v. Moncur, 28 Cal. App. 462, 469, 152 P. 968; In re Selowsky, 38 Cal. App. 569, 581, 177 P. 301." (Italics ours.) The rule referred to above is that announced in the case of Gay v. Torrance, supra, wherein an affidavit based on information and belief was presented in support of a motion for a new trial and of which the court said: "We are satisfied that such affidavit cannot be considered competent evidence as to these matters. Ordinarily, an affidavit made solely on information and belief is unavailing for any purpose. * * * We cannot see that the reasons stated in the affidavit for the making of the same on information and belief, viz., that the persons who knew the facts had refused to make affidavit, can alter the situation. It still remains that there is 'no competent or proper evidence' contained therein, and, if petitioner is unable to procure competent evidence as to the alleged irregularities, she cannot establish the same." In the case of Ex parte Brown, 66 Cal. App. 534, 226 P. 650, 651, a habeas corpus proceeding in a contempt case involving violation of an injunction, based on an affidavit in which all the essential allegations were set forth on information and belief only, the court in the First Appellate District in discharging the writ said: "Ordinarily an affidavit made solely on information and belief is ineffective for any purpose unless at least the sources of the information and belief are stated. This rule obtains where such affidavits are to be used as evidence in some judicial proceeding. Where, as here, the affidavit is in the nature of a complaint, the statement of facts upon information and belief and the failure to give the sources thereof has not been held to be fatal. In Selowsky v. Superior Court, 180 Cal. 404, 407, 181 P. 652, it was held that an affidavit charging the commission of a contempt need

be more specific in its averments of the facts constituting the contempt than a complaint or an information charging a crime. A contempt of this character is at the most a misdemeanor, and, of course, a complaint charging a misdemeanor may be based upon information and belief. The affidavit under consideration in the Selowsky Case was, to a large extent, based upon information and belief; and though the point was not expressly decided, these allegations were treated as sufficient. Though the practice is not an approved one, it would seem to follow from that case that an affidavit charging a contempt may be based on information and belief."

As the Brown Case appears to be the latest expression of opinion on this question, and appears to give countenance to the use of affidavits based wholly on information and belief in the initiation of contempt proceedings, and as it seems to announce a rule which is so far in advance of that so studiously limited by the appellate courts in previous decisions, it becomes important to analyze the decision to be certain how far it may be followed as authority. The affidavit therein charged the accused with occupying certain premises and refusing to vacate after injunction requiring him to vacate. The decision cites the Selowsky Case reported in 180 Cal. at page 404, 181 P. 652, and referring thereto makes this statement: "The affidavit under consideration in the Selowsky Case *was, to a large extent*, based upon information and belief, and, though the point was not expressly decided, *these allegations were treated as sufficient.*" (Italics ours.) With the italicized portion of this statement we find ourselves in disagreement, as the affidavit, which is fully set forth in the decision referred to, contains but two allegations which were based on belief, and the court therein expressly declared that the affidavit was sufficient without allegation of the facts attempted to be set forth on information and belief, and, further, that any finding on that fact was unnecessary to the decision of the ultimate fact in issue and would have been out of place as being a recitation of purely evidentiary matter. The sufficiency of the affidavit in that case was sustained after conceding that there was no sufficient allegation of facts attempted to be alleged on information and belief. And exactly to the same effect the District Court in the Third Appellate District had previously held, in the case of Selowsky (38 Cal. App. 569, 177 P. 301), as herein above quoted, and which was cited on the point in the later Selowsky Case. The next statement in this decision is: "Though the practice is not an approved one, it would seem to follow from that case that an affidavit charging a contempt may be based on information and belief." Having noted that the case referred to does not give approval to the use of affidavits based on information and belief in contempt cases, but that both the Supreme Court and District Court of Appeal of the Third District, in their several decisions on the same affidavit, conceded the insufficiency of such allegation in the affidavit and decided in each case that without such allegation the affidavit was still sufficient, we are confronted with the conclusion that the District Court of the First District misunderstood the effect of the Selowsky decision when it announced that "it would seem to follow from that case that an affidavit charging a contempt may be based on information and belief." Furthermore, while it is true that the rule has been established in this state that an affidavit charging commission of a contempt need not be more specific in its averments of facts constituting a contempt than a complaint charging a crime, still this rule does not include or imply the further rule that the affidavit stating such facts may be on information and belief, as is permitted in complaints in misdemeanor cases. As the apparently reluctant conclusion of the court in the Brown Case was predicated on a misconception of the effect of the decision in the Selowsky Case, we cannot accept the rule therein announced, though we do agree with that court in its opinion that the practice of using affidavits based on information and belief is not an approved one.

[11] As was said in the case of Gay v. Torrance, supra, an affidavit made solely on information and belief is ordinarily unavailing for any purpose. Such affidavits, especially where no source of information is therein stated, are hearsay in so far as they attempt to convey any proof of the facts therein stated, and may amount to no more than mere recitation of public rumor or common gossip. To give countenance to a rule by which a member of society may be taken into custody or forced to trial on the basis of such an affidavit might lead to flagrant abuse of opportunities thereby afforded. Should such an affidavit be held sufficient to confer jurisdiction in the most meritorious and authentic case, under the same rule it must likewise be held sufficient even though the affidavit was founded on pure gossip or public rumor. There is nothing in the language of section 1211 of the Code of Civil Procedure which requires a construction that one affiant must needs have all the essential facts within his

own knowledge in order to supply the affidavit of facts constituting a contempt, but it is clearly susceptible to an interpretation which will permit the grouping of several affidavits, if necessary to embrace all essential facts, into one document or as a part of a master affidavit or verified petition, and thus constitute an affidavit of the facts.

While we recognize the tendency to classify constructive contempts prosecuted under the provisions of the Code of Civil Procedure along with misdemeanors prosecuted under the provisions of the Penal Code, we must at the same time recognize also that the former method of proceeding is summary in character and drastic in results where guilt is adjudged; for therein no jury may be demanded and no appeal may be taken from the judgment entered, which, under the law, is final and conclusive (section 1222, Code Civ. Proc.), and may be reviewed only under the limited process of certiorari or habeas corpus; while in the latter proceeding the right to a jury trial exists, and appeal may be taken from the judgment.

For the reasons above stated, and in accordance with the intimated but unexpressed views of the courts in the cases above cited and quoted from, other than the Brown Case, we are satisfied that an affidavit based wholly on information and belief, and without stating any authentic source of such information, is not an affidavit of the facts prescribed by section 1211 of the Code of Civil Procedure and is insufficient as a basis of jurisdiction to support a warrant or order to show cause or a judgment in a proceeding in constructive contempt. In this conclusion we find direct support in decisions of other state courts, wherein it has been held that an affidavit in contempt proceedings based on information and belief is not sufficient to confer jurisdiction. Such were the decisions in State v. Gallup, 1 Kan. App. 618, 42 P. 406; State v. Conn, 37 Or. 596, 62 P. 289; Freeman v. City of Huron, 8 S. D. 435, 66 N. W. 928; State v. Newton, 16 N. D. 151, 112 N. W. 52, 14 Ann. Cas. 1035; Belangee v. State, 97 Neb. 184, 149 N. W. 415; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; Early v. People, 117 Ill. App. 608; Robertson v. State, 20 Ala. App. 514, 104 So. 561; Ex parte Landry, 65 Tex. Cr. R. 440, 144 S. W. 962, and Russell v. Wayne Circuit Judge, 136 Mich. 624, 99 N. W. 864.

The conclusion reached on this point renders it unnecessary to consider the other points presented.

The petitioner is discharged and his bail exonerated.

STEPHENS, Presiding Justice (concurring).

I concur. In doing so it seems proper to mention that the subject-matter of this case involves some very important principles in the administration of justice. First, the right of the incorporated bar to combat the unethical practices of its own members; and, secondly, the right of the court to protect its own reputation and preserve its powers. Of corresponding and even greater importance is the right of the individual to be free from legal proceedings founded only on hearsay upon which summary action may be had. In the instant proceeding, full and earnest objection was made by the accused (petitioner herein) in answering the court's order to show cause. But the court overruled the objection and proceeded summarily to try the issue. No opportunity was accorded petitioner to test the court's jurisdiction by any proper writ from an appellate court, and no appeal lay from the trial court's determination.

In these circumstances, I think the historic requirement that the substance of an alleged contempt must be positively averred should not be broken down by judicial decision. On the other hand, the facts show a scandalous manipulation of funds awarded by the court for the benefit of minors. Whether or not petitioner was involved in such manipulation. I do not intimate. It would seem, however, that the facts would admit of positive allegations should the State Bar be advised to take further action.

I concur: CRAIL, J.

CONSTANTIAN et al. v. MERCEDES BENZ CO.

Civ. 8498.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1935.

Hearing Granted by Supreme Court March 1, 1935.

1. Bailment ⇐14(1)

Bailee for hire of personal property held not to have assumed liability for loss or damage thereto while in its possession, though its agent signed delivery sheets carrying notation that renters were responsible for loss or damage, since such printed statement was not part of contract where not specially referred to or called to bailee's attention.

2. Contracts ⇐163

Printed conditions on letter or bill head, or order blank of proposer, not specially referred to or called to attention of the other party to the contract, will not be regarded as part of contract.

3. Bailment ⇐14(1)

Bailee for hire of personal property, who removed property to another location without permission or knowledge of bailor and contrary to terms of agreement, became liable for loss of goods at such place, which would not have occurred if goods had not been so removed.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Action by M. S. Constantian and others against the Mercedes Benz Company. Judgment for plaintiffs, and defendant appeals.

Modified.

Stick & Moerdyke, of Los Angeles, for appellant.

C. H. Hartke and John Y. Pashgian, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

The plaintiffs rented to the defendant the goods described in the complaint, and the same were destroyed by fire. Thereafter plaintiffs brought this action to recover the value of the property lost. The plaintiffs recovered judgment, and the defendant now appeals therefrom.

Appellant states the question involved upon appeal as follows: "Is a bailee for hire liable for the value of the goods which were destroyed during the bailment, by a fire which was not caused by the negligence of the bailee, in the absence of an agreement expressed, or fairly implied, enlarging his ordinary liability as a bailee?" We shall assume that under the conditions stated in the question no liability would be imposed upon the bailee. Such seems to be the law, and respondent does not contend against this proposition. Respondent does contend, however, that the defendant in this case did by contract assume and agree to be liable for any loss or damage to said property while in his possession; and with respect to a part of the property, that in violation of the contract the defendant bailee without permission of the bailor removed the property to a place other than the place where it was to be used, and the property was there destroyed by fire, although without negligence on the part of the bailee.

In accordance with the facts alleged by plaintiffs, the court after hearing the evidence, found that a portion of the described items of property were rented to the defendant, and accepted by defendant, to be used only at its place of business in the city of Los Angeles, and that without permission or knowledge of the plaintiffs defendant removed said property from its place of business to a place of exhibit in an automobile show in another part of the city, at which place all of the property described in the complaint was destroyed by fire. The evidence is sufficient to sustain the court's finding upon these questions of fact.

There was a second lease, of other property consisting of three oriental rugs, which were rented to be used at the defendant's place of exhibit in the automobile show. But as to all of the property described in the complaint the plaintiffs alleged and the court found, that the defendant assumed the risk and agreed to become and be responsible and liable for any loss or damages thereto while in its possession. The court did find, however, and in fact it was stipulated, that the destruction of the property by fire was without any fault or negligence on the part of the defendant.

[1] It is contended by appellant that the court erred in that part of finding two which is as follows: "That defendant assumed the risk and agreed to become and be responsible and liable for any loss or damage to said personal property or any part thereof while in its possession." It does not appear that in the conversations between the representatives of the parties, preliminary to delivery of the goods, any statements were made on the subject of responsibility for any such loss

or damage. The finding, if sustained at all by the evidence, must depend upon a printed statement in the "delivery sheets" which, on three separate occasions, accompanied the delivery of goods to the defendant. These sheets were upon a printed form. At the top, in capital letters, were the words, "Delivery Sheet." At the bottom, following the space left for description of items delivered, there were two printed lines. The first, in small capitals, said: "This sheet will be confirmed by regular invoice." The lower line, in ordinary type, said: "Renters responsible for loss or damage of goods while in their possession." Two of these delivery sheets, as produced in evidence, contained an acknowledgment of receipt, signed by an authorized representative of the defendant. The third was signed by a man who was present and received the goods, but whose authority to receipt therefor is not proved, as he was not in the employ of defendant. But defendant did receive the property.

In the first transaction of hiring of these rugs and furnishings, the bailee was represented by its manager, Mr. Smith, and the bailors by Mr. Arzivian. In response to a telephone message, Mr. Arzivian brought to the defendant's place of business a truck load of goods, from which the articles hired were selected. The delivery sheet was made out in duplicate, signed by an employee of defendant, under direction of Mr. Smith, and a copy retained by each party. Nothing was said about responsibility for loss or damage, and nothing was said about the printed statement on that subject at the bottom of the delivery sheet. It is also true that this subject was not discussed in connection with the subsequent deliveries. There is no evidence that the printed matter at the bottom of the delivery sheets was ever brought to the attention of the defendant, other than as that fact may be inferred from the fact that the delivery sheets were in defendant's possession. It is upon this foundation that appellant contends that it did not agree to be responsible or liable for any loss or damage to said personal property while in its possession, in the absence of any fault or negligence on the part of appellant. It is our opinion that on this proposition the contention of appellant should be sustained.

[2] "The rule seems to be firmly established that printed conditions on letter or billheads, or order blanks of the proposer not specially referred to or called to the attention of the other party to the contract, will not be regarded as a part thereof." May Hosiery Mills v. G. C. Hall & Son, 77 Cal. App. 291, 295, 246 P. 332, 333, and cases there cited. As was said in relation to printed matter in a bank passbook: "The case is not one in which the party must know that he is accepting a contract, as where he is accepting an insurance policy, and should therefore realize the necessity of acquainting himself with its terms." Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 601, 613, 182 P. 293, 298, 5 A. L. R. 1193. In the ordinary course of business, one signing a "Delivery Sheet" would know that he was acknowledging a receipt of the goods. He would not know that he was making a contract, or changing the terms of liability which the law imposed upon him as purchaser or bailee of the property delivered to him. We are aware that there are some decisions which perhaps are not consistent with the conclusion above stated. In Taussig v. Bode & Haslett, 134 Cal. 260, 66 P. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250, it was held that the owner of goods deposited by him in a warehouse was bound by conditions printed plainly on the face of the warehouse receipt; that it was his duty to take note of the contents of the receipt, if he had the opportunity to do so. That case is discussed in Wilson v. Crown Transfer, etc., Co., 201 Cal. 701, 712, 258 P. 596, pointing out some of the differences in fact which should control the application of the rule stated in the earlier decision. Upon the facts shown in the present case, we are satisfied that the printed statement in the "delivery sheets," to which we have referred, was not a part of the contract between the parties.

[3] We have stated that upon sufficient evidence the court found that without permission or knowledge of the plaintiffs and contrary to the terms of its agreement, the defendant removed to the automobile show the rugs and furnishings included in the first transaction. By reason of this fact we think that the defendant made itself liable for the loss which followed, and which would not have occurred if the goods had not been so removed. 6 Cor. Jur. p. 1111; Welch v. Mohr, 93 Cal. 371, 28 P. 1060; St. Losky v. Davidson, 6 Cal. 643; Lilley v. Doubleday, L. R. 7 Queen's Bench 510.

The complaint alleged that the goods included in the first hiring were of a value amounting in all to $1,425, and that the remaining property was of the value of $1,250. The court included both of these in one finding, that the entire value was $2,675. Since the total amount of value thus found is the

same as the aggregate of values alleged in the complaint, we interpret this as a finding that the values alleged in the complaint were truly stated.

The judgment was for $2,675, together with $112 unpaid rental, interests, and costs. In conformity with the views herein stated, the judgment is hereby modified by reducing the principal sum thereof from $2,787 to $1,362, and by allowing interest from March 11, 1929, at the rate of 7 per cent. per annum only on the principal sum as thus reduced, with costs as taxed in the original judgment. Appellant shall recover its costs of this appeal.

We concur: HOUSER, J.; YORK, J.



3 Cal.App.2d 105

TRACY v. BRECHT et al.

Civ. 5221.

District Court of Appeal, Third District, California.

Dec. 15, 1934.

Hearing Denied by Supreme Court Feb. 11, 1935.

1. Appeal and error ⇐1010(1)

In action by automobile guest against host for injuries, whether host was driving car while intoxicated *held* for trial court under evidence that host had seven drinks and afterwards drove at high speed with little regard for traffic.

2. Appeal and error ⇐1011(1)

Where question whether automobile host was driving car while intoxicated was one of fact for court under evidence, reviewing court was bound by trial court's finding notwithstanding conflicting testimony.

3. Automobiles ⇐243(7)

In action for injuries to automobile guest, evidence that host, after taking several drinks, drove between forty and fifty miles per hour through city, nearly hit school bus, refused to slow down, and swerved out and back in passing cars, *held* admissible.

4. Automobiles ⇐243(3)

That one has collision on highway may be introduced to show that driver of automobile was intoxicated.

5. Automobiles ⇐243(3)

In action for injury to automobile guest, acts and conduct of person at time of alleged violation of statute prohibiting driving of automobile while intoxicated *held* admissible.

6. Automobiles ⇐243(3)

Testimony as to number of drinks of intoxicating liquor taken by automobile driver and his acts and conduct from beginning of drinking until collision may be introduced and considered in determining whether he was driving automobile while in intoxicated condition or was under influence of intoxicating liquor.

7. Automobiles ⇐181(1)

Automobile driver is not absolved of liability for guest's injury if quantity of liquor driver consumed and under influence of which he was laboring was sufficient to produce "intoxication" which involves the numbing of faculties so as to affect capacity to observe, to recollect, or to communicate (St. 1929, p. 537, § 112; St. 1931, p. 1693, § 141¾).

[Ed. Note.—For other definitions of "Intoxicated; Intoxication," see Words & Phrases.]

8. Automobiles ⇐244(20)

Where faculties of automobile driver are so far affected that he cannot appreciate hazard involved by manner in which automobile is driven or imminent dangers arising from cutting in and out, fast driving, and quick stopping, on street where traffic is heavy and school children are passing to and fro, conclusion that such person has reached degree of "intoxication" rendering him liable for guest's injury is sufficiently supported (St. 1931, p. 1693, § 141¾).

9. Automobiles ⇐245(24)

That person has been drinking intoxicating liquor and thereafter drives car in negligent manner does not show as matter of law that he was driving while under influence of intoxicating liquor.

10. Automobiles ⇐234

In action for injury to automobile guest, driver of car with which plaintiff's host collided *held* not necessary party, particularly where case involved question of intoxication of host.

11. Parties ⇐31

Where action of two or more persons unite in producing injury, all of such persons may properly be brought in as defendants, but joining of all is not necessary as plaintiff may still elect to institute suit against one only, since one is not relieved for his own wrong by reason of others being also guilty of like wrong.

12. Damages ⇐132(8)

$6,500 *held* not excessive where woman's knuckles were cut off, forehead cut, eye blacked, arm broken, and legs and back bruised,

requiring medical and hospital expenses of $650 and leaving her without full use of arm and with nerves unsettled.

13. Appeal and error ⇐989

Reviewing court need not review testimony in light of count which has been dismissed, even though record might show sufficient to justify finding supporting such a count.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Stella Tracy against Nettie Brecht and husband. Judgment for plaintiff, and defendants appeal.

Affirmed.

Inman & West, of Sacramento, for appellants.

John M. Welsh and Butler, Van Dyke & Harris, all of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendants in the sum of $6,500 for and on account of personal injuries, hospitalization expenses, and doctors' fees, suffered and necessitated by reason of a certain automobile collision between a car driven by the defendant, Nettie Brecht, in which the plaintiff was riding as a guest, and an automobile driven by a Mr. McCuen. From this judgment the defendants appeal.

The complaint, after alleging the existence of certain public highways and streets in the city of Sacramento, the fact of the defendant Nettie Brecht being the driver of a Hudson sedan automobile in which the plaintiff was riding as a guest, and setting forth the fact of the collision to which we have referred as occurring on the 26th day of September, 1933, at about the hour of 3 p. m. of said day, contains the following: "That at said time and place said defendant, Nettie Brecht, was then and there driving and operating said automobile while under the influence of intoxicating liquors, and while in an intoxicated condition; that as said automobile in which plaintiff was riding, as aforesaid, and which was then and there being driven and operated by defendant, Nettie Brecht, as aforesaid, did approach and traverse the said intersection of 5th Avenue with 32nd Street, as aforesaid, said defendant, as a direct and proximate result of her said intoxicated condition, did so unlawfully and recklessly drive and operate said automobile as to cause the same to, and the same did, solely by reason thereof, strike and violently collide with a certain Studebaker automobile then and there proceeding southerly through said intersection, on 32nd Street."

As a second cause of action the plaintiff alleges willful misconduct on the part of the defendant Nettie Brecht in the driving of said automobile. The complaint further alleges that the intoxicated condition of the defendant Nettie Brecht was the direct and proximate cause of the collision just referred to. The injuries to the plaintiff resulting from the collision are then set forth in detail.

As grounds for appeal the defendants urge that the testimony is insufficient to show that the defendant Nettie Brecht was intoxicated; that the findings are not supported by the evidence; that other parties should have been brought into the action; that the court erred in the admission of evidence; and that the damages awarded are excessive.

[1, 2] Without mentioning the various places at which the liquor imbibed by the defendant Nettie Brecht, preceding the collision, was obtained, it is sufficient to state generally that the defendant Nettie Brecht had seven drinks; first, a bottle of home brew, two drinks of whisky, three gin fizzes, and, finally a drink of whisky described as "terrible stuff." We may here state that none of these drinks was taken in the presence of the plaintiff. After having had six of the drinks mentioned, the defendant Nettie Brecht, accompanied by two other persons, drove her automobile to the residence of the plaintiff and invited the plaintiff to accompany the party, apparently for the purpose of going some place to have dinner and then to the theater. This purpose was not very definitely explained.

After taking the last drink of whisky, the testimony shows the conduct of the defendant Nettie Brecht in driving the automobile. It appears that the automobile was driven for a number of blocks on a street in the city of Sacramento known as Franklin boulevard. This boulevard is intersected by Fifth avenue. Franklin boulevard, in its general course, is northerly and southerly. Fifth avenue, in its general course, is easterly and westerly. Paralleling Franklin boulevard is a certain other street known as Thirty-second street. The Hudson sedan was driven for a number of blocks on Franklin boulevard, turned into Fifth avenue, and came into collision with an automobile driven by a man named Mc-

Cuen at the intersection of Fifth avenue with Thirty-second street.

The testimony is to the effect that the defendant Nettie Brecht drove the Hudson sedan on Franklin boulevard very rapidly, from 40 to 45 miles an hour, as one witness explained, between 40 and 50 miles per hour; that in driving the car the defendant Nettie Brecht would pull in behind cars, pull out fast, pull in behind cars again, slap on her brakes, came close to hitting a school bus in passing some cars, was asked to slow down, refused to do so, but continued to swerve out and back again in trying to pass more cars. This continued for a number of blocks. While driving on Franklin boulevard, a car driven by an acquaintance passed Mrs. Brecht, whereupon Mrs. Brecht stated that she was going to "catch it," and thereafter continued to drive rapidly until the time of the collision. The plaintiff in the action requested permission to take the wheel. Other passengers begged Mrs. Brecht to stop. The defendant Mrs. Brecht refused to allow the plaintiff to take the wheel, declaring that she was all right. In turning into Fifth avenue the car was driven at a speed of about 25 miles per hour, making a sweeping turn. After entering Fifth avenue the car was driven from 40 to 45 miles per hour. On Franklin boulevard, and also on Thirty-second street where it was intersected by Fifth avenue, school children were passing to and fro. On reaching the intersection of Fifth avenue with Thirty-second street, instead of slowing down, she swerved her car to the right in order to avoid striking the McCuen car which was being driven in a southerly direction. The Hudson car was then being driven in an easterly direction. The sweep of the Hudson car in swinging in front of the McCuen car was not sufficiently wide, and the left rear wheel of the Hudson sedan was caught by the left front wheel or front portion of the McCuen car and upset, resulting in quite serious injuries to the plaintiff, as alleged herein. The testimony is to the effect that no attempt was made by the defendant Nettie Brecht to check the speed of the car in entering Thirty-second street; no application was made of the brakes; and one witness testifying that the Hudson sedan at that instant was being driven between 40 and 50 miles an hour. One of the witnesses gave a higher speed than 35 miles an hour as the car was being turned from Franklin boulevard into Fifth avenue. There is no controversy as to the drinks taken by the defendant Nettie Brecht.

The testimony is also to the effect that the defendant Nettie Brecht, after the collision, was in a very excited condition, and objected to being taken to the emergency hospital. The testimony also shows that at the time the Hudson sedan was being driven on Franklin boulevard, the traffic was very heavy. We quote from the testimony of one witness as follows:

"Q. Now, will you please describe to the court the way that Mrs. Brecht drove that car for that period, approximately twenty blocks? A. Awfully fast. She would pull in behind a car and then pull out again to pass, and when she was unable to make it, put on her brakes and pull back in again behind the other cars. There was a school bus coming along, or a P. G. & E. bus; she nearly hit that in trying to pass some cars. We asked her to not go so fast, to slow down; but it did not seem to make any difference, and even then, she would do it all over again; she would swerve back again and try to pass more cars.

"Q. Now, when did she start to do that? A. After we had gone about three blocks on Franklin Boulevard.

"Q. What happened at that time? A. A car had passed us and Mrs. Brecht became terribly excited over it, and she said, 'I am going to catch that car'; and from then on she started driving fast, and she continued to drive fast up to the time of the accident.

"Q. Now, then, during this interval of 18 or 20 blocks when she was driving northerly on Franklin Boulevard, and swerving in and out of the traffic, what were you girls in the car doing? A. Begging her to stop."

The testimony also is to the effect that Mrs. Brecht was told to look out for the children, but that did not cause her to slacken the speed of the car that she was driving.

As controverting the testimony tending to show intoxication, the defendants introduced the testimony of two physicians and a police officer, to the effect that Nettie Brecht was not intoxicated. One of the physicians treated Mrs. Brecht approximately a half hour after the collision. Just how long it was after the collision the second physician had an interview with Mrs. Brecht has not been called to our attention, but we assume it was within a reasonable time.

[3] The objection of the defendants to the admission of testimony showing the manner in which the defendant Nettie Brecht drove the Hudson sedan on Franklin boulevard seems to us clearly untenable. In Hasten v.

State, 35 Ariz. 427, 280 P. 670, the court, having before it the cause of a defendant convicted of driving an automobile while under the influence of liquor, said: "There are three assignments of error. The first raises the question of the admissibility of certain evidence as to the speed at which appellant was driving when arrested. It is urged that the speed of his car has no connection with the particular offense charged. We cannot agree with this contention. It is a notorious fact that one of the first things a driver under the influence of liquor is apt to do is to drive at a high rate of speed, especially when an advanced state of intoxication has not yet been reached. Such being the case, the speed at which appellant was driving was one of the circumstances which the jury might properly consider in determining whether he was under the influence of liquor at the time."

[4, 5] That one has a collision on the highway may also be introduced to show that the driver of the car was intoxicated, as his manner of handling the car might be most pertinent. Thomas v. State, 109 Tex. Cr. R. 207, 3 S.W.(2d) 807. Likewise, the acts and conduct of a person at the time of the alleged violation of a statute prohibiting the driving of an automobile while intoxicated, is admissible. Stewart v. State, 108 Tex. Cr. R. 199, 299 S. W. 646. See, also, State v. Griffin, 320 Mo. 288, 6 S.W.(2d) 866.

[6] Without lengthening this opinion by citation of authorities, we may call attention to the notes in 68 A. L. R. beginning on page 1362, also notes in 49 A. L. R. beginning on page 1395. Also to the notes in 42 A. L. R. beginning on page 1506. The cases collected in the notes show that testimony as to the number of drinks of intoxicating liquor taken by the person involved, and his acts and conduct from the beginning of the drinking until the collision of the cars, may be introduced in evidence, and taken into consideration for the purpose of determining whether the one involved was or was not driving an automobile while in an intoxicated condition; also as to whether the person involved was only under what is called the "influence of intoxicating liquor."

[7] The principal contention of the appellants is that the act of Nettie Brecht at most comes only under the prohibiting provisions of section 112 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1929, p. 537), and not under the provisions of section 141¾ of the same Act (St. 1923, p. 517, as added by St. 1929, p. 1580, and amended by St. 1931, p. 1693), permitting recovery for injuries suffered by a guest resulting from the intoxication or willful misconduct of the driver of the automobile in which the guest is riding.

We do not question that the decisions in many states, as in California, draw a distinction, or a line of demarkation between the terms "under the influence of intoxicating liquor" and "intoxication." Likewise, we agree with the appellants that section 112 of the California Vehicle Act has for its purpose the protection of the general public, and that section 141¾ of the act has for its purpose the protection of an automobile driver from unwarranted claims made by guests. This distinction alone, however, is insufficient to absolve the driver of an automobile from liability if the quantity of liquor consumed, and under the influence of which he is laboring, is sufficient to produce a state of intoxication described in section 933 of Wigmore's Work on Evidence, to wit: "Intoxication, if it is of such a degree as to deserve the name, involves a numbing of the faculties so as to affect the capacity to observe, to recollect or to communicate."

A further definition of what is meant by "intoxication" may be found in 33 Corp. Jur., p. 479, note 32, as follows: "There are degrees of intoxication varying all the way from slight stimulation to complete coma. It is only at some point along the line between the two extremes that the loss of control of the mental faculties occurs. (State v. Yates, 132 Iowa, 475, 109 N. W. 1005.) In order for a person to be intoxicated, it is not necessary for him to be so much under the influence of intoxicating liquor as to be mentally and physically incapable of taking care of himself. (Yazoo, etc., R. Company v. Davidson, 106 Miss. 108, 63 So. 340.)"

Practically all of the cases called to our attention have had to deal with the question of whether the person involved was under the influence of intoxicating liquor, and not whether the person was intoxicated. However, the language of the court in the case of People v. Dingle, 56 Cal. App. 445, 205 P. 705, 708, relied upon by the appellants, where the court instructed the jury as to what constituted being under the influence of intoxicating liquor, is as follows: "The statute does not say that no person shall operate or drive a motor vehicle on the public highway while 'intoxicated,' but that no person shall operate or drive such a vehicle on the public highway while 'under the influence of intox-

icating liquor.' The instruction, therefore, very properly does not undertake to define 'intoxication,' but does state what acts and what condition will justify a finding that the accused is 'under the influence of intoxicating liquor,' within the meaning of the statute. It is probably true, however, that the phrase 'under the influence of intoxicating liquor' is, substantially and to all practical intents and purposes, synonymous with such words as 'intoxication' and 'drunkenness.' But even so, the instruction gives a good definition of 'intoxication.' In St. Louis, etc., Ry. Co. v. Waters, 105 Ark. 619, 152 S. W. 137, the Arkansas Supreme Court defined 'intoxication,' or 'drunkenness,' substantially in accord with the definition given in this instruction. In that case the court said: 'A man may be said to be drunk whenever he is under the influence of intoxicating liquors to the extent that they affect his acts or conduct, so that persons coming in contact with him could readily see and know that the intoxicating liquors were affecting him in that respect.'"

[8] In nearly all of the definitions which have come under observation as to whether one is under the influence of intoxicating liquor or is intoxicated, the question is whether the person involved is so far under the influence of intoxicating liquor, or has reached such a degree of intoxication, that his ability to operate a car in the manner that an ordinarily prudent and cautious person in full possession of his faculties, using reasonable care, would operate or drive a similar vehicle under like conditions. If the faculties of the person involved are so far affected, stimulated, or stupefied as not to be able to appreciate the hazard involved by the manner in which the automobile is being driven, or the imminent dangers arising from cutting in and out, fast driving, and quick stopping, on a street where the traffic is heavy and school children are passing to and fro, the conclusion that such a person is so far under the influence of intoxicating liquor as to have reached a degree of intoxication required by section 141¾ of the California Vehicle Act is sufficiently supported.

In Lockhart v. State, 108 Tex. Cr. R. 597, 1 S.W.(2d) 894, an instruction to the effect that a person was intoxicated where a sufficient quantity of intoxicating liquor had been taken into the stomach to deprive him of normal control was upheld.

In State v. Graham, 176 Minn. 164, 222 N. W. 909, 911, in dealing with the question of the influence of intoxicating liquor, it is said: "When a person is so affected by intoxicating liquor as not to possess that clearness of intellect and control of himself that he otherwise would have, he is under the influence of intoxicating liquor" within the meaning of that term as used in the statute prohibiting the operation of vehicles while in such condition.

In Daniels v. State, 155 Tenn. 549, 296 S. W. 20, 23, the court said: The phrases "'under the influence of an intoxicant,'" and "'while in a drunken or partly drunken condition'" means "substantially the same thing and are * * * used synonymously" in the statute.

[9] The appellants call our attention to the case of Tomlinson v. Kiramidjian, 133 Cal. App. 418, 24 P.(2d) 559, 560, where the court said: "From the evidence that a person had been drinking intoxicating liquor and thereafter drives his car in a negligent manner, it does not follow as a matter of law that he was driving while under the influence of intoxicating liquor." We readily agree with this statement, but an examination of this case shows that testimony was admitted very similar to the testimony in this case as to the manner in which the defendant was driving his car. It also appears from the opinion that the jury found in favor of the plaintiff, and the action of the trial court in setting aside the verdict and directing judgment be entered for the defendant was reversed by the appellate court.

In this case, just as in the case which we have been considering, it was for the trial court to determine the degree of intoxication under which the defendant Nettie Brecht was laboring at the time of driving the car on Franklin boulevard and Fifth avenue and at the instant of the collision. The court found as follows: "That it is true that at said time and place said defendant, Nettie Brecht, was then and there driving and operating said automobile while under the influence of intoxicating liquor and while in an intoxicated condition," etc.

The finding is not ambiguous. The defendant Nettie Brecht could not be intoxicated to any degree without also being under the influence of intoxicating liquor. As to whether the witnesses testifying for the plaintiff, detailing the number and kind of drinks which the defendant Nettie Brecht had imbibed, and her manner of driving the car on the respective streets, and her actions after the collision, satisfied the court that she was driving her car while in an intoxicated condition, was a question of fact for the court to determine, and, as the court so found from

the facts and circumstances set forth in the transcript and summarized herein, we are bound by such finding even though two physicians and a police officer testified that in their opinion Nettie Brecht was not intoxicated. The record contains no explanation of what degree of influence produced by intoxicating liquors must be observed before creating what such witnesses would call "an intoxicated condition." The decision of the trial court, with all the circumstances and conditions before it, is not only more persuasive as to its correctness than the opinions of three witnesses who failed to observe that the defendant Nettie Brecht was in what they would call "an intoxicated condition," but also precludes this court from holding the contrary.

[10] The appellants further urge that F. N. McCuen, the driver of the car with which the car driven by the defendant Nettie Brecht came in collision, should have been brought into the action. There is no merit in this contention. If it be assumed that both McCuen and Nettie Brecht were tort-feasors, the plaintiff would still have the privilege of electing to bring suit against one of them and not as against both. This cause of action, however, is different from one against tort-feasors, where a plaintiff may very properly bring in two or more defendants. The action in the instant case involves the question of the intoxication of the defendant Nettie Brecht and not simply her negligence. The action against McCuen, so far as the record discloses, would have been against him only on the ground of negligence.

[11] The cases cited by the appellants show, and it is not disputed, that, where the action of two or more persons united in producing an injury, all of such persons may properly be brought in as defendants, but even under such circumstances the joining of all of the persons guilty of negligence is not necessary, as the plaintiff may still elect to institute suit against one only. This is for the reason that one is not relieved for his own wrong by reason of others being also guilty of a like wrong.

[12] It is finally contended that the damages awarded are excessive. The hospital expenses, doctors' fees, etc., amounted to the sum of $650. The remainder of the award was allowed on account of personal injuries. The injuries suffered by the plaintiff are clearly set down in the respondent's brief, which we have verified by an examination of the record, and, for convenience, incorporated the same herein, to wit: "When the car turned on its side her arm stuck out and was caught between the pavement and the car, the car skidding along with her arm in that position; that her knuckles were cut off, leaving a scar, her forehead cut, her eye blacked, and one arm broken; that her legs and back were bruised so that she was unable to walk; that after she left the hospital she was able to walk a little, but not very good, and that her injuries still bothered her when she bent over; that the pain still persisted; that since the injury her nerves had been unsettled; that she could not drive a car in traffic, and so when she reached the boulevard she had to take a street car and leave her car there; that Dr. Binkley at first attempted to set her arm, and she was then taken to Dr. Anderson, who attempted it, and that she ultimately went to Dr. Fabian; that he had to reduce the swelling and prepare the skin, which took a week, and that her arm had to be dressed once or twice a day for the burns, which were very painful; that after a week an open reduction was performed, under anaesthetic, and a cast placed on her arm for about three weeks; that she still had not the full use of her arm, and sometimes was not able to hold anything she attempted to pick up; that she could lift things one way, but seemed to lack the strength to exert force in other directions; that sometimes her arm seemed to come unjointed in the elbow, and she would have to work it back and forth to get it back again."

This summary shows that we cannot hold the judgment excessive.

[13] The count in the complaint based upon willful misconduct having been dismissed, even though the record may show sufficient to justify a finding supporting such a count, we are not under the necessity of reviewing the testimony in the light of that count.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

3 Cal.App.2d 251

PEOPLE v. BEAL et al.

Cr. 280.

District Court of Appeal, Fourth District, California.

Dec. 20, 1934.

1. Robbery ⇐10

Accused who by means of deadly weapons obtained money from bank, but who did not remove money from bank because they were apprehended, *held* properly convicted of robbery in first degree as against contention that accused were only guilty of attempted robbery because they did not take money out of immediate presence of lawful possessor thereof (Pen. Code, § 211).

2. Robbery ⇐10

Crime of "robbery" is complete when robbers by means of force or fear obtain possession of personalty in presence of its lawful custodian and reduce it to their manual possession, and it is unnecessary, to complete the crime, that they carry it out of physical presence of lawful possessor or make their escape with it (Pen. Code, § 211).

[Ed. Note.—For other definitions of "Robbery," see Words & Phrases.]

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Willis Lee Beal and another were convicted of robbery and assault with a deadly weapon, and they appeal.

Affirmed.

M. W. Conkling, of San Diego, for appellants.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendants were jointly charged by an information filed by the district attorney of San Diego county with the offenses of robbery, and assault with a deadly weapon, committed on the 9th day of August, 1934. Both defendants were convicted on both counts and sentenced to confinement in the state penitentiary, with the sentence on each count running consecutively. This appeal is taken from the judgments and from the orders denying their motions for new trial.

Defendants urge the single ground for a reversal of the judgments and orders that the evidence does not support the verdicts and judgments finding them guilty of robbery in the first degree. They admit that the evidence is sufficient to support their convictions of attempted robbery and assault with a deadly weapon.

The evidence shows that the defendants, in company with Pete Aguinaldo, drove to the front of the branch of the Bank of America in the city of La Mesa. Aguinaldo remained in the car while defendants entered the bank. They approached window No. 2 behind which H. A. Hall was standing, and one of them asked concerning the transfer of some money from El Centro. Hall knew nothing of such a transfer and asked Mr. Van Dorn, another employee, about it. Hall started towards his office when he heard a voice saying, "Stick 'em up." Both defendants were armed, and Marcelo had Hall "covered." Marcelo ordered the three employees of the bank to lie down on the floor, which they did. He scooped the money at window No. 2 into a sack, then ordered Hall to open the money chamber of the vault. Hall obeyed, and Marcelo added the money taken from the vault to that already in his sack, which made a total of about $5,000. He made Hall again lie down on the floor and had moved about thirty feet towards the gate leading to the lobby of the bank when he tripped and fell. The employees of the bank pounced upon him, and one of them knocked him unconscious with a blow from the butt of a revolver. The sack spilt open during the struggle, and the money was scattered over the floor, from whence it was recovered and returned to the bank. Marcelo was arrested inside the bank.

At some time during the latter part of the robbery, Mrs. Ida Andermatt entered the bank and approached a teller's window to make a deposit. She felt the presence of some one behind her, and turned to find Beal pointing a revolver at her ribs. She was so frightened that she screamed and slapped Beal's face. Beal struck her over the head with his revolver, cutting a gash in her scalp and knocking her to the floor. Beal ran from the bank and was arrested a short distance away. During the mêlée in the bank Aguinaldo drove away and was later apprehended.

Appellants admit that the evidence is sufficient to sustain the conviction of assault with a deadly weapon, and that it shows them guilty of attempted robbery. They maintain that it is not sufficient to sustain the conviction of robbery because the money was not taken from the immediate possession of its lawful custodian. This contention is based on the language of section 211 of the Penal

Code, which is as follows: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

[1, 2] They argue that the words "taking of personal property * * * from his * * * immediate presence" must be construed as meaning the taking of personal property in the immediate presence of the lawful possessor and taking it out of and completely away from the presence of such person. From this they contend that, as Marcelo took the money from the immediate presence of the employees of the bank, but was apprehended before he carried it outside of the room in which the bank was located, he did not take it from their immediate presence, and that appellants could be convicted of nothing more serious than an attempt to commit robbery.

We cannot agree with the contention of appellants, nor can we presume that the Legislature intended that we put any such strained and unreasonable construction upon the language of this section. The crime of robbery is complete when the robbers without lawful authority and by means of force or fear obtain possession of the personal property of another in the presence of its lawful custodian and reduce it to their manual possession. It is not necessary that, to complete the crime, they carry it out of the physical presence of the lawful possessor or make their escape with it.

The judgments and orders appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



3 Cal.App.2d 254

PEOPLE v. AGUINALDO.

Cr. 281.

District Court of Appeal, Fourth District, California.

Dec. 20, 1934.

Hearing Denied by Supreme Court Jan. 17, 1935.

1. Criminal law ⇐1186(4)

Order consolidating two trials under two informations against separate defendants *held* erroneous, but error was one of "procedure" within constitutional provision that judgment shall not be set aside for error in procedure unless error results in miscarriage of justice, where informations dealt with same transaction and court had jurisdiction of felonies and of defendants (Const. art. 6, § 4½).

"Procedure" includes in its meaning whatever is embraced by the three technical terms, pleading, evidence, and practice.

[Ed. Note.—For other definitions of "Procedure," see Words & Phrases.]

2. Criminal law ⇐1186(4)

As respects whether erroneous order consolidating trials under separate informations against separate defendants resulted in miscarriage of justice so as to justify grant of new trial, reviewing court would presume that objecting defendant did not exhaust his peremptory challenges and that jurors were satisfactory to him (Pen. Code, §§ 1070, 1098; Const. art. 6, § 4½).

3. Criminal law ⇐1186(4)

Erroneous order consolidating trials under two informations against separate defendants *held* not to result in miscarriage of justice so as to justify grant of new trial as to objecting defendant, where informations charged robbery and assault with deadly weapon against all defendants, and objecting defendant admitted that evidence supported conviction of assault with deadly weapon and of attempted robbery and disputed conviction of robbery on technical grounds (Pen. Code, §§ 1070, 1098; Const. art. 6, § 4½).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Pete Aguinaldo was convicted of robbery and assault with a deadly weapon, and he appeals.

Affirmed.

George R. Baird, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was convicted of the crimes of robbery and assault with a deadly weapon. His motion for new trial was denied, and he has appealed from the judgment and from the order denying this motion.

As grounds for reversal of the judgment and order he urges: (1) That the evidence does not support the verdict and judgment finding him guilty of robbery, but is only suf-

ficient to support a conviction of attempt to commit robbery; (2) that the trial court erred in overruling his objection to the consolidation of his case with that of the defendants in People v. Willis Lee Beal and Felipe Marcelo (Cal. App.) 39 P.(2d) 504, and forcing him to trial with them over his objection and without his consent.

The first contention made by appellant is precisely the same as that made by defendants in the case of People v. Beal, supra, and is there decided against him. The facts of the instant case and the reasons for our conclusions are fully set forth in that decision and need not be repeated here. The second ground requires careful examination.

As appears in the Beal Case, appellant, with Marcelo and Beal, acted together in the robbery of the La Mesa branch of the Bank of America. A complaint was filed against them jointly, but the preliminary examination of appellant was held separate from that of his codefendants, and he was separately held to answer in the superior court. One information was filed charging Beal and Marcelo with robbery and assault with a deadly weapon. A separate information was filed charging appellant with like crimes. Neither information in any way referred to the other, although it may be readily inferred from the identical dates and the names of the parties injured that the three defendants were jointly engaged in the commission of the same crimes.

The two cases were set for trial on the morning of the same day in the same department of the superior court. When they were called for trial, counsel for appellant moved for a continuance. This motion was denied. He then objected to going to trial at the same time and before the same jury with Beal and Marcelo. The deputy district attorney in charge of the prosecutions moved that the two cases be consolidated for the purpose of trial. This motion was granted over the objection of appellant. A jury was impaneled which returned separate verdicts against each of the defendants. Separate judgments were pronounced upon them. The two appeals are presented upon separate clerk's transcripts and a single reporter's transcript.

It has been held in People v. O'Connor, 81 Cal. App. 506, 254 P. 630, 635, and People v. Foward, 134 Cal. App. 723, 26 P.(2d) 532, that such a consolidation was erroneous. It was also held in both cases that the error was not cured by section 4½ of article 6 of the Constitution. It does not appear that hearings in the Supreme Court were asked in either of these cases.

While we agree with the holdings in these cases that the consolidation of two cases for purposes of trial constituted error, we find ourselves in sharp disagreement with the conclusions there reached that the error was not one of procedure, and that, therefore, section 4½ of article 6 of the Constitution had no application to the situations there presented.

The reasons for this conclusion of the court are thus stated in the O'Connor Case: "As generally defined, 'procedure' includes in its meaning whatever is embraced by the three technical terms, pleading, evidence and practice. 32 Cyc. 405. Had there been no denial of the exercise of any peremptory challenges, we seriously question whether this section has any application to the cause before us. This section must refer to pleading and procedure, as authorized by the Codes. Thus, to make it applicable to the pleadings, had there been any defects in the informations not affecting the substantial rights of the parties, as accorded by law, then, and in that case, the error should be held harmless. Likewise, if the court omitted to follow the procedure embodied by the Codes for the arraignment and trial of the defendants upon the informations filed against them and had committed some error in so doing, which did not affect the substantial rights of the parties, then such error in procedure would likewise be held harmless, but, it cannot reasonably be held that section 4½ of article 6 is so broad in its meaning as to permit the trial court to disregard the usual and ordinary procedure in the trial of a cause and adopt a new and entirely different manner from that recognized by law. Such a course is not a mistake in procedure, it is a substitution of procedure. What would excuse a mistake in procedure would not and could not be held to allow the creation of a course unprovided for by law. Mistake is one thing; a substitution is an entirely different thing. As we have said, the defendants were deprived of the right of trial by jury, as it should have been constituted by law, in that they were compelled to go to trial before jurors whom they were entitled to reject, which brings it in principle on a parallel basis with decisions of courts relative to the right of trial by jury."

A situation, while factually different but presenting a legal question somewhat similar in effect to that in the O'Connor Case, was considered in the case of People v. Howard,

211 Cal. 322, 295 P. 333, 334, 71 A. L. R. 1385, where a jury of twelve with two alternates had been drawn. During the trial a regular juror discovered that she knew two of the witnesses; that she was prejudiced against them; that this prejudice would affect her verdict. She was excused, one of the alternates was drawn, took the vacant place in the jury box, heard the balance of the case as a regular juror, and participated in returning the verdict. In discussing this situation the majority opinion of the Supreme Court said:

"It is now contended by the defendant that, upon discovering the state of mind of the regular juror, a mistrial should have been ordered, and that to substitute the alternate for the regular juror under such circumstances amounted to a reversible error, in that he was thereby deprived of a trial by jury as guaranteed by section 7 of article 1 of the Constitution. While the value and importance of the privilege thus guaranteed cannot be overemphasized, on the record now before us we cannot see how or wherein there was any invasion of the common-law right of a jury trial. The first essential of a common-law jury in criminal causes is a jury of twelve citizens, no more nor less, drawn from the locality, duly examined and sworn to try the cause. No objection was offered to the panel in this case. The second requirement is that the jurors must be impartial. No claim is made that juror Shields, the alternate selected, was not in fact a fair and impartial person to act as a juror. While the record brought here does not contain the examination of the jurors on voir dire, it does indicate that the same proceedings were had in the selection of the alternate jurors as in the case of the first twelve who took their places in the box. We may assume that the defendant was satisfied that the alternate jurors thus selected would give him the fair and impartial trial to which he was entitled, should either be called in lieu of one of the other jurors. The third essential is that the verdict shall be unanimous, and that was so in this case, for the record shows that the twelve jurors agreed and returned a unanimous verdict.

"While the circumstances of this case are not such as to bring it within the purview of section 1089 of the Penal Code providing for alternate jurors, we think the procedure by which the alternate juror was substituted in the place and stead of the regular juror was, at most, but an irregularity which in no way substantially affected the defendant's rights. In the execution of the means which the lawmakers provide to enforce the guaranties of the organic law, the end to be effected must be through the adoption of a reasonable and practical method to secure attainable ends. When this has been done, nothing more can be demanded, from the very nature of things. It is not claimed that the verdict would have been any different had the alternate juror not participated in the deliberations of the jury. He was subject to the same challenge and took the same oath as the other jurors. We should assume that in all respects he obeyed his oath and that he well and truly tried all the matters in issue and rendered a true and impartial verdict in the cause. Defendant's right was to a fair and impartial jury, not to a jury composed of any particular individuals. People v. Durrant, 116 Cal. 179, 199, 48 P. 75. The situation here presented is not one in which a waiver of the right to a jury trial in a felony case enters into the consideration."

Section 4½ of article 6 of the Constitution provides: "No judgment shall be set aside, or new trial granted, in any case, * * * for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

If it is true that the substitution of a new method of procedure for one established in the Penal Code is always "not a mistake in procedure; it is a substitution of procedure," to which the provisions of section 4½ of article 6 cannot apply, it is difficult to see how its provisions could ever apply to any procedural error in a criminal case. If the forms provided in the Penal Code are followed, there can be no error and no occasion to apply the section. If a trial judge departs from these established forms he puts into effect other procedure of his own invention or at least adoption. In every such case of error in procedure there is a substitution of new procedure for that provided in the Penal Code. Whether it be called a "substitution of procedure" or a "mistake in procedure" the error still remains one of procedure. The mere choice of a name should not affect the application of the constitutional provisions to such a situation. If we correctly understand the rule laid down in the O'Connor Case, its strict application would nullify the provisions of section 4½ of article 6 of the Constitution when strictly procedural errors occur in the trial of a criminal case.

In the Foward Case the court, in considering the effect of the provisions of sections 954 and 1098 of the Penal Code on an order consolidating two criminal cases, said: "There is nothing in the language of either section authorizing the consolidation of separate informations against separate and distinct defendants. Where, as here, neither information refers in any way to the other, there can be no consolidation, regardless of evidence produced during the trial indicating that the charges relate to the same set of circumstances. This is so because in determining the rights of the parties relative to joint or separate trials in such cases, the trial court is bound by the contents of the information or indictment and cannot look beyond its averments. The matter is jurisdictional. In case the trial court, as it did here, disregards the defendant's rights and unlawfully consolidates trials, it is not mere error which can be cured by the application of the provisions of section 4½ of article 6 of the Constitution. All of the above legal propositions are decided in People v. O'Connor, 81 Cal. App. 506, 254 P. 630, which authority is determinative of this appeal."

It is difficult for us to see how the order now under consideration consolidating the two cases for the purpose of trial affected the jurisdiction of the court. All of the offenses were committed in San Diego county. They were felonies of which the superior court of that county had exclusive original jurisdiction. It also had jurisdiction of the persons of the defendants who were present in court and represented by counsel. Every element requisite to give the superior court jurisdiction was present and proved.

[1] We have reached the conclusion that, while the order consolidating the two cases for trial was erroneous, it was an error of procedure only and subject to the provisions of section 4½ of article 6 of the Constitution. Having reached this conclusion, it remains for us to determine whether or not it resulted in a miscarriage of justice.

[2] The record does not contain the detailed proceedings of impaneling the jury. It only shows that twelve men and women were impaneled to try the case. In the absence of any showing to the contrary, we must presume that appellant did not exhaust his peremptory challenges, and that the members of the jury were satisfactory to him. If the trial court had limited appellant to the number of peremptory challenges provided in section 1098 of the Penal Code, and had refused to give him the number to which he was entitled under section 1070 of that Code, and had he been compelled to accept a juror not satisfactory to him, the condition presented would be most serious, and the question of prejudice would then be of first importance. Such is not the case. He was satisfied with the members of the jury.

In the O'Connor Case it appears that the court limited the peremptory challenges of the defendants to the number provided in section 1098 of the Penal Code and refused to give them the number to which they were entitled under this and section 1070 of that Code. They were required to accept a juror not satisfactory to them and whom they were lawfully entitled to peremptorily challenge. In our opinion this constituted prejudicial error that fully justified the appellate court in reversing the judgments, and the discussion of the applicability of section 4½ of article 6 of the Constitution to the facts of that case was unnecessary to its decision.

[3] Appellant comes before us admitting that the evidence amply supports the verdict and judgment finding him guilty of assault with a deadly weapon. He also admits that there is ample evidentiary support for a verdict and judgment finding him guilty of attempted robbery. He disputes the conviction of robbery only on the technical grounds we have already considered in People v. Beal, supra. There has been no miscarriage of justice in this case. It is impossible to see how any jurors with any regard for their oaths could ever return a verdict of not guilty on either charge. Our reversal of the judgment would amount to a gross miscarriage of justice. We have reached the conclusion that under the provisions of section 4½ of article 6 of the Constitution we cannot reverse the judgment or order a new trial.

The judgment and order denying the motion for new trial are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

3 Cal.App.2d 407

NULSEN v. NULSEN et al.

Civ. 8932.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

1. Appeal and error ⇐110, 872

Order denying motion for a new trial is not appealable but may be reviewed on appeal from order granting nonsuit.

2. Appeal and error ⇐123

Entry of order of nonsuit on the minutes was in legal effect a judgment of nonsuit and was appealable, and no other or formal judgment of nonsuit was required (Code Civ. Proc. § 581).

3. Trial ⇐165

All evidence produced on behalf of plaintiff, both on direct and cross-examination, must be considered in passing on defendants' motion for nonsuit.

4. Evidence ⇐591

Evidence elicited on cross-examination is regarded as testimony on the part of the party calling the witness.

5. Trial ⇐139(1)

Nonsuit may be granted when the evidence brought out on direct or cross-examination of the plaintiff so conclusively establishes a defense that the court might properly grant a new trial in case of a verdict for plaintiff on like evidence.

6. Husband and wife ⇐326

Wife who consented to her husband's going to another state with another woman so that he might procure a divorce and marry the other woman *held* not entitled to maintain suit for alienation of husband's affections.

7. Limitation of actions ⇐30

Suit for alienation of husband's affections *held* barred because not brought within one year after alleged cause of action accrued (Code Civ. Proc. § 340, subd. 3).

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Suit by Helen Hovey Nulsen against Hazel L. Nulsen and others. From order granting defendants' motion for nonsuit and from an order denying plaintiff's motion for a new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and order granting nonsuit affirmed.

Dan V. Noland and Alfreda M. Noland, both of Los Angeles, for appellant.

Burke & Ball and John H. Burke, all of Long Beach, for respondents.

WILLIS, Justice pro tem.

[1, 2] Appellant, plaintiff below, brought suit against respondents to recover damages for alienation of her husband's affections. On the trial before a jury the court granted respondents' motion for nonsuit. Appellant moved for a new trial, which motion was denied, and she has appealed from both the order granting nonsuit and the order denying motion for new trial. The latter order is nonappealable, but it may be reviewed on the appeal from the order granting nonsuit. This order was duly entered on the minutes, and this amounted in legal effect to a judgment of nonsuit, from which an appeal properly lies. No other or formal judgment of nonsuit is required. Section 581, Code Civ. Proc.; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322; Lewis v. Hammond Lumber Co., 114 Cal. App. 390, 300 P. 49; Tromanhauser v. Grisemer, 123 Cal. App. 153, 11 P.(2d) 32.

[3-7] Respondents in their respective answers pleaded consent and connivance of appellant to the withdrawal of her husband's affections and the transfer thereof to respondent Hazel L. Nulsen, and that appellant's cause of action was barred by the provisions of section 340, subd. 3, of the Code of Civil Procedure. Both these defenses were adopted and made a part of the grounds of the motion for nonsuit herein. Appellant contends that it was error for the court to entertain and consider such defenses in passing upon the motion for nonsuit. Upon the determination of such a motion, all the evidence produced on behalf of the plaintiff, both on direct and cross-examination, must be considered. Evidence elicited on cross-examination is regarded as testimony on the part of the party calling the witness. Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697. A court may grant a motion for nonsuit whenever the evidence brought out upon the direct or cross-examination of the plaintiff so conclusively establishes a defense as that the court might properly grant a new trial in case of a verdict in his favor upon like evidence. Crebs v. Uplifters Country Home, 133 Cal. App. 88, 23 P.(2d) 807. Appellant's own testimony herein revealed that she consented to her husband

leaving her and going away to another state with respondent Hazel L. Nulsen, to there obtain a divorce and to marry such respondent. This was sufficient to sustain the order for nonsuit. The defense of the statute of limitations being properly pleaded that also is sufficient to sustain the order for nonsuit if the facts clearly established the bar. Patterson v. Doe, 130 Cal. 333, 62 P. 569; Fall v. Lincoln Mortgage Co., 115 Cal. App. 651, 2 P.(2d) 58. It appears from plaintiff's evidence and the face of the record that the complaint herein was filed more than one year after plaintiff's cause of action accrued. This constitutes a complete defense as a matter of law, and, in the absence of an offer by plaintiff to furnish further proofs to toll or avoid the bar of the statute, the motion for nonsuit was properly granted.

The motion for new trial was properly denied. We have examined the rulings of the court on admissibility of evidence, assigned as error herein, and find no error in such rulings.

The appeal from the order denying the motion for new trial is dismissed and the order granting nonsuit is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 540

WYMAN et al. v. MONOLITH PORTLAND CEMENT CO.

Civ. 5258.

District Court of Appeal, Third District, California.

Jan. 10, 1935.

Hearing Denied by Supreme Court March 11, 1935.

1. Patents ⇐219(4)

In licensors' action for royalties against licensee of patent, licensors were not required to plead or prove their title to patent unless licensee pleaded and proved something in nature of eviction.

2. Judgment ⇐570(5)

Judgment granting motion to dismiss licensors' action for infringement of patent against licensee who refused to pay royalties, on ground that licensors failed to show title to patent, *held* not res judicata of licensors' action against licensee for royalties.

3. New trial ⇐164

Setting aside judgment for defendant, changing findings and conclusions of law, and entering judgment for plaintiffs, upon plaintiffs' motion for new trial, *held* authorized by statute, which manifests legislative intent to permit court to correct its own errors without incurring delay and expense incident to new trial or appeal (Code Civ. Proc. § 662).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by E. B. Wyman and another against the Monolith Portland Cement Company. Judgment for defendant was set aside upon plaintiffs' motion for a new trial, and judgment was entered in favor of plaintiffs, and defendant appeals.

Affirmed.

Bordwell, Mathews & Wadsworth, of Los Angeles, for appellant.

Edward B. Howell and Mark A. Hall, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought to recover royalties from the Monolith Portland Cement Company for the use of a certain process covering the making of plastic waterproof cement.

In 1918 letters patent were issued to Hans M. Olson for a method of manufacturing waterproof cement. Olson was anxious to have this process placed upon the market, and to assist him in so doing he entered into an agreement in July, 1920, with E. B. Wyman and E. C. Meiklejohn, wherein Olson as inventor, and Wyman and Meiklejohn agreed to form a corporation; 50 per cent. of the stock thereof to be issued to Olson and 25 per cent. each to Wyman and Meiklejohn, the parties agreeing that Wyman would install a plant, or arrange with others so to do for the purpose of manufacturing and marketing the cement under said letters patent. By mutual consent no corporation was formed. However, through the efforts of Wyman, a contract was entered into between Olson, Wyman, Meiklejohn, and the United States Potash Company, later known as Monolith Portland Cement Company, the appellant herein, wherein for a consideration of 5 cents a barrel, the cement company was granted the exclusive right to the use of the process. Appellant proceeded under this agreement and continued so to do undisturbed over a period

of years, and until the same was terminated in 1928 by the cement company in accordance with the terms of the agreement. After the execution of the agreement between Olson, Wyman, and Meiklejohn and the appellant herein, Olson directed appellant to pay the royalties due, 50 per cent. to himself and 25 per cent. thereof to Wyman and 25 per cent. to Meiklejohn. This division of royalties was carried out for a period of seven years and the payments were so made without objection by any one until appellant, in 1928, notified respondents it would make no more payments to them.

After receipt of this notice from the cement company by Wyman and Meiklejohn, no further payments were made to them, and this action was brought to collect 25 per cent. due each of the plaintiffs for the royalties which had accrued. As a defense to this action appellants set up failure of consideration, claiming that neither Wyman nor Meiklejohn ever acquired any license rights under the Olson patent, nor had they any interest therein and therefore conveyed nothing of value to appellant.

A trial was had which resulted in a judgment in favor of the cement company. Upon motion for a new trial this judgment was set aside and judgment entered in favor of plaintiffs herein, for the amount sued for.

Upon this appeal the cement company maintains that the amended complaint fails to state a cause of action, that the findings are not supported by the evidence, that the decision is contrary to law, and that the trial court upon the motion for a new trial did not have the power to vacate the judgment entered in favor of defendant and order judgment for respondent.

It is alleged in the second cause of action that: "On and prior to the 29th. day of October, 1920, the plaintiffs, together with one Hans M. Olson were joint owners of the right to manufacture and sell cement under United States Letters Patent Number 1283546, issued to Hans M. Olson, on the 5th. day of November," etc.

[1] Appellant contends that assuming that respondents were the owners of such right on the date alleged in the complaint, there is no affirmative allegation that they were the owners of such right either at the time the royalties were alleged to have accrued or on the date of the filing of the second amended complaint. Under our view of the case this is not material, although if such proof were necessary we believe the finding to that effect is amply sustained. The contract is executed by plaintiffs individually, and the presumption is that they were owners of that which they were undertaking to convey; the letters of Olson to plaintiffs indicate an ownership in them, and the action of the parties themselves over a period of seven years is entitled to some consideration on that question. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951. However, it clearly appears from the evidence that the right of appellant, the cement company, to manufacture and sell the patented product was never revoked nor interfered with, and until appellant can show "something in the nature of an eviction" no cause of action arises. The allegations in the complaint, therefore, were superfluous, and whether or not it alleges ownership in respondents at the time of the filing of the complaint was immaterial. It was not necessary for plaintiffs to either plead or prove their title, and appellant is estopped from denying plaintiffs' title unless it pleads and proves that it has failed to receive that for which it contracted.

The situation here present is somewhat analogous to an action by a landlord to recover rent from his tenant, who under such circumstances is estopped to deny the title of his landlord. 21 Cor. Jur. 1238; Lefurgey v. Prentice, 36 Cal. App. 338, 171 P. 1080; Garvey v. Lashells (Klamath River, etc., Co.), 151 Cal. 526, 91 P. 498.

The following cases support the contention of respondents that in an action to recover royalties under a license defendant cannot defend by denying the title of plaintiff "without pleading and proving something in the nature of an eviction," as was said in White v. Lee (C. C.) 14 F. 789; also McKay v. Smith (C. C.) 39 F. 556; Holmes, Booth & Haydens v. McGill (C. C. A.) 108 F. 238; Victory Bottle Capping Co. v. O. & J. Mach. Co. (C. C. A.) 280 F. 753; United States v. Harvey Steel Co., 196 U. S. 310, 25 S. Ct. 240, 49 L. Ed. 492; Potterton v. Condit, 218 Mass. 216, 105 N. E. 443; Martin v. New Trinidad L. Asphalt Co., 182 App. Div. 719, 170 N. Y. S. 234; Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43; Walker on Patents, § 355; 48 Cor. Jur., Patents, §§ 460, 461, 466.

The distinction must be borne in mind between the sale of a patent itself and the sale of certain rights or licenses thereunder. In the former situation the vendor must of course have title to that which he sells, for otherwise there is a failure of consideration, but a licensee merely acquires a use, and whether or not his vendor has title is not in issue unless and until there is some interfer-

ence with the use by the licensee. Marston v. Swett, supra.

In the case at bar appellant has neither alleged nor proven any detriment or deprivation through plaintiffs' alleged lack of title, but it appears that for over seven years it has without hindrance exclusively used and enjoyed the process. The contract as to development of the process was entered into between Olson, Wyman, and Meiklejohn, and related solely to the rights between these parties. To this agreement appellant was a stranger, the right it acquired arising by virtue of a later contract between these three parties and itself. Whatever may have been the private understanding or agreement between these three in their private internal dealings was not of its concern so long at least as plaintiffs performed their agreement and the company received that for which it bargained.

[2] After the cement company refused to pay the royalties to plaintiffs herein, they filed an action in the federal court against the company for an infringement of the Olson patent; but upon motion to dismiss, this action was determined in favor of the cement company, the federal court holding that plaintiffs therein had failed to show any title in the patent itself. There is of course a distinction in the ownership of the patent and an assignment therein, which must be in writing, and an interest of the patentee in rights arising under a license. Walker on Patents (6th Ed.) § 351. The claim of appellant, therefore, that the holding in the federal court is a bar to the present action, which was pending at the time the action in the federal court was filed, and the decision of that court was on a motion to dismiss, and not upon the merits, is unsound. It would be res judicata only as to an action upon the same facts and between the same parties. Newhall v. Hatch, 134 Cal. 269, 66 P. 266, 55 L. R. A. 673; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597; City of Los Angeles v. Mellus, 59 Cal. 444.

[3] The next point urged by appellant is that the trial court had no right upon the motion for a new trial to change the findings and modify the judgment. At the conclusion of the trial, judgment was ordered in favor of defendant cement company, and thereafter findings were prepared and a judgment entered. Later, upon motion for a new trial, the court denied the motion for a new trial and vacated and set aside the judgment, findings, and conclusions of law theretofore entered, and ordered judgment for plaintiffs, and prepared and filed new findings and conclusions of law and judgment in accordance therewith. This the court did under the authority granted by section 662 of the Code of Civil Procedure, and properly so if it believed the original findings and judgment were erroneous. The very purpose of the section is to permit a court to correct its own errors without incurring the delay and expense incident to a new trial or appeal.

Appellant refers to the case of Quevedo v. Superior Court, 131 Cal. App. 698, 21 P.(2d) 998, where the trial court on an application for a new trial as to part only of the issues, granted a new trial as to all issues, and the reviewing court held the trial court was limited to do no more than to act upon the motion directed to the single issue; but here the motion was broad enough to cover the entire issue, and the action of the trial court therefore was not beyond the scope of the motion.

Other points are urged for reversal, but in effect they are the points mentioned above in different forms, and we believe sufficient has been said to make clear our holding on the main points in issue.

For the foregoing reasons therefore the judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.



3 Cal.App.2d 304

PHILLIPS et al. v. CLIFFORD F. REID, Inc., et al.

Civ. 8978.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1934.

Hearing Denied by Supreme Court Feb. 21, 1935.

1. Cancellation of instruments ⇐47

In purchaser's action to cancel contract of purchase and note and trust deed given by her, evidence sustained finding that no undue influence was used on purchaser, that purchaser had knowingly entered into the contract, and that blanks in instruments involved were filled in with purchaser's contract.

2. Appeal and error ⇐173(7)

Contention that vendor's agent had no authority to make binding contract must be

overruled on appeal, where such authority was not raised by the pleadings or during the trial, and there was no evidence on the subject.

3. Mortgages ⇨258

In purchaser's action to cancel contract of purchase and note and trust deed given by her, purchaser was estopped, as against a bona fide holder in due course of note and trust deed, to assert that trust deed was invalid, because oral, instead of written, authority to fill in blanks after execution of trust deed had been given by purchaser to another (Civ. Code, § 3095).

4. Bills and notes ⇨378

Where a person executes a negotiable or nonnegotiable instrument containing blanks, and intrusts it to a third person, with power, express or implied, to fill in the blanks in a certain manner, a bona fide holder may enforce the instrument (Civ. Code, § 3095).

5. Injunction ⇨26(1)

Where there was no showing that granting of injunction would prevent multiplicity of suits, or that any damage or injury would result if injunction should not be granted, or that the remedies pursued in actions sought to be enjoined were improper, denial of injunction restraining prosecution of the suits was proper.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Three separate actions by Clara A. Phillips and another against Clifford F. Reid, Inc., and others, which were consolidated for trial. From judgments for defendants in the actions, plaintiffs take three separate appeals.

Affirmed.

C. J. Enking and E. V. Knauf, both of Los Angeles, for appellants.

Reay, Scharf & Reay, of Los Angeles, for respondent L. W. Chandler.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents Clifford F. Reid, Inc., and Security-First Nat. Bank of Los Angeles.

PER CURIAM.

Plaintiff brought three actions against the defendants, respondents herein. The first one to quiet title to certain real property; the second to cancel and declare void a certain promissory note, trust deed, and contract of purchase, and the third to enjoin certain municipal court actions. The three actions were consolidated in the lower court and tried as one. In the action to quiet title, plaintiff claimed the property in fee. Defendant Chandler claimed that the property was incumbered by a trust deed given to secure the payment of a promissory note executed by plaintiff as a down payment in the purchase from defendant Reid Company, of certain other real property hereinafter mentioned. Chandler further claimed he purchased the note and deed of trust in the due course of business, in good faith and without knowledge or notice of any defect therein, and the said note had not been paid. In the action wherein it was sought to declare void said note and deed of trust and the contract to purchase the real property in question, and other papers in connection therewith, plaintiff alleged that she signed all of said instruments against her will and by reason of her confusion and nervousness and because of undue influence exercised upon her by defendant Reid Company. She further alleged that the trust deed, note, and contract of purchase were, at the time of signing, all blank in all particulars save the printed portions thereof; that said blanks were filled in by the Reid Company without her knowledge or consent, and the day following the signing thereof she repudiated all of them. The third action was one wherein plaintiff sought to enjoin certain municipal court actions, which were actions in unlawful detainer to recover possession of the real property covered by the deed of trust after sale and for a deficiency on the note. Judgment went in favor of defendants in all three actions. Three separate appeals are taken with one set of briefs. We will discuss all three appeals together.

[1] The court found in effect that plaintiff agreed to buy and the defendants agreed to sell the property in question, and that she executed her promissory note in favor of Reid Company, and the trust deed securing said promissory note; that the Reid Company filled in the blanks in the deed of trust with the consent and authority of plaintiff; that plaintiff did not sign the instruments against her will or as the result of being confused, or that she did not know their import; that she was not of weak mind, and no undue influence was exercised by the defendants to induce her to sign the same. Appellant claims that the findings are not supported by the evidence. There is no merit in this contention. The facts show that on June 18, 1930, plaintiff, a widow 73 years of age, accompanied a neighbor of hers on a trip to Hollywood Riviera, a real estate subdivision, the legal title of which was vested in respondent Security-

First National Bank, the same being held in trust for the Reid Company. The tract was being sold to the public by respondent Reid Company. The trip to the property was made by plaintiff in the car of one James Overton, a salesman of the company. When the party arrived at the tract, Overton drove over the same, showed plaintiff several different lots, and explained their location. Plaintiff expressed herself as being impressed with the property, and stated that, if she bought a lot, it would be a business one. She was shown a particular business lot and expressed her interest in it, but stated she was not satisfied that she had enough money to buy it. Overton informed her that, as she owned real property, the matter might be worked out in some manner, and he introduced plaintiff to a Mr. Boyles, an agent of the company, and asked him if he could make terms so that plaintiff could purchase the same. Overton and Boyles then discussed the question of making a loan to plaintiff upon property owned by her in Huntington Park. It was finally agreed by Boyles to advance plaintiff the sum of $4.000 on her property with which to make the purchase. The following instruments were then drawn up and executed: (1) A trust deed, executed by plaintiff as trustor, on a regular form of defendant Title Guarantee & Trust Company, as trustee. (2) A promissory note on a printed form of the same company, the amount of which, and the maturity date of which, were filled in by pen and ink and then signed by plaintiff. The note referred to the fact that it was secured by a trust deed. (3) A so-called offset statement containing, among other things, certain printed recitals above the signature of plaintiff to the effect that the maker of the note secured by the trust deed received full consideration therefor, and that there were no offsets, claims, or defenses against the same. This offset statement was blank as to the description of the property and the description of the note secured by the trust deed. (4) A letter of confirmation. (5) A contract of purchase on a printed form, in which there was left blank the description of the property purchased, the terms and times when the consideration was paid, and the date. (6) A sales slip which was completely filled in before being signed by plaintiff. After these papers were signed, Mr. Boyles informed plaintiff that the agreement of sale and all the papers would be filled in in conformance with the sales slip, which contained a complete and binding agreement of sale, and plaintiff authorized Boyles to perform this task. Boyles was a notary, and he attached a certificate to the trust deed as being executed by plaintiff. All the papers were then sent to the main office of the Reid Company, which company sent a letter to the Title Guarantee & Trust Company, trustee, inclosing the trust deed involved and authorizing them to record it. There is no evidence in the record that the agents of the Reid Company exerted any undue influence upon plaintiff to execute the different documents, and in fact there is no allegation as to the facts constituting the alleged undue influence, the complaint containing the mere allegation of undue influence. Plaintiff in her testimony does not claim that any false statements were made to her concerning the property, nor are there any statements by any one that she was induced to make the purchase. On the contrary, so far as the record shows, very little, if anything, was said concerning the purchase, either by the agents or plaintiff, and no complaint is here made that plaintiff was induced to make the purchase by any representations on the part of the agents, and in fact she testified that she did not know why she had entered into the contract. The day following the sale, Overton met plaintiff pursuant to her promise to furnish the Reid Company with an abstract of her Huntington Park property. She then indicated to Overton that she did not intend to go on with her purchase or furnish the abstract. Overton informed plaintiff at this time that he could make a profit for her on a resale of the lot. This is the only evidence of any representations of any kind or character that were ever made at any time to plaintiff either before or after the completion of the contract.

After plaintiff had purchased the property, the Reid Company offered the note and trust deed for sale to defendant Chandler. After examination of the transaction, Chandler purchased the same and took title thereto. The evidence is clear that Chandler was a bona fide holder in due course, and the court so found. The evidence fully supports the findings of the trial court.

[2] Plaintiff presents the argument that there was no complete contract of sale, for the reason that the Reid Company was not bound by any contract oral or written, as Overton was a mere salesman who had no authority to make terms or enter into a contract for the Reid Company, and plaintiff withdrew from the deal before it was confirmed. So far as the evidence shows, Boyles, the agent of the company, had full power to enter into the contract, and the sales agreement signed

by plaintiff constituted a valid and binding contract. Moreover, no question was raised by the pleadings or at any time during the trial as to the authority or lack of authority on the part of Boyles to sign on behalf of the Reid Company. No testimony was introduced upon the subject, and it was not an issue in the case.

[3, 4] The additional argument is presented that, as the description of the property, the obligation secured, and the name of the trustor, were not filled in at the time plaintiff signed the deed of trust, it was void, as no written authority was given to insert the omissions. The court found that the agent had oral authority to fill in the blanks, and the evidence amply supports this finding. Appellant does not question the fact that the agent was orally instructed to perform this act, it being her contention that there could be no valid oral or verbal authority so to do. Even conceding this to be true as against the original parties, it is not true as against an innocent purchaser for value. Where a person executes an instrument containing blanks, and intrusts it to a third person, with power express or implied to fill in the blanks in a certain manner, a bona fide holder will be protected, and the instrument is enforceable in his hands. This rule is not restricted to negotiable instruments, but extends to non-negotiable instruments as well. Cassetta v. Baima, 106 Cal. App. 196, 200, 288 P. 830; Moore v. Croft, 47 Idaho, 572, 277 P. 423; Rancho San Carlos v. Bank of Italy Nat. Trust & Sav. Ass'n, 123 Cal. App. 291, 11 P. (2d) 424. The rule applies, not only in jurisdictions which recognize the rule that parol authority is sufficient to authorize the filling in of blanks in a sealed instrument, but also in the jurisdictions in which the rule is adopted that such authority must be under seal. 1 Ruling Case Law, §§ 58 and 59, pp. 1022–1024; Dolbeer v. Livingston, 100 Cal. 617, 35 P. 328; Civ. Code, § 3095. Under such circumstances appellant is estopped to deny the validity of the note and trust deed. Riverside Portland Cement Company v. Maryland Casualty Co., 46 Cal. App. 87, 189 P. 808; Hockett v. Pacific States Auxiliary Corp., 218 Cal. 382, 23 P.(2d) 512. Here, there is nothing in the record to show that the execution of the instruments was not the free and voluntary act of plaintiff, or that she did not sign the same with full knowledge of the legal effect of such documents. The case does not involve a situation where the questioned instruments might have been obtained by theft.

[5] And, finally, appellant, in support of her appeal from the order denying her an injunction to prevent a multiplicity of suits, claims that this relief was improperly denied. No showing was made that the granting of the injunction sought would prevent a multiplicity of suits or that appellant would suffer any damage or injury by the trial of the municipal court actions. Nor was there any showing that the remedies pursued were not proper, or that cause existed for the injunctive relief sought.

In the action to quiet title, the evidence is sufficient to support the finding that respondent Chandler is the owner of the property in question, free and clear of all claims of plaintiff.

The judgments are affirmed.



3 Cal.App.2d 753

Clara A. PHILLIPS, Plaintiff and Appellant, v. CLIFFORD F. REID, Inc., a Corporation, John Doe, Jane Doe, and Title Guarantee & Trust Company, a Corporation, Sued as Doe-Roe Company, a Corporation, Defendants and Respondents.

Civ. 8977.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1934.

Hearing Denied by Supreme Court Feb. 21, 1935.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

C. J. Enking and E. V. Knauf, both of Los Angeles, for appellant.

Reay, Scharf & Reay, of Los Angeles, for respondent L. W. Chandler.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents Clifford F. Reid, Inc., and Security-First Nat. Bank of Los Angeles.

PER CURIAM.

Complaint to quiet title. The judgment is affirmed on the authority of Phillips v. Reid (Cal. App.) 39 P.(2d) 512, this day decided.

3 Cal.App.2d 753

Clara A. PHILLIPS and J. F. Phillips, Plaintiffs, Cross-Defendants, and Appellants, v. L. W. CHANDLER and Municipal Court of the City of Los Angeles, Honorable R. Morgan Galbraith, Judge Thereof, Defendants and Respondents; L. W. Chandler, Defendant, Cross-Complainant, and Respondent.

Civ. 8976.

District Court of Appeal, First District, Division 1, California.

Dec. 24, 1934.

Hearing Denied by Supreme Court Feb. 21, 1935.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

C. J. Enking and E. V. Knauf, both of Los Angeles, for appellants.

Reay, Scharf & Reay, of Los Angeles, for respondent L. W. Chandler.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents Clifford F. Reid, Inc., and Security-First Nat. Bank of Los Angeles.

PER CURIAM.

Complaint for injunction. The judgment is affirmed upon authority of Phillips v. Reid (Cal. App.) 39 P.(2d) 512, this day decided.

3 Cal.App.2d 245

FORNEY v. BRODIE et al.

Civ. 5286.

District Court of Appeal, Third District, California.

Dec. 20, 1934.

Hearing Denied by Supreme Court Feb. 18, 1935.

1. Venue ⇐78

No motion for change of venue supporting contention that plaintiff was compelled to proceed to trial while his motion for change of venue was pending was before court, where motion for change of venue had previously been denied, notwithstanding plaintiff raised substantially same question before other judges of same court without procuring order permitting renewal of motion (Code Civ. Proc. § 182).

2. Appeal and error ⇐884

Plaintiff could not complain of notice given him as to setting of cause for trial and trial date, where plaintiff took part in examination of jurors and helped select jury on trial date.

3. Continuance ⇐46(1)

Physician's affidavit that plaintiff was physically unable to attend court, and that physician had ordered him to remain in bed at complete rest for several days, *held* upon its face insufficient to compel granting of continuance.

4. Continuance ⇐7

Continuances are largely within discretion of trial judge.

5. Continuance ⇐46(1)

Refusing plaintiff prosecuting action in forma pauperis continuance, and directing nonsuit *held* not abuse of discretion, where jury had been called, and physician's affidavit of plaintiff's inability to attend court did not disclose nature of plaintiff's illness, nor how long jury might be required to be held at county's expense.

Appeal from Superior Court, San Diego County; J. T. B. Warne, Judge.

Action by Elmer L. Forney against H. D. Brodie and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Ray H. Overacker, of Huntington Beach, for appellant.

J. C. Hizar, of San Diego, and J. U. Hemmi, of Oceanside, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This appeal from a judgment of nonsuit rendered in favor of defendants and against plaintiff arose from an action for malicious prosecution. Plaintiff appeared in propria persona and prosecuted the action in forma pauperis. Present counsel on appeal did not appear of record in the case until the settlement of the bill of exceptions, and entered the case solely for the purpose of prosecuting this appeal.

It seems from the various pleadings on file that plaintiff is or was a builder or building contractor and registered as such with the state registrar of contractors. About the 8th day of May, 1930, a complaint for injunctive relief was filed against the plaintiff and others by the city of Oceanside, county of San Diego, to restrain defendants therein from continuing with the erection of a certain building which was then being constructed

without having first obtained a building permit from the municipality.

It appears from the record before us that this action was determined in favor of plaintiff herein, but as a result thereof some ill feeling seems to have been engendered.

Among these defendants herein sued for such malicious prosecution was the then city judge of the city court of the city of Oceanside, the city attorney of the city of Oceanside, the complainant before the registrar of contractors and other citizens of the county of San Diego, who, it is alleged, willfully and maliciously caused plaintiff to be arrested and caused statements to be published derogatory to him. Issues were joined, and the cause was ready for trial in the latter part of January, 1933.

The record discloses that throughout the course of this litigation some eleven motions to disqualify various judges had been made upon the ground of bias and prejudice.

On April 25, 1932, a motion for change of place of trial was argued before Hon. A. C. Finney, a judge of the superior court, presiding. Plaintiff was present, but refused to proceed with his motion, alleging the court was without jurisdiction. The court, however, held otherwise, and the motion was denied.

On October 6, 1932, the question of the qualification of the several judges of the superior court for San Diego county was submitted to Hon. Edwin F. Hahn, a judge of the superior court of the state of California in and for the county of Los Angeles, duly sitting in the county of San Diego, who then passed upon the qualifications of the various judges of San Diego county, and held each and every one of them duly qualified and denied the motion of plaintiff.

On June 26, 1933, plaintiff and defendant appeared in response to a notice that the above-entitled case would be set in department 3 of the superior court before Hon. J. T. B. Warne, a judge of the superior court in and for the county of Tuolumne and duly assigned to the county of San Diego. Over the objections of plaintiff that he had received no notice of trial, the cause was called for hearing. It appears from the record, however, that, some time prior to June 26, Hon. L. N. Turrentine, the judge presiding in the department where the cause was set for trial, requested plaintiff herein to sign a stipulation that the matter proceed to trial on June 26th. Plaintiff had also been informed by the chairman of the judicial council that Judge Warne would be willing to try the case and expressed the wish the matter be disposed of while Judge Warne was filling the assignment in San Diego. On June 26th, a jury was impaneled, and the court thereupon adjourned to June 28, 1933, for the taking of testimony. On June 28th the court reconvened, and the judge thereof directed plaintiff to proceed with the introduction of evidence in support of his amended first and second causes of action. Plaintiff objected, claiming a right to proceed as to the first cause of action as set forth in his original complaint, but as to that he was overruled.

Evidence was thereupon presented upon behalf of plaintiff during the day of June 28, 1933, and the cause continued to June 29th, for further proceedings. On June 29th plaintiff failed to appear, but an affidavit was presented to the court upon behalf of plaintiff by Dr. George W. Getze, which affidavit is in the following language:

"Dr. George W. Getze

"Carlsbad, Calif. June 29, 1933 7 A. M.

"To the Judge of the Superior Court, Dept. 3:

"I wish to certify that I have just examined Elmer L. Forney of 218 Geneva St. Huntington Beach, Calif. and find him physically unable to attend Court to-day.

"I have ordered that he remain in bed at complete rest for several days.

"Mr. Forney is plaintiff in case 70644 of Superior Court, Dept. 3.

"Respectfully, Geo. W. Getze, M. D.

"Subscribed and sworn to before me this 29th day of June, 1933.

"W. McClellan

"Notary Public in and for the County of San Diego, State of California.

"My commission expires Dec. 17, 1934."

Defendants objected to a continuance on the ground of insufficiency of the affidavit, which objection was sustained. A motion was thereupon made for a nonsuit, which was granted. Thereafter plaintiff filed a motion for a new trial which, after presentation, was denied. In due time notice of appeal was given from the judgment rendered in favor of defendants, and by virtue of this appeal the matter is now before us.

It has seemed necessary to narrate at this length the many steps taken by plaintiff, steps unnecessarily involved and unduly repeated for an orderly presentation of the issues before the court, but caused perhaps either by the attempt of plaintiff to represent himself before the trial court or by an unfounded distrust of the courts to give him a fair trial.

We have not attempted to enumerate all of the appearances of plaintiff in court and his attempt to disqualify the various trial judges assigned to try the cause, nor of the many demands for a change of venue. In reading the affidavits in support of these motions, we can find not the least cause or excuse for the attitude of plaintiff, and must assume it to be misinformation upon his part or to a desire to vex and annoy counsel or impede the functions of the courts themselves without cost to plaintiff, he availing himself of a generous public that permitted him to take a pauper's oath and escape the payment of fees upon his part.

[1] The objection of plaintiff that he was compelled to proceed to trial while a motion for change of venue was pending is without foundation. The question of venue had been passed upon and determined adversely to the contention of plaintiff by the learned judge then presiding in the superior court of San Diego county. In various attempts thereafter plaintiff raised substantially the same question before other judges, although no order had been given plaintiff for permission to renew such motion.

Section 182 of the Code of Civil Procedure then in effect provided: "If an application for an order, made to a judge of a court in which the action or proceeding is pending, is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same."

There was therefore no valid motion for a change of venue before the court when the cause was called for trial on June 26, 1933.

[2-5] Complaint is also made by plaintiff as to the nature of the notice given him as to the setting of the cause for trial and the trial date thereof, but this objection is removed by the fact that upon that day plaintiff took part in the examination of jurors and selected a jury to try the cause. Thereafter the matter was continued from the 26th of June to the 28th day of June, permitting plaintiff an opportunity to obtain his witnesses and proceed with the cause. Upon that day he appeared in court with witnesses and introduced evidence in support of his cause of action. The following day, June 29th, appellant failed to appear, but submitted to the court the affidavit heretofore set forth. This affidavit is upon its face insufficient to compel the granting of a continuance. It does not appear therein the nature of the illness of which appellant was then suffering, nor the length of time that he probably would be confined to his bed. Continuances are largely within the discretion of the trial judge, and, inasmuch as no abuse of this discretion is here made to appear, we cannot hold that the court exceeded its jurisdiction in directing the cause to proceed to trial. It will be recalled that a jury was in attendance, which jury had been called and was being held at the expense of the county, and inasmuch as it could not be ascertained from the affidavit the nature of the illness, nor how long a jury might be required to be held, the court was within its rights in directing a nonsuit.

As Mr. Justice Sloss said, speaking for the court in the case of Beckman v. Waters, 161 Cal. 581, 119 P. 922, 925: "It is also claimed that the court erred in denying the motion for a continuance on the ground of the absence of the plaintiff. The court did not abuse its discretion in this ruling. The affidavits offered to support the motion showed, at most, that the plaintiff was unable to be present at the time set for the trial. But there was nothing to indicate that he would be able to appear at any later time; nor was there any sufficient showing of an excuse for the failure to take his deposition in proper form before the trial."

Appellant also complains because the court refused to order the court reporter to attend at the trial and perform his services without receiving the statutory per diem. We will not here consider that objection, as it does not appear in view of the outcome in the proceedings that such order, whether right or wrong, affects any right of plaintiff. This appeal is by bill of exceptions and is heard, not upon the testimony, but upon the clerk's transcript.

It appears beyond question that plaintiff was afforded ample opportunity to present his issues before an unbiased and impartial court, and he failed to avail himself of that right.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

CHAMBERLIN v. DAVIS et al.

DAVIS et al. v. CHAMBERLIN et al.

FIRST NAT. TRUST & SAVINGS BANK OF SANTA BARBARA v. SAME.

Civ. 8895.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Rehearing Denied Jan. 30, 1935.

Waters and water courses ⇐167(1)

In action by grantee of one-third interest in creek to recover sum placed in escrow with executor of grantor by owner of one-sixth interest in creek to cover one-sixth of cost of dam constructed on creek, evidence *held* insufficient to show that owner of one-sixth interest contracted to pay anything toward cost of dam.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by Theodore Chamberlin, Jr., against Harold H. Davis and the First National Trust & Savings Bank of Santa Barbara, in which the defendants cross-complained. From the judgment, plaintiff appeals.

Affirmed.

Wm. A. Freeman, of Los Angeles, for appellant.

E. B. Starbuck and Griffith & Thornburgh, all of Santa Barbara, for respondent.

STEPHENS, Presiding Justice.

From the year 1926, one Harold H. Davis and one Judge B. Canfield owned adjoining ranches in the Los Olivos district of Santa Barbara county. They, together with one Long, owned the waters of Zaca creek; Long owning one-half thereof, Canfield one-third, and Davis one-sixth. From time to time Canfield and Davis worked together harmoniously in relation to their water rights; Canfield usually assuming the burden of the planning and construction necessary, and Davis always paying to Canfield one-third of any expense incurred.

For some time Canfield and Davis had discussed and planned the building of a dam across Zaca creek. Davis told Canfield that he (Davis) would pay one-third of the cost of the dam.

On February 25, 1929, Canfield sold to appellant, Theodore Chamberlin, Jr., all of his interest in the ranch, including his water rights in Zaca creek. As part of the consideration for the sale, Canfield agreed with Chamberlin to pay the sum of $10,000, and no more, toward the cost of the construction of said dam, which sum of $10,000 was placed in escrow by the parties. By the terms of the escrow, if the dam cost less than $10,000, Canfield was to receive the difference. Chamberlin proceeded to have the dam built, and, when finished, the cost amounted to $12,478.47.

On April 10, 1929, Canfield notified Davis of the fact that he (Canfield) had put up $10,000 for the contemplated work, and would look to Davis for his proportionate share of money actually expended, to which Davis answered without in any manner objecting to the portion fixed as his liability.

Canfield died April 19, 1929, and respondent, the First National Trust & Savings Bank of Santa Barbara, became executor of his estate and later trustee under his will.

After the death of Canfield, and before appellant had let the contract for the building of the dam, Davis went to the executor bank to see about paying his share. The cost was not then definitely known. Whereupon Davis, under date of May 22, 1929, gave the bank the following writing: "Confirming our conversation relative to the dam being built by Mr. Chamberlin in connection with his portion of the ranch purchase from the last Robert B. Canfield, I beg to advise that, as owner of a portion of this ranch, I consider myself responsible for one-sixth (⅙) of the expenses of this dam, and agree to reimburse you, upon demand, as Executors of the above Estate, for the amount which you are advancing for me."

On July 31, 1929, Davis paid to the bank $439.01, being one-sixth of bills incurred by Canfield prior to his death relative to preliminary engineering, sounding for bedrock, right of way, etc. Subsequently, on October 18, 1929, Davis paid to the bank $2,100, accompanying the payment with the following letter:

"First National Trust and Savings Bank,
Santa Barbara, California

"I hand you herewith the sum of $2100.00 which you are authorized to use as follows:

"Secure a statement of the cost of the Canfield dam ⅙th of which cost I am to pay. Out of funds handed you herewith you are authorized to pay bills in an amount equal to ⅙th of said cost after retaining the sum of $1,667.00 to be held until such time as you

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

secure for me an instrument signed by both First National Trust and Savings Bank of Santa Barbara and Theodore Chamberlin, Jr. The said agreement should designate the party to whom said $1,667.00 is payable.

"The amount handed you herewith should be in full of all claims and demands against me by reason of my agreement to pay 1/6th of the costs of said dam. Any moneys remaining after the payment of said 1/6th are to be returned to me.

"Yours truly,

"Harold H. Davis.

"Oct. 18, 1929."

Appellant, as plaintiff, filed his complaint against Davis, against the bank as the escrow holder, and against the bank as the executor of the estate of Canfield, for the sum of $1,879.19, claiming that Davis was indebted to appellant in that sum "for and on account of money laid out and expended within two (2) years last past by plaintiff for and on behalf of said defendant and for his use and benefit at the special instance and request of said defendant and which said defendant promised and agreed to repay to plaintiff." The complaint set forth the deposit of the said $1,879.19 with the bank, and that the bank as executor of the estate of Canfield claimed an interest in the money. Answers and cross-complaints and answers to cross-complaints were filed. Davis disclaimed any interest in the money whatsoever, and by the time the case came to trial it was stipulated that there was a total of $1,934.50 remaining in the hands of the bank, and said amount was at that time deposited with the clerk of the court, leaving the sole issue to be determined, whether the money should be paid to appellant, Chamberlin, or to the bank as trustee under the will of Canfield. The court made its findings in favor of the bank as trustee, whereby the bank as such trustee was to receive $1,666.67, being one-sixth of the cost of the dam, and the remainder of the $1,934.50 so deposited, to wit, $267.83, should be paid to appellant, and that there was not any contractual obligation on the part of Davis to pay anything to appellant.

From the judgment in accordance with said findings, appellant appeals, claiming that the findings and judgment should have been in his favor for the full amount, basing his claim upon the contention that the evidence showed a contractual liability on the part of Davis to appellant.

A summary of the testimony on this question by appellant, Chamberlin, was that his first conversation with Davis was in May, 1929, after he had purchased the ranch, at which time he told Davis he had purchased the ranch from Judge Canfield, and that one of the conditions of the purchase was that a dam had to be built by Chamberlin so that he could get the water into the distribution box; that Davis told appellant that he (Davis) had a one-sixth interest in the dam and that he was going to pay one-sixth of the cost of the dam, and requested Chamberlin to keep him advised as to what was going on; that he (Chamberlin) let the contract in June and construction started about the 1st of July; that about the middle of August, in conversation with Davis, he told Davis that the dam was going to cost over $12,000, and that Davis said he was going to pay one-sixth of the cost of the dam; that he had one-sixth interest in the water and that he wanted a one-sixth interest in the dam; that he wanted to pay me for the one-sixth; that Davis wanted to know if he (Chamberlin) wanted some money; that he told him, "No"; that he would complete the dam, and when he had the final figures they could make a settlement; that it was soon thereafter that the bank, as executor of Canfield's estate, made a demand on Davis for one-sixth of the cost of the dam. Davis told me "that the Bank had requested some money from him and that he advised me to go down and see the Bank and find out if I couldn't straighten it out." A few days later I met him * * * and he says, "Ted, you had better go and see the Bank. I have been in there again and they want that money, you better go down and straighten it out." Mr. Davis, a few days later, telephoned me that he had deposited the money in the bank; that he had put the money in escrow; that the bank had made a demand on him; that he did not know whether he was obligated to pay him (Chamberlin) or the bank, and that he was putting it into escrow with instructions to protect himself. Chamberlin further testified that in his contract with Judge Canfield the only sum of money that Judge Canfield was to contribute for the cost of the dam was $10,000; that this amount had been paid by the bank.

Davis, called under section 2055, Code of Civil Procedure, testified that he had several conversations with Chamberlin concerning the dam; that in one conversation about the middle of August he told Chamberlin that he was going to pay one-sixth of the cost of the dam; that he did not say to whom he would pay it; that "the question to whom I should pay it at that time did not come up"; that he (Davis) knew that Chamberlin was build-

ing the dam and that Judge Canfield had put up $10,000 for that purpose.

The testimony further showed that there was not any agreement in writing between Chamberlin and Davis.

Giving the testimony the most favorable interpretation possible to appellant, the most that can be said for it is that Davis expressed a willingness or desire to pay one-sixth of the cost of the dam. The proof fails completely to show any contractual obligation on the part of Davis to pay anything to Chamberlin.

Appellant further contends that the evidence is insufficient to show any contractual liability on the part of Davis to Canfield, and that therefore the portion of the judgment in favor of the bank as trustee under the will of Canfield is not supported by the evidence.

Irrespective of whether the evidence does or does not so show, it is not a matter concerning which appellant can complain; that would be a matter of complaint lying solely with Davis, and he has not appealed.

Judgment affirmed.

I concur: CRAIL, J.

This opinion was prepared by Hon. RUBEN SCHMIDT, Justice pro tem. of this court.



3 Cal.App.2d 411

BOARD OF EDUCATION OF CITY OF LOS ANGELES et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 10017.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 28, 1935.

Master and servant ⊂=364

Compensation claimant who, having been on county welfare rolls, was given work order recommended by board of education, and was injured while working as school janitor pursuant to relief project outlined by board and administered by agency organized by federal Civil Works Administration, *held* not "employee" of county or board within Compensation Act, especially in view of amendment thereof excluding persons performing services solely for aid from any charitable or relief organization, notwithstanding Accident Commission's finding that board of education received benefit of claimant's services (Gen. Laws Supp. 1933, Act 4749, §§ 8 (a), 12½; Act 5815, § 1).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Petition by the Board of Education of the City of Los Angeles and the State Compensation Insurance Fund for a writ of review as to an award made by the Industrial Accident Commission in a proceeding under the Workmen's Compensation Act by Harry Stout, claimant, in which the commission decided that the County of Los Angeles was the general employer and that the Board of Education was the special employer, and accordingly made an award against the State Compensation Insurance Fund, as insurance carrier of the Board of Education.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

WILLIS, Justice pro tem.

In December of 1933, respondent Harry Stout was on the county welfare rolls of Los Angeles county, receiving aid in the form of groceries and foodstuff, being classified as an "open welfare case." The Civil Works Administration (CWA), a federal relief agency, under its plan to furnish relief and relief work in aid of the states, requested the board of education of the city of Los Angeles, among other municipal corporations in Los Angeles county, to outline a project whereby work positions in and about the schools might be furnished, the plan requiring that the persons to fill these positions should be so-called "white collar" persons on the county welfare rolls. The board by resolution furnished an outline of a project, therein providing positions for clerical, gardener, and janitor service, and such like, but therein expressly declined to assume compensation liability or liability for injuries to workmen on the project. The CWA accepted this project and organized another agency called "Civil Works Service" (CWS) to administer the same, naming the project "Civil Works Service Project No. 8223." The county welfare officials sent

Stout to the board to qualify himself for a position in this project. The board passed upon his qualifications and recommended him for a work order as a gardener, and such order was issued by county welfare to the respondent, who went to work on December 18, 1933, at Fishburn Avenue school in Maywood. He was supervised by the principal of the school in his performance of service, but was subject to discharge or transfer to another project by CWS only, and his wages were fixed by the latter and paid by the disbursing officer of CWS from funds derived from federal appropriations provided for federal emergency relief. On January 15, 1934, while working as a janitor at the school, Stout was injured. After a hearing, the respondent commission decided that the county of Los Angeles was the general employer, and that the board of education was the special employer; that the board received the benefit of his service; and that said respondent was injured in the course of and arising out of such employment, and made an award against State Compensation Insurance Fund, as insurance carrier of the board of education.

The questions herein presented are: (1) Was respondent Stout, at the time of injury, an employee as contemplated by the Workmen's Compensation Act? (2) Was he excluded from the benefits of such law by the amendment of section 8(a) thereof in 1933?

The transaction revealed by the record herein is clearly one lying within the field of public welfare, and the essential characteristics of a contract of hire are not found therein, as defined in the Workmen's Compensation Law. Nor does it fall within the purview of that law or the theory upon which the law is founded and upheld. Under the facts going to make up the transaction, and the definitions of employer and employee in the law in question, respondent Stout was not an employee of either the county of Los Angeles or the board of education. Nor does the finding that the board received the benefit of his services in any wise support a conclusion that thereby the status of employee was established. These conclusions are clearly consistent with and sustained by the decision in the case of McBurney v. Industrial Accident Commission, 220 Cal. 124, 30 P.(2d) 414, decided on a state of facts constituting a transaction so similar to the one here involved, in its essential factors, as to constitute it a binding authority on this court.

In addition to the subject-matter on which the decision in the McBurney Case was based, there arises in this case a new and additional factor by reason of certain subsequent amendments of the law relating to indigents and workmen's compensation. By Act 5815, § 1, Deering's General Laws (1933 Supp., p. 2042), in effect August 21, 1933, it was provided that work might be created and required of an able-bodied indigent as a condition of relief. Respondent Stout was able-bodied, and this work was made work and was given him for the purpose of relief. By amendment of section 8(a) of the Workmen's Compensation Law (Deering's Gen. Laws, 1933 Supp., p. 1831, Act 4749), approved August 2, 1933, there was added a provision excluding from construction of the term "employee," as therein defined, "any person or persons who perform services in return for aid or sustenance only, received from any religious, charitable or relief organization." Stout received aid from a relief organization in the form of wages in return for service performed only on a relief project. Clearly he is excluded from the category of "employee" as thus limited by the act in question. Section 12½ of the same law, added at the same session (Deering's Gen. Laws, 1933 Supp., p. 1834, Act 4749), does not, as claimed by respondent commission, in any wise affect or change the definition of "employee," as contained in section 8(a) of the law. On the contrary, it is predicated on the existence of the status of employee, as defined in section 8(a), is limited to unemployment work relief program conducted by the state or any political subdivision thereof, and simply provides a measure of determining disability payments if and when such are found to be lawfully due to some injured employee under the terms of the Workmen's Compensation Law.

The award is annulled.

We concur: STEPHENS, P. J.; CRAIL, J.

BECKJORD v. TRAEGER, Sheriff, et al.*

Civ. 8779.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

As Modified on Denial of Rehearing Jan. 26, 1935.

1. Chattel mortgages ⇐63
Fraudulent conveyances ⇐47

Bulk Sales Law and statute requiring chattel mortgage to be accompanied by good-faith affidavit *held* to be for protection of creditors not in privity with parties to obligation, and hence would not be available to those in privity with such parties (Civ. Code, §§ 2957, 3440).

2. Estoppel ⇐94(1)

Assignors who assigned lease, consenting that assignees should give mortgage on fixtures to secure rent payment, *held* estopped from claiming that assignees' debt to them for money loaned should come ahead of mortgage secured debt as regards right to fixtures, even if assignors were without actual notice of the mortgage (Civ. Code, § 2973).

3. Estoppel ⇐110

Where estoppel was discussed in opening discussion of case and in testimony that followed and was in effect carried into findings, it became issue as effectively as though it had been pleaded.

4. Fraudulent conveyances ⇐47

Bulk Sales Law *held* inapplicable to transfer of fixtures on which mortgage was given by transferee to secure rent payment, where venture had not become going one when chattel mortgage was given (Civ. Code, § 3440).

5. Chattel mortgages ⇐63

Good-faith affidavit on chattel mortgage *held* in substantial compliance with statute, though mortgagee's name which was signed to affidavit did not appear in body of instrument and notary did not write "notary public" after her signature on jurat (Civ. Code, § 2957).

Argued before Superior Court, City and County of Los Angeles; Lester W. Roth, Judge.

Action by J. G. Beckjord against William I. Traeger, as Sheriff of Los Angeles County, and others. From an adverse judgment, defendants Silas F. Slusher and others appeal.

Affirmed.

Walter F. Haas, H. C. Johnston, and G. E. Kerrin, all of Los Angeles, for appellants.

John A. Jorgenson, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

A judgment was rendered in the superior court against defendants, all of whom other than defendant Traeger, as sheriff, appeal.

The findings of fact supported, as we think, by the evidence, may be abbreviated as follows: The plaintiff, Beckjord, respondent herein, owned an open market premises and was a party to a lease of the same and a party to a chattel mortgage upon fixtures therein; Ben H. and Chauncey W. Chamberlain were the lessees and mortgagees in possession. The lease and the mortgage were combined in one instrument. Prior to the date of such lease, Beckjord had entered into an agreement regarding a lease of the same premises to Silas F. and Margaret F. Slusher. The Slushers had the right to assign their interests to any lessee who would be satisfactory to Beckjord and accordingly they produced the Chamberlains as assignees and represented that Ben H. Chamberlain was financially able to pay the aggregate rental for the whole leasehold term, and that they (the Slushers) intended to turn over the fixtures then in the premises to the Chamberlains, and that they would back the Chamberlains in altering, improving, and equipping the market. The Slushers with full knowledge of the transaction permitted it to proceed, and they consented to the giving of the chattel mortgage on all fixtures, etc., as security for rental and performance of the lease.

Upon such representations the lease and mortgage with the Chamberlains was entered into. Immediately prior to and during the time the negotiations by which the Chamberlains became lessees, and up to such time, no business was being done on the premises and no sales stock of any kind was on hand. The Chamberlains defaulted in some of the required payments on the lease, and they were also behind in obligations to the Slushers for money loaned them in connection with the market transaction. The Slushers brought suit against the Chamberlains on two promissory notes and had the sheriff attach the fixtures, etc., mortgaged to Beckjord. The sheriff was informed of this chattel mortgage, and, in order that the sheriff should retain possession, the Slushers and a surety executed an indemnity bond

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 41 P.(2d) 172.

to the sheriff. Later the fixtures were sold to defendant S. F. Slusher, and he removed them from the premises and converted them to his own use. Beckjord brought an action for damages and recovered.

As above indicated and contrary to the contention of appellants, it is our opinion that the evidence in the case supports the findings and also the judgment, but appellants contend that the chattel mortgage given Beckjord by Chamberlains was and is void as to Slushers. This claim is based upon the premise (a) that the provisions of section 3440 of the Civil Code (Bulk Sales Law) had not been complied with before the Chamberlains executed the mortgage; and (b) that the mortgage cannot be effective as against the Slushers, as the "good-faith" affidavit, affixed to the mortgage, and which is required by section 2957 of the Civil Code, was fatally defective.

[1-3] Aside from the alleged deficiencies of the affidavit attached to the mortgage, we hold that neither of these contentions is tenable. Both of these sections of the Civil Code are for the protection of creditors not in privity with the parties to an obligation, and the findings of fact remove the Slushers from that category. Under the findings it can hardly be said that the Slushers were without notice of the mortgage when that was one of the terms of the deal. Section 2973, Civ. Code, But even if they were without actual notice, they were certainly estopped from claiming their debt ahead of the mortgage secured debt. It may be admitted that estoppel must ordinarily be pleaded, but an inspection of the transcript reveals the fact that estoppel was discussed in the opening discussion of the case and in the testimony that followed and was in effect carried into the findings. In such circumstances it became an issue of the case as effectively as though it had been pleaded.

[4] It is our opinion that section 3440 of the Civil Code does not apply for the reason that the venture had not become a going one when the chattel mortgage was given. The Chamberlains had not opened a sales establishment upon the premises and did not do so until some time thereafter. The market had been completely closed before the Chamberlains became interested in it.

[5] In addition to the facts that the mortgage given to Beckjord by Chamberlains was known to Slushers and was given with their approval, we think the good-faith affidavit substantially complies with the statute. The signature of Beckjord, with the Chamberlains, to the affidavit, is effective notwithstanding Beckjord's name does not appear in the body of the instrument. The fact that the notary did not write "notary public" after her signature on the jurat is a technicality without merit; her affirmed seal included upon its imprint both her name and her office. For a general discussion germane to the subject, see 1 California Jurisprudence, 250 et seq. Appellant claims that the fixtures, alleged to be unlawfully seized and converted, were given too high a valuation by the trial court. We think the trial court was better able to fix the value than we are.

Judgment affirmed.

We concur: CRAIL, J.; WILLIS, Justice pro tem.

2 Cal.2d 87

SONDEL v. ARNOLD.

L. A. 14661.

Supreme Court of California.

Dec. 20, 1934.

Rehearing Denied Jan. 17, 1935.

1. Tender ⇐19(2)

Tender of amount of obligation must be duly made and in good faith to discharge lien given as collateral security therefor (Civ. Code, §§ 1493, 1504).

2. Tender ⇐28

Evidence supported finding that purchaser of property subject to trust deed securing note designating office of mortgagee company as place of payment did not duly and in good faith make tender of payment essential to discharge lien of trust deed in hands of mortgagee's assignee who attempted to change place of payment to a bank (Civ. Code, §§ 1493, 1504).

In Bank.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Ida Sondel against J. K. Arnold, wherein defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals, and defendant files a motion to dismiss or affirm.

Motion denied. Judgment affirmed.

Henry L. Knoop and David A. Sondel, both of Los Angeles, for appellant.

Lazare F. Bernhard, of Los Angeles, for respondent.

WASTE, Chief Justice.

This is an appeal by the plaintiff from a judgment quieting the title of the defendant and cross-complainant to certain real property situate in the county of Los Angeles. The cause now comes before us both on the merits and upon motion of the respondent to dismiss or affirm for an asserted lack of merit in the appeal.

The action is one in equity commenced by appellant to have it decreed that the lien of the trust deed under which respondent derived title had been discharged prior to the purported sale thereunder, and that all proceedings leading up to such sale and the trustee's deed thereafter executed to respondent were void and of no effect. It was also prayed that respondent be perpetually enjoined from asserting any claim to the property.

Respondent answered and cross-complained, requesting that his title to the property be quieted. At the conclusion of the trial, the court below found in substance that the lien of the trust deed had not been discharged prior to the trustee's sale and that said sale and the deed subsequently executed were valid and effective. It thereupon quieted respondent's title. Other findings essential to the disposition of the cause will be mentioned hereinafter.

It appears that on November 21, 1929, the then owners of the property in dispute borrowed $6,500 from the Pulliam Mortgage Company, for which they gave their promissory note, due November 21, 1932, and as security therefor executed a deed of trust on the property. The office of the Pulliam Mortgage Company in Los Angeles was designated in the note as the place of payment thereof. Prior to the maturity date, the Pulliam Mortgage Company sold and assigned the note and deed of trust to the respondent. On February 24, 1930, the appellant purchased the property "subject to the deed of trust," but did not at any time assume or agree to pay the note.

Several months prior to the maturity of the note, the appellant sought an extension of time upon the terms of which the parties were unable to agree. Thereafter, and on November 9, 1932, twelve days prior to the due date of the note, respondent addressed the following letter to the appellant, which the latter admittedly received: "Please note that the loan on your property * * * will be due November 21, 1932, amount $6,500.00 and interest $113.75. I will have your papers on that date at the Bank of America, South Spring Street and Seventh, at Window No. 16, at 11 a. m. I will change that time if you call me at Wyoming 9635 before that date. * * *" No response of any character was made to this letter by appellant.

Neither the principal nor the interest mentioned in the letter was ever paid by appellant, or the makers of the note, whereupon respondent proceeded to and did procure a trustee's deed to the property following sale for alleged default. This action was then commenced by appellant to have the trustee's sale and resultant deed declared void on the ground that she had on the maturity date of the note made a valid tender of the amount due, causing, under the provisions of section 1504 of the Civil Code, so she asserts, a ces-

sation of interest and a discharge of the lien against the property. The cited Code section provides that: "An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." It has been held under this section that a tender, duly made, of the amount of an obligation, works a discharge of a lien given as collateral security therefor. Leet v. Armbruster, 143 Cal. 663, 668–672, 77 P. 653; Walker v. Houston, 215 Cal. 742, 745–747, 12 P.(2d) 952, 87 A. L. R. 937.

[1] In support of his motion to dismiss, respondent urges that appellant, being a mere purchaser of the property subject to the lien, is not a party to the note or indebtedness secured, but rather a stranger thereto, and cannot therefore by a mere tender discharge the lien and free the property therefrom, but must actually pay the amount due. He cites three authorities from sister states which tend to support his theory. While we are inclined to the view that the above-mentioned California cases announce a rule at variance with that set down in the cases from other jurisdictions relied on by respondent, we find it unnecessary to now declare that a purchaser of property subject to a lien, though not a party to the contract creating the indebtedness for which the property is security, and not personally liable for such indebtedness, may by a tender free the property from such lien. Assuming the latter to be the rule in this state, our examination of the record satisfies us that appellant did not make a tender sufficient to bring the rule into action in the present case. A tender to be effective for the purpose contended by appellant, under the terms of the very section relied on by her (section 1504, Civ. Code), must be "duly made," and, as further provided in section 1493 of the Civil Code, "an offer of performance must be made in *good faith*, and in such manner as is most likely, under the circumstances, to benefit the creditor."

In this regard the evidence tends to show, as indicated above, that twelve days prior to the maturity date of the note the respondent informed appellant by letter, which the latter admitted receiving, that he would have the necessary papers on that date at window 16 of the Bank of America, South Spring street at Seventh, at 11 a. m., and would "change that time if you call me"; that appellant did not at any time make any form of response to this letter, nor did she then or subsequently ever inform respondent of her willingness to pay off the trust deed at the office of the Pulliam Mortgage Company, designated in the note, or at any other place; that the respondent appeared at the time and place mentioned in the letter, with certain of the papers, and would have executed others in the event appellant offered payment; that appellant neither personally nor by agent appeared at said time and place, or at any other time or place, with the money essential to pay off and discharge the lien of respondent's trust deed; that on the maturity date of the note the appellant's husband, who acted as her agent in this matter, telephoned to the office of the Pulliam Mortgage Company and inquired whether the latter was in a position to accept payment on the trust deed and deliver the papers, to which query a negative response was given. At this point the evidence is in conflict; the appellant's husband testifying that he informed Mr. Pulliam that he "was then leaving my office, on the way to his office, to take care of the * * * note and he should have the note, trust deed, fire insurance policy, and request for reconveyance ready for us with somebody in the office, so that upon my arrival the matter could be taken care of," but that Pulliam told him that respondent "had at no time left the papers with him." Pulliam, on the other hand, testified that appellant's husband "asked me if he came up there to pay the loan would we be authorized to accept payment and could we deliver the papers to him. * * * The conversation was in the form of a questionnaire, as far as Mr. Sondel's statements were concerned. * * * He did not at any time say he wanted to pay his loan. He merely asked questions."

The trial court found that "at no time, either before, at, or after the maturity of the promissory note herein referred to, did the plaintiff and cross-defendant, or anybody whomsoever, at the place specified for payment, or at any other place, or at all, make an offer to perform, or offer to perform, under the promissory note herein referred to, or to pay the same, or any part thereof, as alleged in plaintiff's complaint herein, or otherwise, or at all, nor did the plaintiff and cross-defendant, or any person whomsoever, make any tender, nor did said plaintiff and cross-defendant tender to the defendant and cross-complainant J. K. Arnold, or to any other person for the account of the defendant and cross-complainant Arnold, or otherwise, or at all, the sums due under the provisions of said note, or any part thereof.

"It is true that had said Arnold been present at the office of said Pulliam Mortgage Company on November 21st, 1932, with the note, trust deed, insurance policies and an executed request for reconveyance of the property secured by the trust deed, and had plaintiff's husband upon examination of said papers found them all to be in proper form, he would have paid the amount of said debt to said Arnold upon delivery to him of said papers, but, at the same time, on the 21st day of November, 1932, plaintiff knew that J. K. Arnold had requested payment of the note at Bank of America, Seventh and Spring streets, and intended to be there to accept payment; that plaintiff did not believe that J. K. Arnold would be at the office of Pulliam Mortgage Company to receive such payment or that any papers relating to the loan would be there, or that the Pulliam Mortgage Company would be authorized to accept payment. That plaintiff believed that said Arnold would be at the Bank of America to receive payment of the note and that if payment was tendered to said Arnold it would be received and all papers to which plaintiff was entitled on payment would be executed and delivered to her.

"That in communicating with Pulliam Mortgage Company respecting the payment of the note, plaintiff was avoiding rather than seeking a meeting with said Arnold. * * *

"Also in connection with paragraph VI, it is true that neither the plaintiff nor anyone else appeared at the office of the Pulliam Mortgage Company, or at the home of the defendant and cross-complainant J. K. Arnold, or at the Bank of America, Seventh and Spring Street Branch, or at any place on said day of maturity, or at any time, for the purpose of paying off said note, or tendering the amount due under said note and deed of trust, or any part thereof. * * *

"That the defendant and cross-complainant J. K. Arnold, was ready on the day of maturity of the said note and at all times, to execute a request for reconveyance to the said plaintiff herein upon being tendered the payment of the within obligation."

[2] The finding of fact that appellant had not at any time or place made a tender or offer of performance is warranted under the evidence and fatal to her contention herein. We fail to perceive wherein appellant may derive much comfort from the italicized portion of the above findings. That portion is not the equivalent of a finding of sufficient tender, as appellant apparently concludes. Reasonably construed as a whole, the findings are susceptible of but one interpretation, viz., that appellant did not in good faith make a tender of performance. In view of the conflict in the testimony and the admission of appellant's husband while on the stand that neither appellant nor any person representing her had appeared at the office of the Pulliam Mortgage Company, designated in the note, or at the Bank of America, designated in respondent's letter, or at any other place, with the money necessary to pay off and discharge the lien, or had ever contacted respondent directly or through an authorized agent and actually tendered the amount due, we are satisfied with the trial court's conclusion, and unhesitatingly declare that there never had been a tender and refusal, within the meaning of the authorities, so as to work a discharge of the lien. Our reading of the record convinces us that by her conduct appellant, as found by the trial court, was seeking to avoid, rather than to make, payment. In other words, a tender had not been "duly" and in "good faith" made, even though for present purposes we conclude that respondent, as appellant urges, was without authority to attempt to change the place of payment. Respondent's conduct in this regard, whether proper or improper, did not relieve appellant from making a reasonable effort to pay off the lien. This she did not do. On the contrary, the evidence discloses that her efforts throughout have been evasive and her purpose insincere. In other words, there have not been a definite tender and an unwarranted refusal, essential to work a discharge of the lien. Smith v. Mould, 87 Misc. 199, 149 N. Y. S. 552, 555; Hilmes v. Moon, 168 Wash. 222, 11 P.(2d) 253, 260, 93 A. L. R. 1. Under the circumstances, the trial court's disposition of the cause is fair and proper.

For the foregoing reasons, the motion is denied, and the judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

2 Cal.2d 162

FULLERTON OIL CO. v. JOHNSON.

L. A. 14017.

Supreme Court of California.

Dec. 27, 1934.

1. Taxation ⇐37

Amendment to Franchise Tax Act depriving oil company of privilege of using January 1, 1928, values as base in computing deductions for depletion, and relegating it to March 1, 1913, values *held* not invalid as taxing capital rather than "income" which must be deemed to be realized gain so that increases in value of capital assets are "income" in year they are physically realized (St. Cal. 1931, p. 61, § 8 (g); Const. Cal. art. 13, § 16, subds. 2 (a, b), 5, as added in 1928).

[Ed. Note.—For other definitions of "Income," see Words & Phrases.]

2. Taxation ⇐376(1)

In computing franchise tax based on net income, allowance for depletion in computing net income in case of oil and gas properties is at best an approximation, and computation of depletion is of such highly technical nature that in absence of clear proof to contrary legislative discretion should not be interfered with (St. Cal. 1931, p. 61, § 8 (g).

3. Taxation ⇐376(1)

Oil company is not entitled as matter of constitutional right to depletion allowance in computing income to determine amount of franchise tax based on net income (St. Cal. 1931, p. 61, § 8 (g).

4. Constitutional law ⇐229(1)
Statutes ⇐72
Taxation ⇐37

Amendment to Franchise Tax Act placing corporations owning oil and gas properties in separate class for purpose of computing depletion *held* not unconstitutional, classification being reasonable (St. Cal. 1931, p. 61, § 8 (g); Const. Cal. art. 1, § 11; U. S. Const. Amend. 14).

5. Constitutional law ⇐211
Statutes ⇐71

Equal protection clause of Constitution and provision that all general laws shall have uniform operation do not prevent discrimination based on reasonable classification (Const. Cal. art. 1, § 11; U. S. Const. Amend. 14).

6. Constitutional law ⇐229(1)
Statutes ⇐72

Under constitutional provisions for equal protection of laws and for uniform operation of general laws, Legislature has wide powers of classification and may classify various callings, trades, and businesses for purpose of taxation (Const. Cal. art. 1, § 11; U. S. Const. Amend. 14).

7. Taxation ⇐376(1)

Amendment to Franchise Tax Act effective February 27, 1931, could be applied in computing tax due for 1931, which accrued January 1, 1931, and was computed on net income for 1930, where tax was not payable until March 15 and became lien on first Monday in March, 1931, and tax was for privilege of doing business as corporation in 1931 (St. Cal. 1929, pp. 19, 20, 25, 28, 31, §§ 2, 4, 13, 23, 29; St. Cal. 1931, p. 61, § 8 (g).

8. Taxation ⇐319(1), 362

Taxpayer is not entitled, regardless of legislative action, to have current taxes computed on same basis as past taxes have been assessed, but taxes for current year may be changed during year and additional taxes may even be imposed during current year on same subject of taxation.

In Bank.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Fullerton Oil Company against Charles G. Johnson, as treasurer of the state of California. From an adverse judgment, defendant appeals.

Reversed.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen. (Roger J. Traynor, of Berkeley, and Frank M. Keesling, of Sacramento, of counsel), for appellant.

Claude I. Parker and George H. Koster, both of Los Angeles (Bayley Kohlmeier, of Los Angeles, of counsel), for respondent.

PER CURIAM.

Defendant appeals from a judgment in favor of plaintiff rendered by the trial court upon defendant's refusal to further plead after a demurrer to the complaint had been overruled. Defendant insists that the demurrer should have been sustained without leave to amend and judgment entered in favor of the state.

The action was instituted by the Fullerton Oil Company to regain a portion of the taxes for the year 1931 assessed to it, under the Bank & Corporation Franchise Tax Act (Stats. 1929, p. 19), and paid by it under protest. Respondent's objections to the amount of the tax exacted from it for the year 1931 arise out of the fact that the state applied to respondent in computing its tax for that

year a 1931 amendment to section 8 (g) of the act (Stats. 1931, p. 61), which amendment became effective February 27, 1931.

Before discussing the specific contentions of the parties hereto, it is first necessary to briefly refer to the constitutional and legislative background of the Franchise Tax Act. Prior to 1928, franchises of corporations were taxed under the provisions of article 13, § 14, of the state Constitution, as amended in 1926, that section providing that all franchises of corporations should be assessed at their actual cash value. In November of 1928 there was added to the Constitution a new section, article 13, § 16, authorizing the Legislature to provide a different method for the taxation of franchises. Subdivisions 2 (a, b) and 5 of that new section read as follows:

"2. (a) All financial, mercantile, manufacturing and business corporations doing business within the limits of this State, subject to be taxed pursuant to subdivision (d) of section 14 of this article, in lieu of the tax thereby provided for, shall annually pay to the State for the privilege of exercising their corporate franchise within this State a tax according to or measured by their net income. The amount of such State tax shall be equivalent to four per cent of their net income. * * *

"(b) The Legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may provide by law for the taxation by any other method authorized by this Constitution of the corporations, or the franchises, subject to be taxed pursuant to subdivision (a) of paragraph 2 of this section. * * *

"5. The Legislature * * * shall define 'net income,' and may define it to be the entire net income received from all sources. * * * Said taxes shall become a lien on the first Monday in March of 1929 and of each year thereafter. The Legislature shall pass laws necessary to carry out this section. * * *"

Pursuant to this constitutional authority, the Legislature in 1929 passed the Bank & Corporation Franchise Tax Act, supra. The constitutionality of certain provisions of that act was before this court in Pacific Company v. Johnson, 212 Cal. 148, 298 P. 489, affirmed in 285 U. S. 480, 52 S. Ct. 424, 76 L. Ed. 893. Section 8 (g) of that act, as originally enacted, read in part as follows:

"Sec. 8. In computing 'net income' the following deductions shall be allowed. * * *

"(g) In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion. * * *

"The basis upon which depletion is to be allowed in respect of any property shall be as provided in sections 113 and 114 of the said revenue act of 1928, or upon the basis provided in section 19 hereof. * * *

"In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph."

Section 19 referred to in section 8 (g), supra, provided that for the purpose of ascertaining the gain or loss from the sale or other disposition of property acquired prior to January 1, 1928, and disposed of thereafter, the basis shall be the fair market value as of January 1, 1928. The "Revenue Act of 1928" referred to in section 8 (g), supra, is the Federal Revenue Act of 1928. Sections 113 and 114 of the Revenue Act of 1928 (26 USCA §§ 2113, 2114), above referred to, provide generally that in computing the depletion allowance for companies operating oil and gas wells, as to property acquired after February 28, 1913, the cost of the property shall be used as a base, and as to property acquired before March 1, 1913, either the cost of the property or its fair market value as of such date shall be used.

As already stated, section 8 (g) above quoted was amended in 1931. It is the applicability of a portion of this 1931 amendment to respondent for the year 1931, and the constitutionality of that section as amended that is involved on this appeal. So far as pertinent here, the 1931 amendment provides:

"In computing 'net income' the following deductions shall be allowed. * * *

"(g) * * * In the case of oil and gas wells the allowance for depletion shall be twenty-seven and one-half per centum of the gross income from the property during the taxable year. Such allowance shall not exceed fifty per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed in the manner provided in sections 113 and 114 of said revenue act of 1928."

Respondent is an oil and gas company and owns oil and gas properties which were acquired by it prior to January 1, 1928. Under section 8 (g) of the Franchise Tax Act, as it was originally enacted in 1929, respondent, in computing its depletion allowance for 1931, could have used as a base, as one of its alternatives, the January 1, 1928, values of said properties. Under the 1931 amendment to the section, under this same alternative, respondent is prohibited from using the January 1, 1928, values as a base, and must use either the cost of the properties or their March 1, 1913, values.

Respondent contends that the 1931 amendment is unconstitutional, or at least not operative as to it for the year 1931 for three main reasons:

1. In the first place, it is contended that in depriving respondent of the privilege of using January 1, 1928, values as a base in computing the deduction for depletion and relegating it to the March 1, 1913, values, the state is taxing the increase in value occurring between 1913 and 1928; that this increase in value is capital and not income; that under the 1928 amendment to article 13, § 16, the Legislature is limited to a tax according to, or measured by, net income and cannot levy a tax on capital. This is the main point to be determined on this appeal.

2. In the second place, respondent points out that the 1931 amendment to section 8 (g) only applies to corporations operating oil and gas properties, and that such corporations are the only corporations deprived of the opportunity of basing depletion on the January 1, 1928, values of their properties. It is contended that such discrimination amounts to a denial of the equal protection of the laws and constitutes a violation of the uniformity clauses of the State and Federal Constitutions.

3. In any event, respondent contends the tax for 1931 became a fixed and determined liability on January 1, 1931, and it is respondent's position that since the amendment here involved did not become effective until February 27, 1931, that amendment cannot be applied to it in computing the tax due for the year 1931.

[1] These contentions will be considered in order:

We do not agree with respondent that the formula provided for the computation of the depletion allowance for corporations operating oil and gas properties by the 1931 amendment in section 8 (g) above quoted results in taxing capital rather than income. Assuming that the Legislature by the provision of article 13, § 16, subd. 2 (a), above quoted, is limited to a franchise tax measured by the income of the taxpayer (a point we do not here decide in view of the provisions of subdivision 2 (b) above quoted), it is our opinion the tax here involved is one measured by income and not capital. It is true that by the 1931 amendment respondent is deprived of the opportunity of using the January 1, 1928, values as a base, and that it must use the cost or March 1, 1913, values as a base. It is further true that in thus computing the depletion allowance any increase in value in the properties occurring between 1913 and 1928 would thus be included in the tax base. That fact, however, does not make the tax one measured by capital as distinguished from income as those two terms are usually understood, and are used in the act here involved. Under the federal Income Tax Act, the federal courts have established the principle that "income" within the meaning of the Income Tax Act is "realized gain," and that such realized gain is taxable in the year of its realization regardless of when it accrued. Thus under the federal act increases in the value of capital assets accruing subsequent to March 1, 1913, are taxable as income not in the year such increases in value occur, but in the year such increases in value are actually realized by sale or other transfer. Merchants' Loan & Trust Company v. Smietanka, 255 U. S. 509, 41 S. Ct. 386, 65 L. Ed. 751, 15 A. L. R. 1305; Eisner v. Macomber, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570. Respondent concedes that accretions to capital accruing after the passage of the act can be properly taxed as income in the year of their fruition, but contends that accretions to value prior to the date of the taxing act cannot be so taxed. We can see no constitutional difference between accretions to capital prior to the date of the taxing statute and those occurring subsequent thereto. If increases in the value of property constitute income, and constitute income in the year in which realized rather than in the years when such increases in value accrue, it would seem that constitutionally speaking it makes no difference when such increases in value accrue—whether before or after the effective date of the taxing statute. This very point has already been decided in accordance with the above views by the United States Supreme Court. In Lynch v. Hornby, 247 U. S. 339, 38 S. Ct. 543, 62 L. Ed. 1149, and Helvering v. Canfield, 291 U. S. 163, 54 S. Ct. 368, 78 L.

Ed. 706, it was held that dividends declared and paid by a corporation from profits and surplus accumulated prior to March 1, 1913, constitute "income" to the recipients and not "capital." A case even more directly in point is MacLaughlin v. Alliance Insurance Company, 286 U. S. 244, 52 S. Ct. 538, 76 L. Ed. 1083. That case involved the following state of facts: Under the 1913, 1916, 1917, and 1918 Revenue Acts stock fire insurance companies were taxed upon their income, including gains realized from the sale or other disposition of property, accruing subsequent to March 1, 1913, but by the Revenue Acts of 1921, 1924, and 1926 such gains were again subjected to tax, including all gains accruing since March 1, 1913. The taxpayer contended that gains accruing prior to 1928 during years when such gains were not taxable, constituted capital and were therefore not taxable as income. The United States Supreme Court held that such gains were taxable on the basic theory that all such accretions in value are income in the year of realization regardless of when they accrued. The contention of the taxpayer in the MacLaughlin Case is stated at page 248 of 286 U. S., 52 S. Ct. 538, 539, as follows:

"The company contends that so much of the gain as accrued before the effective date of the taxing act was capital, which could not constitutionally be taxed under the Sixteenth Amendment." That is exactly respondent's contention in the present case. The Supreme Court answered this contention as follows:

"The fact that a part of the taxed gain represented increase in value after that date [March 1, 1913], but before the present taxing act, is without significance. Congress, having constitutional power to tax the gain, and having established a policy of taxing it, see Milliken v. United States, 283 U. S. 15, 22, 23, 51 S. Ct. 324, 75 L. Ed. 809, may choose the moment of its realization and the amount realized, for the incidence and the measurement of the tax. Its failure to impose a tax upon the increase in value in the earlier years, assuming without deciding that it had the power, cannot preclude it from taxing the gain in the year when realized, any more than in any other case, where the tax imposed is upon realized, as distinguished from accrued, gain. If the gain became capital by virtue of the increase in value in the years before 1928, and so could not be taxed as income, the same would be true of the enhancement of value in any one year after the adoption of the taxing act, which was realized and taxed in another. But the constitutionality of a tax so applied has been repeatedly affirmed and never questioned. The tax being upon realized gain, it may constitutionally be imposed upon the entire amount of the gain realized within the taxable period, even though some of it represents enhanced value in an earlier period before the adoption of the taxing act." (Citing cases.)

Respondent argues, however, that even the MacLaughlin Case limits the taxing of realized gains to a period after the effective date of the Sixteenth Amendment, and tries to distinguish the case on that ground. The reasoning of the United States Supreme Court, as indicated from the quotation supra, was not so limited.

As a clear indication of the extent of the United States Supreme Court's opinion in the MacLaughlin Case, that court cited and approved the case of Norman v. Bradley, 173 Ga. 482, 160 S. E. 413 (appeal to United States Supreme Court dismissed for want of a substantial federal question sub nom. Glenn v. Doyal, 285 U. S. 526, 52 S. Ct. 404, 76 L. Ed. 923). The Bradley Case is directly in point. The Georgia Income Tax Act became effective August 22, 1929, and provided for the taxation of income received on or after January 1, 1929. It incorporated by reference those provisions of the Federal Reserve Act which used March 1, 1913, value, or cost, as the basis for determining depreciation, depletion, etc. Two taxpayers sold shares of stock in February, 1929, and a third sold stock in October of 1929. The increase in value of the stock, in both instances, had admittedly occurred prior to the enactment of the statute. The tax collector assessed all of the increased value as income for 1929. The Supreme Court of Georgia was evenly divided with respect to the tax on the profit from the sales made in February (those sales occurring before the act was passed), but held, one judge dissenting, that the profit from the sale made in October was taxable as income, even though all of such profit accrued prior to the passage of the taxing act. The basis of the majority view was that the act was aimed at profits from the sale or other disposition of property, and that such profits are taxable as income, but "such profits become income only when the sale is made. They may exist before in the form of increased value. They get to be income only at the time of realization by sale. * * * Unrealized value may exist which is not taxable as income, but which does become taxable immediately upon its present realization

by the owner of the property. * * * Accrued profits do not become income until realized by sale, but upon such realization they are taxable immediately as income." 160 S. E. 413, 415. That reasoning appeals to us sound and in accord with the decisions of the United States Supreme Court. We are of the opinion that from the standpoint of income taxes, or taxes measured by income, "income" must be deemed to be realized gain, and that increases in value of capital assets are income in the year they are physically realized. When such increased value of capital assets came into existence is immaterial—the only question is, When was it realized?

Respondent relies upon State ex rel. Bundy v. Nygaard, 163 Wis. 307, 158 N. W. 87, L. R. A. 1917E, 563. This case is contrary to the conclusions herein arrived at. The Wisconsin Income Tax Act was passed in 1911. By the terms of that act, the Legislature attempted to tax increases in value of capital assets in the year of their realization regardless of when they accrued. The taxpayer purchased certain securities in 1907, which he sold at a profit in 1914, all of said profit accruing prior to 1911. The Supreme Court of Wisconsin held that increases in value of capital assets occurring prior to the effective date of the taxing act cannot be taxed as income; that such increases in value are capital and not income; that such additions to capital cannot be made into income by legislative mandate. The difficulty with this reasoning is that it proceeds upon a misconception of what is actually taxed. As already pointed out, it is realized gain that is taxed, and that is taxed only in the year of its realization. The reasoning of the Wisconsin court would equally apply to capital gains occurring over a number of years subsequent to the passage of the taxing act and realized later.

We are of the opinion that the Supreme Court of the United States in the MacLaughlin Case and the Supreme Court of Georgia in the Bradley Case have adopted the proper reasoning.

[2, 3] Another reason which impels the same conclusion in this particular case is that the allowance for depletion in the case of oil and gas properties is at best an approximation. The computation of depletion is of such a highly technical nature that in the absence of clear proof to the contrary the legislative discretion should not be interfered with. We have been referred to no case holding that as a matter of constitutional right an allowance for depletion in the case of oil and gas properties must include a deduction for gains accruing prior to the effective date of the act, nor, in fact, have we been referred to any case in which any court has set aside the judgment of the Legislature as to what is a proper allowance for depletion. The cases are quite to the contrary. In Darby-Lynde Co. v. Commissioner (C. C. A.) 51 F.(2d) 32, at page 33, it is stated: "A taxpayer is not entitled, as a matter of right, to make any deductions from income for depletion on account of oil extracted and sold during a taxable year. [Citing many cases.] Authority for such deduction must be found in the applicable statutes."

In Prairie Oil & Gas Co. v. Motter (C. C. A.) 66 F.(2d) 309, at page 310, it is stated: "The right to an allowance for depletion is a matter of grace on the part of the taxing power, and one claiming it must establish its right thereto."

Respondent seeks to escape the compelling force of these cases, and the cases therein referred to, on the theory that the federal government, under the Sixteenth Amendment, is not limited to an income tax on net income but may tax gross income, while under the California constitutional provision, article 13, § 16, subd. 2 (a), supra, the Legislature can only tax net income. Although such a distinction in power does exist, it is immaterial as far as this point is concerned. In the first place, every federal revenue act passed under the Sixteenth Amendment has purported only to tax net income. In the second place, if, as respondent contends, a depletion allowance must be allowed to it as a matter of constitutional right, such right could only exist because depletion causes the taxpayer's assets—i. e., capital—to shrink. The point here involved has nothing to do with the distinction between net and gross income. The distinction here involved is between income and capital. The federal authorities above referred to are therefore directly in point and hold that the taxpayer is not entitled, as a matter of constitutional right, to a depletion allowance.

[4-6] The second main contention of respondent requires but brief consideration. It is pointed out that the 1931 amendment to section 8 (g) applies only to oil and gas properties and that such corporations are the only corporations deprived of the opportunity of basing depletion on the January 1, 1928, values of its properties. This clearly constitutes a discrimination, and respondent contends that such discrimination amounts

to a denial of equal protection of the laws in violation of the Federal Constitution (Amendment 14), and that it also violates article 1, § 11, of the California Constitution providing that all general laws shall have a uniform operation. These clauses are approximately identical in scope. They have both been before the courts so many times that their scope and operation are now well defined. Neither clause prevents a discrimination based on a reasonable classification. The Legislature has wide powers of classification and may classify various callings, trades, and businesses for the purpose of taxation. In the so-called "chain store" tax case—State Board of Tax Com'rs v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A. L. R. 1464—the United States Supreme Court discussed these principles very clearly. The tax there involved adopted a different measure of taxation for stores known as chain stores from that applied to stores of a similar kind owned and operated as individual units. At page 537 of 283 U. S., 51 S. Ct. 540, 543, the court stated:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892; Southwestern Oil Co. v. Texas, 217 U. S. 114, 30 S. Ct. 496, 54 L. Ed. 688; Brown-Forman Co. v. Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 L. Ed. 883. The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342, 36 S. Ct. 370, 374, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350. As was said in Brown-Forman Co. v. Kentucky, supra, at page 573 of 217 U. S., 30 S. Ct. 578, 580:

"'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives, or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the Legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

Many other cases might be referred to. In Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237, a Pennsylvania statute levied a tax on one kind of coal and excluded other types of coal. It was upheld as based on a reasonable classification. In Lake Superior Cons. Iron Mines v. Lord, 271 U. S. 577, 46 S. Ct. 627, 70 L. Ed. 1093, it was held the Legislature could validly treat ore lands as a distinct class of property for taxation purposes, and could constitutionally tax such lands although such tax was not extended to quarries or forest lands. The case of Stanton v. Baltic Mining Co., 240 U. S. 103, 36 S. Ct. 278, 60 L. Ed. 546, is quite closely in point. It was there contended that the Federal Revenue Act of 1913 was unconstitutional in that the depletion provisions of that act discriminated against mining corporations in favor of other corporations. The classification was held to be reasonable.

In view of these cases, can it be said that the legislative classification of corporations owning oil and gas properties into a separate class for the purpose of computing depletion constitutes an unconstitutional exercise of power? Can it be said that there is no reasonable basis for the classification? We are clearly of the opinion that the Legislature was well within its powers in making this classification. In computing what constitutes a reasonable depletion allowance for corporations operating oil and gas properties, peculiar and technical problems are involved not present in the case of any other type of property. At best, the formula adopted by the Legislature in computing the depletion allowance for these companies must be an approximation, and that formula, in the ab-

sence of an abuse of power, though different from the formula provided for other corporations, will not be disturbed.

[7, 8] The last contention of respondent is equally without merit. Respondent points out that prior to the 1931 amendment to section 8 (g) it could compute its depletion allowance on the basis of the 1928 values of its properties, and that since that amendment it is deprived of that privilege. Respondent also points out that under section 2 of the act the tax for any year is computed upon the basis of the net income for the previous year. Section 4 of the act provides that taxes for the current year "shall accrue on the first day after the close of the 'taxable year,'" which taxable year, in respondent's case, corresponds with the calendar year. It therefore follows that respondent's 1931 tax "accrued" on January 1, 1931, and was computed upon the net income for 1930. The tax, although accruing on January 1, 1931, was not payable until March 15, 1931, under section 23 of the act, and under section 29 the tax became a lien on the first Monday in March, 1931. Under the provisions of section 13 of the act, the taxpayer any time between January 1 and March 15 can file his return. The 1931 amendment to section 8 (g) changing the method of computation became effective February 27, 1931.

Based on these sections, respondent contends that since its tax for 1931 accrued on January 1, 1931, based on its net income for 1930, at which time 1928 values could be used in computing depletion, the 1931 amendment denying that privilege cannot be used to compute the 1931 tax. To permit the February 27, 1931, amendment to apply in computing the 1931 tax, according to respondent, would be to give that amendment an unlawful retroactive effect. Respondent strenuously contends that its tax liability for 1931 became a determined and accrued liability before the effective date of the amendment. To this contention there is a conclusive answer. The retroactivity alleged is more apparent than real. If the 1931 amendment be applied in computing the 1931 tax, such application is to give the amendment a prospective rather than a retroactive operation. Although under the act the net income earned in 1930 is used as a base for computing the tax due for 1931, the tax collected in 1931 is not for the privilege of doing business in 1930 but is a tax for the privilege of doing business as a corporation in California for 1931. It is a tax for the privilege of exercising a corporate franchise for the entire year 1931—that is the current year when the act here involved became effective. The privilege being taxed is a present and continuing privilege, the amount of the tax being measured by the transactions of a prior year. Although, under the act, the tax accrued on January 1, 1931 and became a lien on the first Monday in March, 1931, the tax imposed for that year was for the entire current year. There is no reasonable or legal basis for contending that a taxpayer is entitled, regardless of legislative action, to have current taxes computed on the same basis as past taxes have been assessed. It is well settled that taxes for the current year may be changed any time during the year, and, in fact, additional taxes may be imposed during the current year on the same subject of taxation. Continental Oil Co. v. Walker (C. C. A.) 285 F. 729; People ex rel. Conn. Mutual Life Ins. Co. v. Kelsey, 116 App. Div. 97, 101 N. Y. S. 902, affirmed 188 N. Y. 541, 80 N. E. 1116; American Refrigerator Transit Co. v. Adams, 28 Colo. 119, 63 P. 410; Milliken v. U. S., 283 U. S. 15, 51 S. Ct. 324, 75 L. Ed. 809.

For the foregoing reasons, the judgment appealed from is hereby reversed.

2 Cal.2d 250

FUHRMAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 15189.

Supreme Court of California.

Jan. 10, 1935.

1. Appeal and error ⇐1074(3)
Trial ⇐387(1)

Court's "decision" consists of findings of fact and conclusions of law, and since only effective judgment is written judgment entered in cause, cross-complainant was not harmed where court, in requiring bill of exceptions to include copy of minute order, corrected such order so as to recite that judgment was ordered for cross-defendants, where findings and judgment thereon so declared.

[Ed. Note.—For other definitions of "Decision," see Words & Phrases.]

2. Exceptions, bill of ⇐53(4)

Prospective appellant, having transcript of testimony and refusing to furnish transcript to court, had no right to compel court by mandamus to omit amendment to bill of exceptions reciting that other evidence was introduced sufficient to support judgment.

3. Exceptions, bill of ⇐53(4)

Mandamus does not lie where petitioner, instead of seeking to compel settlement of bill of exceptions, seeks to correct bill as settled.

In Bank.

Application by Alfred Fuhrman for a writ of mandate against the Superior Court in and for the City and County of San Francisco and Michael J. Roche, one of the judges thereof, to compel the settlement of a proposed bill of exceptions in an action brought by Annie Beasley and another against petitioner.

Writ denied.

H. W. Hutton, of San Francisco, for petitioner.

Dean Cunha and Harry I. Stafford, both of San Francisco, for respondents.

THOMPSON, Justice.

This is an application for a writ of mandate directed to the respondent court directing and commanding it to settle a bill of exceptions. The case of Beasley v. Fuhrman came to trial in the superior court upon the complaint and answer thereto, the cross-complaint of petitioner and an answer thereto, and judgment was rendered for defendant upon the complaint and answer and for cross-defendant in the cross-action. Cross-complainant, the petitioner here, gave notice of appeal from that part of the judgment rendered against him and in due time served and presented to the trial judge his proposed bill of exceptions. No amendments were proposed. But the attorney for the cross-defendants requested counsel to lend him the transcript for the purpose of checking the proposed bill of exceptions, which request was refused. Counsel says that he would not permit its use upon instructions of his client.

Thereafter, and on May 25, 1934 (the trial was concluded February 17, 1933), the proposed bill of exceptions came on for settlement before the trial judge, whereupon it was called to his attention that the minute order omitted to recite that judgment was ordered for the cross-defendants, although the findings of fact and judgment thereon so declared and adjudged. The court therefore corrected the minute order to read as follows: "It is ordered that plaintiff take nothing by her complaint or amended complaint and that defendant and cross-complainant take nothing by his cross-complaint and that plaintiff is the owner in fee simple of the real property described in the cross-complaint of defendant A. Fuhrman, and is entitled to a decree quieting her title to said property against any claims of said defendant," and ordered that a copy of said corrected order be included in the bill of exceptions. The court also ordered a statement to be inserted in the bill of exceptions as follows: "There was other sufficient and competent evidence introduced tending to, and which did establish, that plaintiff was the owner in fee simple absolute of the real property described in defendant A. Fuhrman's cross-complaint and plaintiffs' supplemental answer thereto, and that defendant A. Fuhrman had no right, title or interest whatsoever in and to said real property." It is set forth in respondents' answer to the petition herein: "That by reason of the passage of time and other causes and other trials of different actions intervening the said respondent court could not recall all the testimony that had been introduced in the trial of said action upon the various issues and that on account of the fact that the said petitioner herein refused to assist the said court and to furnish it with the transcript of testimony he then had in his possession, and on account of the fact that the said court felt that evidence other, and additional to the evidence set forth in said proposed bill of exceptions had been introduced upon the trial of said cause, the court ordered" the amendment we have already quoted. The respondent court thereupon, and with the two amendments noted, ordered the bill of exceptions settled, but the petitioner has ever since failed and neglected to have the bill engrossed and presented for certification.

There is no dispute, in fact, concerning the last-mentioned order. What the petition really seeks is an order compelling the respondent judge to omit the two amendments and to settle the bill as originally presented.

[1] Adverting first to the correction of the minute order, it is apparent that petitioner has nothing of which to complain. The decision of the court consists of the findings of fact and conclusions of law, and the only effective judgment is the written judgment entered in the cause. Entirely disregarding

the right of the court to correct and make its records speak the truth, therefore this amendment could have no effect upon the rights of petitioner.

[2] Turning now to the second amendment, petitioner's plea makes little appeal to us. He had it within his power, altogether apart from the laborious course open to the trial judge of calling in the court reporter for a reading of his notes, to have the bill of exceptions correctly reflect the testimony adduced. This he declined to do and we are inclined to leave him where his own action has landed him.

[3] But aside from this is the fact that the bill of exceptions has been settled. We are asked, not to compel its settlement, but to correct it as settled. This is not the proper proceeding for the correction of a bill of exceptions. Thornton v. Hoge, 84 Cal. 231, 23 P. 1112; Hyde v. Boyle, 89 Cal. 590, 26 P. 1092.

The writ is denied.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

2 Cal.2d 221

MARKHAM v. FRALICK et al.

L. A. 14551.

Supreme Court of California.

Dec. 29, 1934.

1. Landlord and tenant ⇐290(½)

Where lessees, upon lessor's three-day notice, had surrendered individual possession of premises, notified their agent to collect no more rent from subtenants, and notified subtenants to pay no more rent, lessor *held* not entitled to maintain action in unlawful detainer, since lessor waived objection to possession of subtenants where they were not given notice to vacate (Code Civ. Proc. §§ 1161, 1164).

2. Action ⇐37

Generally, where facts stated show some right of recovery, litigant cannot be thrown out of court merely because he may have misconceived form of relief to which he is entitled.

3. Landlord and tenant ⇐291(14)

Where action in unlawful detainer would not lie because lessor had failed to show that lessee had unlawfully detained premises, lessor could not recover accrued rent and unpaid taxes, since primary purpose of action is recovery of possession of property, and recovery of rent and taxes is a mere incident which falls when main object fails (Code Civ. Proc. § 1174).

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Blanche C. Markham, as executrix of the estate of William F. Markham, deceased, against Allan Fralick and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

For prior opinion, see 32 P.(2d) 422.

Harlan G. Palmer and Charles D. Thompson, both of Hollywood, for appellant.

Roger Marchetti and Marchetti & Marchetti, all of Los Angeles (A. V. Falcone, of Los Angeles, of counsel), for respondents.

CURTIS, Justice.

This action is one in unlawful detainer. The property in controversy was under a ninety-nine year lease. The lessees, the defendants and respondents in this action, were in default in the payment of some $30,000 rent besides taxes which they had agreed to pay. The leased premises was a city block in Hollywood on which were located some fifteen dwellings or bungalows occupied by ten or twelve subtenants. The defendants were in possession of the property only through their subtenants. Their agent collected the rents and paid them to his principals, the defendants. While the defendants were in default in the payment of said rent and taxes, the plaintiff, the owner of said property, served written notice on the defendants to pay the rent and taxes due and unpaid, or quit and surrender the property to the plaintiff within three days after the service of said notice. No such notice, nor any notice whatever, was ever served by plaintiff on any of the subtenants. Within three days after the service of said notice, the defendants served written notice upon the plaintiff and her attorney of their surrender of the premises to the plaintiff as demanded by the notice served upon the defendants. They also notified their agent not to collect any further

rent from said subtenants, and their said agent also notified said subtenants and the plaintiff that he was no longer the agent of the defendants and had no authority to act as the agent of the defendants or either of them in respect to said property.

Thereafter the plaintiff instituted this action in unlawful detainer against the defendants to recover possession of said premises and the rent and taxes due under the terms of said lease. There is no dispute as to the facts related above. The defendants, as an affirmative defense to said action, alleged their surrender of the possession of said premises to the plaintiff within three days after the service upon them of plaintiff's demand that they pay said rent and taxes or surrender and quit said premises. The court found in accordance with this affirmative defense of the defendants, and rendered judgment in their favor that the plaintiff take nothing by said action. The plaintiff has appealed from this judgment.

[1] In asking for a reversal of the judgment, the appellant first contends that the lessees, the defendants and respondents herein, were guilty of unlawful detainer after notice to quit when the subtenants of the lessees, who were not served with notice to quit, continued to occupy said property after the lessees, in response to plaintiff's demand either to pay the rent due or surrender possession, served notice on the landlord that they surrendered possession of said premises in compliance with said demand. Section 1161, Code of Civil Procedure, defining who are guilty of unlawful detainer, might seem to indicate that notice must be served upon the subtenants as well as upon the tenant before the landlord could maintain an action against the tenant for unlawful detainer. This section was construed in conjunction with section 1164 of the same Code in the case of Tujague v. Superior Court, 69 Cal. App. 35, 39, 230 P. 198, and Telegraph Avenue Corporation v. Raentsch, 205 Cal. 93, 98, 269 P. 1109, 61 A. L. R. 366. These cases hold that where the premises are occupied by the tenant and also subtenants, and the tenant is delinquent in his rent and has been served with notice to pay or surrender possession of the premises, an action in unlawful detainer will lie at the instance of the landlord against the tenant, without service of any notice to quit on any of the subtenants. But in each of these actions, the delinquent tenant was in possession of the premises in conjunction with his subtenants, and had made no effort to comply with the demand of the landlord that he pay the rent due, or surrender up the premises. In the instant action, the evidence shows that the defendants had surrendered their individual possession of the premises to the plaintiff within three days after the service of the notice to pay rent or quit. They notified the plaintiff in compliance with her demand for the rent or for the surrender of the premises, that they surrendered to her the possession of the premises; they notified their agent to collect no more rent from the subtenants; and also notified the subtenants that neither they nor their agent would collect any rent in the future. We think it is apparent from the evidence that defendants did all within their power to comply with plaintiff's demand for the surrender of said premises, except to oust their subtenants and turn over to the plaintiff the premises in an absolutely vacant and tenantless condition. Plaintiff had it in her power to compel the defendants to free said premises of the possession of said subtenants before defendants' surrender of said premises would be complete. She neglected to exercise this right by declining to serve notice to quit upon the subtenants. The evidence shows that this refusal was designedly done and that her intent and purpose was that said subtenants should continue to occupy said premises as the tenants of the plaintiff. This was clearly shown by the statement of her attorney made in open court at the trial of this action in which he said: "We did not wish to serve these subtenants with the notice to pay $30,000 in rent and frighten them to death and drive them all pell mell from the premises with the three-days notice to quit." The attorney making this concession, not only represented the plaintiff in this action and in all proceedings in this matter leading up to the filing of the complaint herein, but as the attorney for the plaintiff actually signed the three-day notice to quit which was served upon the defendants. He therefore was fully advised of the reason why said notice was not served upon the subtenants and intentionally refrained from serving the subtenants for the reason that he wanted them to continue to occupy the property. It is apparent, from the foregoing facts, that the plaintiff waived her right to the possession of said premises in so far as said subtenants were concerned, by expressly refraining from notifying them to quit the possession of said premises and thereby accepted them as her tenants. Having accepted said subtenants as her own tenants, she cannot thereafter complain of their occupancy of the premises and successfully contend

that their possession of the premises was the possession of the defendants. She waived any right to object to their occupancy of the property, and as the defendants surrendered the possession of said premises, subject only to the possession of these subtenants, they did all that was required of them to put the plaintiff in possession and to divest themselves of such possession. As the defendants were not in the possession of said premises at the date of the commencement of said action, they were not guilty of unlawful detainer. An action, therefore, in unlawful detainer will not lie.

[2, 3] Plaintiff makes the further contention that she was entitled to a judgment against the defendants for the rent and taxes due under the lease at the commencement of the action, notwithstanding the action in unlawful detainer would not lie in her favor. In other words, the plaintiff claims that in this action for unlawful detainer, even if such action for the recovery of the leased premises must fail because the defendants had surrendered possession thereof prior to the commencement of said action, nevertheless she is entitled to prosecute said action for the recovery of the rent and taxes due under the lease. The only authority cited in support of her position is the case of Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84, 87, which holds that: "Provided the facts stated show some right of recovery * * * a party cannot be thrown out of court merely because he may have misconceived the form of relief to which he is entitled." This is undoubtedly the general rule applicable to most cases. It is contended by respondents that the rule is different in certain statutory actions and that an action in unlawful detainer is one to which the general rule stated above does not apply. The only California case to which our attention has been called directly bearing upon this question, is the case of Chase v Peters, 37 Cal. App. 358, 360, 174 P. 116, 118. In that case, an action in unlawful detainer was brought by the lessor against the lessee and the assignee of the latter for the recovery of the leased premises and for rent and taxes due under the lease. Judgment was rendered in favor of the plaintiff as prayed for against both the lessee and his assignee. The judgment against the lessee was reversed on the ground that the lessee was not in possession of the property at the commencement of the action, he having transferred the possession of the property to his assignee some time prior to the commencement of the action. It was insisted in that action that, as the lessee under the terms of the lease was liable for the payment of the rent even after he had assigned the lease, a judgment against him for the rent due was proper; but the court held otherwise. In its decision, the court traced the object and purpose of the action of unlawful detainer as follows: "The summary proceeding provided for the obtaining of possession of real property is special, and must be restricted in its use to the particular purposes expressed in the sections of the Code embraced within chapter 4, title 3, Code of Civil Procedure. The mode and measure of the plaintiff's recovery are therein limited. The law on this subject has been construed with strictness, for the relief authorized in some particulars is penal in its nature. The defendant is brought into court to answer within three days after issuance of summons (section 1167); amendments to the complaint are provided to be made without terms (section 1173); in the judgment the rents found to be due and damages may be trebled (section 1174). Other provisions designed to hasten the recovery of possession of the property as the main relief are included, which are all different from those affecting civil actions generally. A cross-complaint or counterclaim is not allowed. Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann. Cas. 1916D 370. Rents accrued at the time of the commencement of the action are allowed to be recovered only because the statute so provides (section 1174). These rents are added to the damages for the unlawful detention." Continuing the court in that opinion further said (page 361 of 37 Cal. App., 174 P. 116, 118): "We have presented, then, the view, illustrated, as we think, both by a consideration of the terms of the statute and the decisions, that the summary proceeding authorized by the Code and here adopted by the plaintiff is one which is, as to its prosecution and remedy, within the scope of its application, exclusive and limited. The statute does not authorize the recovery of any money the right to which accrued before the unlawful detention began, except arrears of rents. And this recovery can only be had against the person guilty of such detention, for the main thing sought is the possession of the property. Arnold v. Krigbaum, supra." In that case, this court denied a petition for a hearing therein. In our opinion, that decision correctly interprets the law relative to actions for unlawful detainer. To permit recovery for rent and taxes in an action of un lawful detainer after the landlord has failed to show that the tenant unlawfully detained

possession of the property would often work a distinct hardship on the tenants. In the first place, he is haled into court in a summary proceeding in which there is denied to him certain procedural rights enjoyed by litigants in ordinary actions. He is denied the substantive right to file a cross-complaint or counterclaim in the action, and possibly he might be subjected to treble damages. Section 1174, Code Civ. Proc. The primary purpose of such an action is for the recovery of the possession of the property. The recovery of rent is a mere incident to the main object. Arnold v. Krigbaum, 169 Cal. 143, 146, 146 P. 423, Ann. Cas. 1916D, 370. When the main object of the action fails, the incidents fall with it. Chase v. Peters, supra.

Upon the two propositions advanced by the appellant, the trial court reached a different conclusion than that contended for by her. In our opinion, the trial court correctly determined the questions presented.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

2 Cal.2d 98

KIEKHOEFER v. UNITED STATES NAT. BANK OF LOS ANGELES.

L. A. 14804.

Supreme Court of California.

Dec. 21, 1934.

Rehearing Denied Jan. 17, 1935.

1. Appeal and error ⇐417(1)

Notice of appeal contained in request of appellant for transcript *held* sufficient to confer jurisdiction upon Supreme Court to hear appeal.

2. Principal and agent ⇐109(4)

General power of attorney granting power to execute "bills," "notes," and other necessary or proper instruments, *held* to authorize attorney in fact to indorse for collection check made payable to principal and received by attorney in fact in principal's business, especially since under power attorney in fact was authorized to demand, sue for, collect, and receive all sums of money and debts due principal (Civ. Code, §§ 3265a, 3266).

[Ed. Note.—For other definitions of "Bill" and "Note," see Words & Phrases.]

3. Evidence ⇐20(2)

It is common knowledge that most of the transactions now carried on in the business world in which money is collected and paid are done by means of bank checks.

4. Principal and agent ⇐109(4)

Where attorney in fact had actual authority under power of attorney to indorse for collection check made payable to principal and received by attorney in fact in principal's business, principal could not recover amount of check from drawee bank, although attorney in fact had indorsed check by simulating principal's signature without adding own name as agent (Civ. Code, §§ 1095, 3100, 3265a, 3266).

5. Forgery ⇐6

Where attorney in fact had legal right under power of attorney to sign principal's name to check indorsement, his act in so doing, even though he simulated principal's signature without adding own name as agent, was not a forgery (Pen. Code, § 470; Civ. Code, §§ 1095, 3100, 3265a, 3266).

6. Principal and agent ⇐170(3)

Principal who had given agent full authority to incumber property for purpose of raising money, and who knowing that agent had carried out purpose and had received money as planned, had made no effort to recover money upon discovering that agent had been untrustworthy until discovery of an alleged irregularity in indorsement of check by which agent obtained money, *held* not entitled to recover from drawee bank.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Emma Martha Kiekhoefer against the United States National Bank of Los Angeles. From a judgment denying plaintiff any relief, plaintiff appeals.

Affirmed.

For prior opinion, see 31 P.(2d) 483.

Lewis M. Andrews and M. D. Andrews, both of Los Angeles, for appellant.

Freston & Files, J. R. Files, Joe Crider, Jr., and G. L. Berrey, all of Los Angeles, Louis Ferrari, of San Francisco, and Edmond Nelson, of Los Angeles, for respondent.

CURTIS, Justice.

Plaintiff was the owner of a valuable lot in the city of Pasadena referred to in the

record as the Lake street property. She became acquainted with Arthur Palmer, a real estate agent in said city. The latter induced her to execute to him a general power of attorney. He borrowed $8,000 from the Mortgage Discount Company, giving as security a trust deed upon plaintiff's said lot, which he executed, together with a promissory note in the sum of $8,000, as attorney in fact of plaintiff, acting under said general power of attorney. This loan was handled through an escrow in the defendant United States National Bank. There was a prior incumbrance of $2,000 on said lot, which the bank paid, and after deducting escrow and other charges there was a net amount of $5,654.91 due out of the escrow, for which the defendant bank drew its check on its escrow account in favor of the plaintiff in her then name of Emma Martha Storz. She has since married. Her name is now Emma Martha Kiekhoefer. This check was delivered to Palmer, who indorsed the same as follows: "Emma Martha Storz by Arthur Palmer, Attorney in Fact. Arthur Palmer." The check bearing said indorsement was presented by Palmer to the Bank of Italy in Pasadena. That bank, however, refused to accept or pay said check as thus indorsed. Palmer took the check out of the Bank of Italy at Pasadena and canceled the indorsements then on the check by drawing lines through the same, and re-presented the check to said bank with new indorsements thereon as follows:

"Pay to the order of Arthur Palmer Company.

"Emma Martha Storz."

And:

"Pay to the Order of Bank of Italy National Trust & Savings Ass'n.

"Arthur Palmer Co."

Arthur Palmer Company was the name in which the said Arthur Palmer carried on his business. The name "Emma Martha Storz" in the new indorsement had been written by Arthur Palmer. In fact, her name to said indorsement had been traced on the back of said check by Palmer so as to simulate the true signature of Emma Martha Storz. The bank cashed said check and gave Palmer credit for the amount thereof and thereafter collected the same from the defendant bank upon which said check was drawn. This check was dated November 14, 1927, and was cashed by the defendant bank on the second day thereafter. The plaintiff, at least as early as April, 1928, discovered that Palmer had borrowed money on the Lake street property by the use of said power of attorney, and on May 21st following she instituted an action against Palmer in which she alleged that she had executed and delivered said power of attorney to Palmer for the purpose of enabling him to borrow money on the Lake street property, but that Palmer had made false and fraudulent representations to her regarding property which he claimed to own and had failed to carry out certain promises made to her at the time she executed said power of attorney, which promises constituted the consideration for her execution of said power of attorney. Thereafter, and some time in the month of August following, at Palmer's preliminary hearing in the municipal court of Los Angeles, on a charge of grand theft, she found out for the first time, when said check was produced at said hearing, that said check had been issued in her favor, and that Palmer had indorsed the same by signing her name on the back thereof as hereinbefore described. She thereupon brought this action against the drawer of said check, the United States National Bank, for the recovery of the sum of $5,654.91. Her complaint in this action contains two counts. In the first count she alleges the circumstances leading up to this issuance of said check, that it was issued in her name and without her knowledge or consent, that it came into the hands of the Arthur Palmer Company; that her indorsement was fraudulently forged to said check, and that the bank claimed to have made payment of said check on said forged indorsement. By the second count of her complaint, plaintiff alleged the same circumstances leading up to the execution of said check as were contained in the first count. She then alleged the delivery of said check to her agent; that it was her sole property; that it was never paid to plaintiff, and without her knowledge or consent said check came into the possession of defendant bank. She also alleged demand for payment and refusal by defendant to pay said check or any part thereof to her. Defendant answered said complaint, and in addition to certain denials alleged that it had paid said check to plaintiff's duly authorized agent, Arthur Palmer, who in said transaction was acting for plaintiff under the general power of attorney hereinbefore referred to. The action was tried by the court, and, upon findings of fact in favor of the defendant, the court rendered judgment denying plaintiff any relief. From this judgment the plaintiff has appealed.

[1] Preliminary to the discussion of the points raised on the main appeal, we will consider the motion of respondent to dismiss

the appeal upon the ground that the notice of appeal is so defective and insufficient as to confer no jurisdiction upon this court to hear said appeal. The notice of appeal herein was contained in the request of appellant for a transcript and is substantially in the same language as the notice of appeal considered by us in the case of Purity Springs W. Co. v. Redwood Ice Delivery, 203 Cal. 286, 263 P. 810, in which we denied a motion to dismiss that appeal. On the authority of that case and the authorities cited therein, the motion of respondent to dismiss the appeal in the present action is denied.

[2, 3] It is contended by appellant that the signing of her name by Palmer to the indorsement of said check was a forgery, and therefore the payment of said check under such an indorsement was unauthorized.

One of the principal, if not the decisive, questions presented on this appeal is whether Palmer, under said power of attorney, had the authority to indorse said check for and on behalf of plaintiff. The answer to this question depends to a large extent, if not wholly, upon the terms of said power of attorney. Among the powers expressly conferred upon Palmer by said instrument was authority, "for me and in my place and stead, and for my use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to me and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same." "Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature or kind soever, and also for me and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages and deeds of trust, hypothecations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfactions of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises. Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present, and I hereby ratify all that my said attorney may or shall lawfully do or cause to be done by virtue of these presents." It is difficult to perceive how the plaintiff could have conferred upon Palmer broader or more comprehensive powers than those enumerated in said power of attorney. In addition to the broad general powers thereby conferred, Palmer was authorized in the name of the plaintiff and for her act and deed to sign, execute, and deliver bills, notes, evidences of debt, and such other instruments in writing of whatever nature and kind as might be necessary or proper in the premises; also to bargain, buy, sell, and deal in choses in action; and to recover, collect, and receive all sums of money, debts, and accounts, "as are now or shall hereafter become due, owing, payable or belonging to me." After detailing these specific powers, the letter of authority conferred upon Palmer "authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do if personally present."

Turning to the Civil Code, we find that a "'bill' means bill of exchange, and 'note' means negotiable promissory note" (section 3266, Civ. Code), and that "a check is a bill of exchange drawn on a bank payable on demand." Section 3265a, Civ. Code. The power of attorney therefore expressly empowered Palmer to execute a check in the name of the plaintiff. While nothing is said in the power of attorney about indorsing checks, authority to indorse would, we think, be included in the power to execute a check. This would especially be true when, under the power of attorney held by Palmer, he was authorized to demand, sue for, collect, and receive all sums of money and debts due plaintiff. It is a matter of common knowledge that most of the transactions now carried on in the business world in which money is collected and paid are done by means of bank checks. We think that it is idle to contend that one who is specifically given the broad powers conferred upon Palmer, including authority to demand and collect debts and receive money due his principal,

is not authorized to indorse a check received by him in his principal's business which was made payable to his principal. The case of Moore v. Gould, 151 Cal. 723, 727, 91 P. 616, 618, involved the authority of an agent under a general power of attorney substantially like that here involved to execute a renewal of a note and mortgage in behalf of his principal. The opinion of the court in that case is quite enlightening, and we quote from it at length as follows: "In either aspect these writings were sufficient to take the case out of the operation of the statute of limitations so far as the defendant Peterson is concerned, if Gould was authorized to execute them as Peterson's agent and in his behalf. Whether or not he was so authorized depends upon a consideration of the terms of the power of attorney. This instrument was in the form in common use in this state and usually described as that of a 'general power of attorney.' It authorized Gould, in the name of Peterson, and for his use and benefit, to perform any of a great variety of acts set forth in the instrument. These acts include almost every conceivable mode of dealing with real and personal, tangible and intangible, property, and their enumeration is followed by these words: 'And to make, do, and transact all and every kind of business of what nature and kind soever, and also for me and in my name, and as my act and deed, to sign, seal, execute, deliver, and acknowledge such deeds, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment, and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.' This power authorized the execution by Gould of the two instruments in question. The purpose and effect of a power of attorney of this kind is to vest in the attorney full authority to transact any and all kinds of business for the principal. Every phrase in it, defining the authority of the attorney, is in broad and unrestricted terms, and such terms are to be given an interpretation in harmony with the scope and purpose of the instrument, read as a whole. It is true that, where a power is given for a limited or specific purpose, general words following the declaration of the particular purpose are to be limited to such acts as may be necessary to accomplish such particular purpose. Washburn v. Alden, 5 Cal. 463; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235; 1 Am. & Eng. Ency. of Law (2d Ed.) 1000. But this rule has no application to such an instrument as the one now under consideration. Nowhere in this power of attorney is there any language limiting the scope of the business which may be performed by the attorney, and the generality of the terms employed clearly includes authority to execute the instruments of renewal." To the same effect are the cases of Hellmann v. Potter, 6 Cal. 13, and Seymour v. Oelrichs, 162 Cal. 318, 322, 122 P. 847. We conclude from these authorities that, under the broad powers conferred upon Palmer by this general power of attorney, he was authorized to indorse for collection the check issued by the defendant bank to plaintiff.

[4] Plaintiff further contends, however, that Palmer, in the indorsement of said check, did not act under the authority given him by said letter of attorney, but that he simulated plaintiff's name in the indorsement of said check, and that he thereby forged her name to said check. To put plaintiff's contention in a different form, she claims that Palmer forged her name to said check, and that the respondent bank paid said check on a forged indorsement. It may be true that Palmer deceived the Bank of Italy by pretending to said bank that the indorsement of said check bore plaintiff's true signature, and that said bank would not have paid said check to Palmer had it not believed that plaintiff had personally signed said indorsement. This action, however, is not against the Bank of Italy, but is against the defendant bank, and the latter is not liable to plaintiff if Palmer had authority to indorse said check by signing plaintiff's name thereto in the manner in which he did. We have already held that Palmer, under the letter of attorney issued to him by plaintiff, had authority to indorse said check as the agent and attorney in fact of the plaintiff. It is contended by plaintiff that he did not so indorse said check, and that, by signing her name to said indorsement in the manner in which he did, Palmer acted beyond his authority, and that her said signature was a forgery. There are authorities to support the plaintiff's position, notably Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771. Ruling Case Law cites that case in support of its statement in volume 21, page 880, that, if an attorney signs his principal's name to a note or mortgage, without adding his own name as agent, there is an insuffi-

cient execution of the instrument. However, in the note following the text of that case in the volume of American Decisions, the correctness of the ruling therein is questioned. Wood v. Goodridge has been criticized by the Supreme Court of Maine (Forsyth v. Day, 41 Me. 382, 391), the judge delivering the opinion in that case stating: "No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned Judge in the case of Wood v. Goodridge, cited above." The case of Wood v. Goodridge has also been rejected by Williston in his work on Contracts, volume 1, page 564. The prevailing rule seems to be correctly stated in the case of Flat Top National Bank v. Parsons, 90 W. Va. 51, 110 S. E. 491, 495, where the court, in discussing this question, declared the law applicable thereto as follows:

"It is further contended by the defendant that the note in suit is not binding upon him, first, because it is not signed by him, and, second, that even if Benton held a valid power of attorney to execute said note on behalf of Parsons, that the note was improperly executed, in that under such a power, the signature should have been in some form such as 'A. F. Parsons, by C. T. Benton, Attorney in Fact,' or 'A. F. Parsons, by C. T. Benton, Agent,' the defendant citing, to sustain his position, 21 R. C. L. p. 880. It says: 'Again, if an attorney signs his principal's name to a note or mortgage without adding his own name as agent, there is insufficient execution of the instrument.' To this we cannot agree. Our Negotiable Instruments Law, Code, c. 98A, § 19 (section 4190), provides: 'The signature of any party may be made by a duly authorized agent; no particular form of appointment is necessary for this purpose, and the authority of the agent may be established as in other cases of agency.'

"This clearly negatives the idea that the name of the agent must appear upon the note signed by him, in some capacity showing his agency. 1 Daniel, Negotiable Instruments (6th Ed.) §§ 298, 299, citing Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; 1 Mechem, Agency (2d Ed.) § 1128, citing First National Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Forsyth v. Day, 41 Me. 382; 2 C. J. page 673; 1 Williston, Contracts, § 299."

The section of the Negotiable Instruments Law referred to above is in the exact language of section 3100 of our Civil Code. Other authorities to the same effect are as follows: Indiana Flooring Co. v. District National Bank, 51 App. D. C. 391, 280 F. 522; Salen v. Bank of State of New York, 110 App. Div. 636, 97 N. Y. S. 361; Cluett v. Couture, 140 App. Div. 830, 125 N. Y. S. 813, affirmed 206 N. Y. 668, 99 N. E. 1105; McCabe Hanger Mfg. Co. v. Chelsea Exchange Bank, 183 App. Div. 441, 170 N. Y. S. 759; Substantial B. & L. Ass'n v. Real Estate Title Ins. & Trust Co., 82 Pa. Super. 211; Wegener v. Emmetsburg Nat. Bank, 195 Iowa, 1267, 193 N. W. 627, 631.

[5] A distinction is made in some jurisdictions between sealed and unsealed instruments or between deeds and mortgages on the one hand and other instruments not affecting real property on the other. In this state it is expressly provided that, "when an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." Section 1095, Civ. Code. The fact that the Legislature has made this requirement respecting instruments affecting real property, and has not seen fit to legislate as to other kinds of instruments, justifies the inference that instruments not affecting real property may be executed without the formality required by said last-mentioned section of the Code. The check here involved did not in any manner affect real property. The indorsement thereof by Palmer was, not only within the authority conferred upon him by said letters of attorney, but the manner in which he made said indorsement was authorized by said instrument. Being a legal indorsement by plaintiff's agent, it was binding upon her, and justified the defendant bank in paying the same. As Palmer had the legal right to sign plaintiff's name to said indorsement, his act in so doing was, of course, not a forgery. Forgery is defined as the signing by a person of another's name knowing that he has no authority so to do. Pen. Code, § 470. Palmer could not know that he had no such authority when he in fact had such authority.

There are other questions raised in the argument and briefs of the parties, but we think the above discussion covers all the essential features of the case as presented by the record.

[6] In closing this opinion, we think a further brief statement should be made of the

case as a whole. The evidence in our opinion clearly shows that Palmer won the confidence of the plaintiff, and induced her to execute said power of attorney in his favor. The purpose of giving him this power of attorney was to enable Palmer to raise money upon plaintiff's Lake street property. This Palmer did in the manner and to the extent practically as plaintiff planned that he should. Plaintiff knew of this transaction as early as April, 1928, the power of attorney having been executed on October 1, 1927. In the month of May following, plaintiff attempted by an action in court to compel Palmer to restore her Lake street property to the condition to which it was at the time she gave to him said power of attorney. It does not appear just what became of this court proceeding, but that is not material. Sometime thereafter, Palmer was arrested for grand theft growing out of his dealings with plaintiff, and at his preliminary examination, held on August 8, 1928, the plaintiff learned that Palmer had indorsed said check by signing her name thereto without adding to the signature his own name followed by words showing an agency. She then conceived the idea that her name to said indorsement was a forgery, and that the bank had no authority to pay the same upon the forged indorsement. This action followed. From the foregoing, the conclusion is inescapable that plaintiff entered into the transaction with Palmer for the express purpose of enabling him to raise money on the property. She gave him full power and authority to incumber her property for that purpose. She knew that he had carried out his purpose, and had received the money just as she had planned. She made no effort to recover this money until she discovered what she construed to be an irregularity in the indorsement of the check through which Palmer obtained the money. She then attempts to recover, not from Palmer, but from the defendant bank, the very money which by her agreement with Palmer she had arranged for him to have, basing her right of recovery on the assumed irregularity in the indorsement of said check. In our opinion there is no principle, either equitable or legal, which would justify a recovery under such a statement of facts.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

3 Cal.App.2d 329

RAY et al. v. PACIFIC GAS & ELECTRIC CO. (two cases).

Civ. 9225.

District Court of Appeal, First District, Division 1, California.

Dec. 26, 1934.

As Amended Jan. 2, 1935 and Jan. 8, 1935.

Hearing Denied by Supreme Court Feb. 21, 1935.

1. Gas ⇐18

Gas company changing nature of gas supplied *held* under duty to warn consumers that adjustment of existing gas consuming appliances is necessary.

2. Gas ⇐18

Gas company changing nature of gas supplied and under duty to warn consumers that adjustment of existing appliances is necessary *held* to have performed duty where printed notices of such change were mailed to every consumer and extensive advertisements were placed in local papers.

3. Gas ⇐18

Gas company changing nature of gas supplied is not under duty to notify persons who become customers after change was made of need for adjustment of existing gas consuming appliances.

4. Gas ⇐18

Person acquiring mechanical appliance to be used in connection with dangerous substance such as gas is under duty to see that such appliance in construction and adjustment is suitable for safe use.

5. Gas ⇐18

Gas company changing nature of gas supplied to customers *held* not under duty to search customers' premises for purpose of discovering gas consuming appliances unsuitable for gas supplied.

6. Gas ⇐17

Distributor of gas must exercise a high degree of care to see that no person is harmed in its distribution and while under its control, but such responsibility is limited to the time gas is in company's own pipes or containers, unless it has been allowed to escape, or having escaped has created a dangerous hazard known or which should be known to distributor who has neglected to remedy condition.

7. Gas ⇐18

Company supplying gas to number of separate apartments, some of which are occupied by nonconsumers, but through interconnected pipes or conductors, is negligent if gas is permitted to escape into nonusers'

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

apartments even though company cannot enter those apartments for purposes of inspection.

8. Gas ⇐18

Person supplying gas is not responsible for condition of pipes on consumers' premises over which he has no control or does not own.

9. Contracts ⇐24

Offer to be binding must be accepted according to its terms, any change in terms by purported acceptance constituting a rejection.

10. Gas ⇐18

Gas company's offer to adjust gas appliances for customer carried implied obligation of customer to designate appliances to be adjusted, hence company was not under duty to search premises to discover other appliances.

11. Gas ⇐18

Negligent performance by gas company of contract with consumer to adjust gas appliances causing condition dangerous to public creates right of action in favor of any person injured thereby.

12. Gas ⇐18

Gas company undertaking to adjust gas appliances of customer *held* not negligent where company's agent adjusted all appliances pointed out by customer but failed to search for or discover other appliances, the operation of one having caused death of customer.

13. Death ⇐99(4)

Awards of $12,500 for the death of each parent to self-supporting son and daughter, neither one living at home, *held* excessive where there was no evidence of direct pecuniary loss that parents owned or were likely to own property in the future, and where the only pretense of financial loss by plaintiffs was the advantage of their parents' society (Code Civ. Proc. § 377).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Actions by John A. Ray and Alma L. Ray against the Pacific Gas & Electric Company. From judgments in favor of plaintiffs in both cases and from order denying motion for judgment notwithstanding, defendant appeals.

Reversed and entry of judgment for defendant ordered.

Thos. J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellant.

Geo. K. Ford and Fletcher A. Cutler, both of San Francisco, for respondents.

PER CURIAM.

The plaintiffs, who are brother and sister, brought two actions against the defendant for the recovery of damages, one for the death of their father, John A. Ray, and the other for the death of their mother, Alma S. Ray, who died as the result of inhaling poisonous fumes from a gas heater which, the plaintiffs charged, the defendant had negligently failed to adjust for the safe burning of the gas supplied by it to its consumers. One W. Chalmers and Pacific Coast Automobile Association were joined as defendants, but these were not served with process, and the cases—which were consolidated for trial—proceeded against the Pacific Gas & Electric Company only. The trial was had before a jury, which brought in a verdict in each case for the sum of $12,500. Two judgments were accordingly entered, each in that amount, and defendant has appealed therefrom and from the order of the trial court made in each case denying its motion for judgment in its favor notwithstanding the verdict.

As grounds for these appeals it is contended, first, that the plaintiffs introduced no proof of negligence on the part of defendant, especially of the specific negligence upon which their complaint is based; second, that John A. Ray and Alma S. Ray, the deceased persons, were guilty of contributory negligence; third, that the judgments are excessive, and also that the trial court erred in certain of its instructions to the jury.

It is alleged in the complaint that "prior to the 6th day of July, 1930, defendant Pacific Gas and Electric Company, a corporation, issued its certain printed notice to the defendant Pacific Coast Automobile Association, which in substance stated that said defendant Pacific Gas and Electric Company had at said time of issuing said notice changed the quality and nature of the said gas which it had prior thereto been furnishing to its customers in the city and county of San Francisco, state of California, and to the said premises at 670 Turk street, and that by reason of said change it was and would be necessary and essential to change and adjust the mechanism of the heaters and heating apparatus then and there on said premises at 670 Turk street, and that said company would send one of its

trained employees to make said inspection and adjustment. That subsequent to the issuance and service of said notice and prior to the said 6th day of July, 1930, said defendant Pacific Gas and Electric Company, its servants and agents, did call at and visit the said premises at 670 Turk street to make said adjustments and inspection of said heating apparatus on said premises, and carelessly and negligently failed and neglected to properly or at all inspect or adjust said heating apparatus, all of which was known to defendants Pacific Coast Automobile Association and W. Chalmers, and that said defendants Pacific Coast Automobile Association and W. Chalmers carelessly and negligently concealed from and failed and neglected to advise decedents thereof, but on the contrary informed decedents that proper inspection and adjustment had been made and said premises were safe for occupancy, and said decedents believed and relied upon the said representations of said defendants Pacific Coast Automobile Association and W. Chalmers; that said decedents had at said times no knowledge as to whether or not said adjustments had been made, nor by reasonable inspection of said heaters could they have known whether said required and necessary inspection and adjustments had been made. * * * That by reason of the joint and concurrent negligence of defendants herein and each of them as aforesaid gaseous fumes were caused to and did then and there escape from said heater. * * *"

The facts bearing upon this question of adjustment of gas burning appliances, as disclosed by the record, are that the defendant gas company, which had for many years as a public utility corporation been supplying to the inhabitants of San Francisco and vicinity for lighting and heating purposes gas which it manufactured, on or about May 29, 1930, decided to substitute natural gas therefor. On account of the difference in the characteristics of the two gases, it was necessary that appliances which had theretofore been adjusted for the proper burning of artificial gas be immediately readjusted for the safe and efficient use of its substitute. Accordingly, the gas company divided its San Francisco territory into a number of districts, and employed some hundreds of mechanics familiar with the method of adjusting gas burning appliances. By printed notice addressed to each of its gas consumers and sent by mail and also published extensively in the local daily newspapers, it informed such consumers that on a given date the change from artificial to natural gas would be made; that a readjustment of their gas consuming appliances was essential; and that it would on the day of the change or immediately thereafter send one of its employees to the home or business establishment of each of its consumers for the purpose of making such adjustment. By the same notice it advised such consumers that if they wished to use their gas appliances before the arrival of its visiting mechanic they should have such adjustment made themselves. On May 29, 1930, the change from artificial to natural gas in the district in which the premises 670 Turk street are situated, was made, and on said day one of a corps of 1,100 mechanics, employed by the defendant for the purpose of making these adjustments, called at said premises but found them unoccupied. Accordingly, no adjustment of any gas burning apparatus which might then have been on said premises was made.

On June 5, 1930, Ray & Ryan, a copartnership engaged in automobile repairing, by arrangement with the owner or lessee, moved into said premises and there commenced the conduct of their business. On June 13, some two weeks after the change from artificial to natural gas and the visiting of consumers' establishments by the defendant's adjusting mechanics in said district had been completed, Ray & Ryan applied to the defendant to be supplied with gas for use in said business. Defendant at once sent an employee, one Otton, to 670 Turk street for the purpose of turning on the gas meter. He found that the meter was already turned on, and that Ray & Ryan had, since taking possession of the premises, been using the gas, and the date of the opening of the account with Ray & Ryan by the defendant was set back to correspond with the commencement of use. While the mission of Otton to the establishment of Ray & Ryan was not specifically to adjust gas appliances but merely to turn on the meter, he took occasion while there to ask one of the partners, Mr. Ryan, if they had any such appliances which needed to be adjusted for the use of the new gas. Asked by plaintiffs' counsel at the trial what reply he made to this request, Ryan testified: "Well, as near as I can recall I said 'There is one heater in the office that needs adjustment' or 'needs to be looked at' or some words to that effect. I am positive about the office heater. He said 'Well, all right,' and turned and started to walk away, and I started to walk forward to some cars that were there, and I said 'There's some around here and they are not connected up,' and I pointed like that to another room where some of those heaters were

stored or setting." Questioned by plaintiffs' counsel as to the rely that he made to Otton's question as given by him at a former trial of this case, he stated that in substance it was, "I know there is one in the office and nothing done in there, but look around and see for yourself." Otton went to the office and made the necessary adjustment to a heater there installed, and, when finished, he asked an employee in the office if there were any more and received the reply, "No, that's all."

At this time there were two small mezzanine rooms situated above the front portion of the working premises, in one of which was installed the gas heater, the use of which caused the tragedy hereinbefore mentioned. This room was unused except as a receptacle for unwanted articles (termed in the evidence junk), was dirty and dusty, even filthy, and it was not the room pointed to by Ryan as a place where Otton might find other and unconnected heaters. Indeed, there is nothing in the record to lead one to suppose that Ryan even knew that this heater was there, and it is a fair inference from the evidence that he did not. This heater remained unadjusted for the use of the new gas; and shortly thereafter the room was cleaned up and used by Ray & Ryan as sleeping quarters on occasions when one or the other remained in their business establishment so late at night as to make it inconvenient to return to their respective homes—which were both outside of the city.

On the night of July 6, 1930, John A. Ray, senior, occupied this room with his wife, Alma S. Ray. About noon of the next day they were found there dead. When found, the heater was burning, and it was apparent from their attire that they had not yet gone to bed, but were on the point of doing so. The dimensions of the room were about 12 by 9 by 6 feet, and it was unventilated except for what air might enter through a broken pane of glass, the hole in which, however, had been covered by a heavy towel—evidently for the purpose of keeping the cold air out. The gas heater was not furnished with any vent to the outside, but there was attached to it a small box containing various chemical substances, which the manufacturer claimed to be efficacious in rendering gas fumes harmless, but which, according to a printed notice on said attachment, should be changed regularly every year, or oftener if gas fumes became noticeable. It was testified by a chemist who made an analysis of these chemicals, and not disputed, that they were useless for the purpose claimed.

[1-4] It will be seen from the foregoing recital that unless negligence can be predicated upon the failure of Otton to search for and discover the gas heater concerned in these fatalities, there was no negligence proven against the defendant, quite apart from the fact that such failure of Otton is not the negligence upon which the purported causes of action are founded. The negligence therein relied upon is the omission to adjust the gas heating appliances in the premises at 670 Turk street while under the immediate control of W. Chalmers and the Pacific Coast Automobile Association. The failure of Otton to search for such appliances was unknown to these codefendants, and the plaintiffs do not contend otherwise. That it was the duty of the gas company, upon changing the nature of the gas supplied to its customers, to warn them that it was necessary to adjust existing gas consuming appliances for the safe and efficient use of the new gas, there can be no doubt; and the efforts made by the defendant to discharge this duty seem to us to have been quite sufficient. But Ray & Ryan became customers of the defendant after the change had been made and the adjustment of apparatus undertaken by the company completed. There is at all times and everywhere resting upon a person, who acquires a mechanical appliance to be used by him in connection with an essentially dangerous substance such as artificial or natural gas, the hazardous nature of which is universally known, the duty to see that such appliance is in its construction and adjustment suitable for its use in safety. He owes this duty to himself, and upon himself must rest the consequences of a failure to discharge it unless the duty has by contract or some legal relationship been cast upon another.

[5-8] It is sought by the respondents to uphold these judgments by contending that it was the duty of the defendant, upon receiving the application of Ray & Ryan to be supplied with gas, to find out and, if necessary, to search the premises for the purpose of discovering whether there existed thereon gas consuming appliances unsuitable for burning the gas supplied by it, and, if any were found, to make the necessary adjustment. Such a claim, we think, is startling in the extreme. It is attempted to be supported by the citation of cases, holding that a person or concern engaged in distributing an essentially dangerous commodity, such as we are here concerned with, is held to a very high degree of care to see that in its distribution and while under the control of the distributor it

shall not be permitted to harm any one. Such cases are Sawyer v. Southern Cal. Gas Co., 206 Cal. 366, 274 P. 544, and House v. Wichita Gas Co., 137 Kan. 332, 20 P.(2d) 479, and many more might be cited. This responsibility, however, is limited to the time that the gas is contained in the gas company's own pipes or containers, unless it has negligently allowed it to escape, or, having escaped, has created a dangerous hazard known or which should be known to the distributor, and he has neglected to remedy the condition. Lewis v. Southern Cal. Gas Co., 92 Cal. App. 677, 268 P. 930; Ingledue v. Davidson, 102 Cal. App. 703, 283 P. 840; Hill v. Pacific Gas & Electric Co., 22 Cal. App. 791, 136 P. 492. The greatest extension of this responsibility to be found in any case cited by respondents is where a gas company is supplying gas to a building containing a number of separate apartments but in which the pipes or conductors are interconnected, and the occupants of some of the apartments are consumers and others are not. As to the latter, it is held that the company is negligent if any of its gas should be allowed to flow into the pipes in their apartments unknown to them and damage should result therefrom, as by the escape of gas into such apartments through an open gas cock or vent; and that the company is not relieved from responsibility because it has no right to enter the apartments of such nonusers for the purpose of investigating the gas pipes therein. Christo v. Macon Gas Co., 18 Ga. App. 454, 89 S. E. 532; Schmeer v. Gas Light Company, etc., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653. We think it a far cry from such a situation to the one in the case at bar, wherein the fatalities were not caused by the unwanted introduction into the decedents' apartment of gas owned and controlled by the defendant, but by a poisonous gas generated therefrom in the operation by the decedents of an apparatus unsuitable for its use. The cases are uniform in holding that a person supplying gas or electricity is not responsible for the condition of the conductors or pipes on the premises of consumers which the former does not own or control (Bell v. Brooklyn Union Gas Co., 193 App. Div. 669, 184 N. Y. S. 807; Southern Indiana Gas Co. v. Tyner, 49 Ind. App. 475, 97 N. E. 580; Middleton v. De Kalb County Gas Co., 168 Ill. App. 353), and the same rule must on principle apply to the customer's own appliances provided by him for the consumption of the commodity supplied (Hill v. Pacific Gas & Elec. Co., supra).

[9, 10] It is further contended by respondents that irrespective of the alleged duty of the defendant to adjust gas consuming appliances, it did, upon the introduction of its natural gas into San Francisco, undertake to do so, and negligently failed to carry out the task undertaken.

We have seen that the offer made by advertisement in local newspapers and printed notices sent through the mail to the customers of the gas company was not a general offer to perform this service for every one or indefinitely, but was confined to existing customers of the company, and was evidently motivated by the fact that the company was voluntarily changing the character of its gas supply, such change entailing the necessity of making suitable adjustment of gas consuming appliances then in use. Ray & Ryan, not being consumers at the time, did not come within the class to whom the offer was made. However, as we have seen, the company did through its employee Otton, at the time when he visited the business establishment of Ray & Ryan, offer to make adjustment of Ray & Ryan's appliances if any they had. This offer bound the company to the extent that it was accepted, there being a sufficient consideration for it in the benefit arising from the business relationship between the parties. It is, however, elementary in the law of contract that an offer to be binding must be accepted according to its terms, and any change in its terms by a purported acceptance is a rejection. The offer of defendant through Otton to adjust the appliances of Ray & Ryan implied on the part of the latter the obligation to facilitate performance by placing at the disposition of the defendant's representative the appliances to be adjusted. They could not, contrary to the implied terms of the offer, require defendant to search through their business premises in order to discover the whereabouts of the articles to be adjusted. The only heater exhibited to Otton was adjusted by him, and a second inquiry by him as to whether there were any others made to an employee of Ray & Ryan brought a negative response. We think it clear that under the circumstances defendant discharged its full duty to Ray & Ryan.

[11] So far as Mr. and Mrs. Ray, the deceased persons, are concerned, there is no doubt that notwithstanding that the obligation of the defendant to adjust gas consuming appliances was one arising from contract —made by an offer and its due acceptance— a negligent performance by defendant of its duty thereunder by which a condition dangerous to the public was produced, would create a right of action in favor of any one

suffering damage thereby. 45 Cor. Jur., Negligence, § 18, p. 646; § 22, p. 650. There is also no doubt that any negligence on the part of the defendant in the performance of the work undertaken, entailing like consequences to a third person, would give a similar right of action. Alabama Utilities Service Co. v. Hammond, 225 Ala. 657, 144 So. 822. These principles, however, have no application here, in the absence of proof of negligence on the part of defendant.

[12] It results from what we have said that the plaintiffs failed to establish any negligence upon the part of the defendant, and that the latter's motion to instruct the jury to bring in a verdict in its favor ought to have been granted.

While this conclusion renders unnecessary a detailed, or perhaps any, discussion of the other contentions of the appellant, it may not be inappropriate to say that its contention as to the excessive amount of the verdicts is, we think, entirely justified.

[13] There was no evidence that the plaintiffs suffered any direct pecuniary loss by the death of their parents. They were both self-supporting and not living at home. It is true they visited the home of their parents more or less frequently on week-ends, and we may assume that on such occasions they rendered no quid pro quo for their entertainment. On the other hand, there is no evidence that the deceased parents owned any property, or that there was any likelihood that they would ever accumulate any in the future. The venture in the establishment in conjunction with Mr. Ryan of the automobile repair business already referred to was quite recent, and whether it would prove profitable yet remained to be seen. There was very little probability that the deceased parents would ever be in such financial position that during their lives the plaintiffs would derive any pecuniary benefit from them. The young man was even paying for his own education by his earnings, and the only pretense of financial loss suffered by the plaintiffs by reason of the tragic death of their parents was that they thereby lost the advantage of their society, and the care, comfort, and counsel which in the event of necessity they might legitimately expect to receive from them.

The action is brought under section 377 of the Code of Civil Procedure, which authorizes a jury to award such damages "as under all the circumstances of the case, may be just." A number of cases, wherein the contention that the damages allowed were excessive was not sustained, are cited by respondents in support of these verdicts. The verdicts in those cases were generally for smaller amounts than those in the case at bar, and involved other elements than those here relied upon, such as the loss of support by wives or minors or dependents. The most liberal of them is the late case of Gilmore v. Los Angeles Railway Corporation, 211 Cal. 192, 295 P. 41, 45. There a verdict of $7,500 in favor of a widow and two adult children was upheld. It was based upon the loss by the wife of her legal right of support and of the comfort and care which all three might have expected to receive from the deceased; and the court takes occasion to point out that the "loss of comfort, protection, and society is a proper element of injury and is by no means to be classed as compensable by merely nominal damages." Measured even by the standard of this case, the verdicts here are in our opinion grossly excessive.

This with our conclusion that the record contains no evidence of negligence on the part of the defendant, Pacific Gas & Electric Company, renders it necessary to reverse the judgments.

The orders and judgments appealed from are reversed, and the trial court is directed to enter judgment in each case in favor of the defendant.



3 Cal.App.2d 504

MERCANTILE MORTG. CO. et al. v. CHIN AH LEN et al.

SAME v. CHIN JOK et al.

Civ. 9622, 9623.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1935.

1. Specific performance ⇐109

Receiver may be appointed in action in equity to enforce covenants of rights of entry and possession under deed of trust.

2. Election of remedies ⇐7(1)

Giving notice of default and commencing proceedings for sale of property under deed of trust, which empowered trustee to enter premises at any time to operate properties and collect rents and to maintain suit

to enforce rights under trust deed, *held* not "election of remedies" precluding suit for specific performance of trust deed provision authorizing trustee, or receiver, to take possession of premises for purpose of collecting rents and preserving property (Civ. Code, § 2924).

"Election of remedies" is the right to choose or the act of choosing between different actions or remedies, where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an "election of remedies" is the choice by a plaintiff of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term is generally limited to a choice by a party between inconsistent remedial rights; the assertion of one being necessarily repugnant to or a repudiation of the other.

[Ed. Note.—For other definitions of "Election of Remedies," see Words & Phrases.]

3. Specific performance ⇐109

Evidence of value of premises and waste thereof authorized appointment of receiver for premises at request of trustee under trust deed who had given notice of default and had started proceedings for sale.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Actions by the Mercantile Mortgage Company and another against Chin Ah Len and others, and against Chin Jok and others, which were consolidated. From an order appointing a receiver, defendant John E. Manders, as guardian, etc., appeals.

Affirmed.

Charles A. Christin, of San Francisco (Thomas J. Keegan, of counsel), for appellant.

Edward R. Eliassen, of Oakland, for respondents.

NOURSE, Presiding Justice.

The guardian of two of the defendants has appealed from an order appointing a receiver.

The plaintiffs held deeds of trust covering three pieces of real property located in what is known as Chinatown in the city and county of San Francisco. Each deed provided that:

"In case default be made in payment, * * * the Trustee * * * shall be entitled at any time, at its option, and either by itself or by a receiver to be appointed by a court therefor, to enter upon and take possession of the above granted premises. * * *"

"The Trustee, * * * may at any time, at its option, commence and maintain suit in any court of competent jurisdiction and obtain the aid and direction of said court in the execution by it of the trusts. * * *"

Acting upon this authority the plaintiffs commenced two actions in specific performance to be admitted to possession of the premises and for the appointment of a receiver to take immediate possession for the purpose of collecting the rents and of preserving the property. These actions were consolidated for the motion for the appointment of a receiver and for the appeal. The defendants opposed by affidavit and oral evidence the appointment of a receiver. The plaintiff treated its complaint as an affidavit upon the hearing, and the order appealed from is based upon the conflict of evidence arising in this way.

It appears that the appellants were in default in the payment of both principal and interest, in the payment of taxes and insurance premiums, to the amount of approximately $13,500; the three buildings, which were used as stores and rooming houses, were badly in need of repair, windows being broken, plaster broken and cracked, plumbing and electric wires and fixtures defective, and the entire premises were left in an unclean and unsanitary condition; that two of the defendants representing conflicting claimants to interests in the properties had been collecting over a long period of time approximately $2,300 a month in rentals from the tenants, some of whom had been compelled to pay double rent under intimidation from these claimants; that the income was being dissipated by these defendants, who refused to use any part of it in the upkeep or repair of the premises or in the payment of the obligations under the deeds of trust. Upon this showing a receiver was appointed to take immediate possession of the premises.

[1] The first point raised by the appellants is not stated correctly. This cause of action is not limited to the enforcement of the covenant providing for the appointment of a receiver. A receiver may be appointed when the action is one in equity to enforce the covenants of the rights of entry and possession under a deed of trust. Mines v. Superior Court, 216 Cal. 776, 779, 16 P.(2d) 732; American Securities Co. v. Van Loben Sels, 218

Cal. 662, 664, 24 P.(2d) 499. It is such a cause of action which is here pleaded.

[2] Their second point is that the trustee having given notice of default and started proceedings for sale has made an election of remedies which precludes the right to sue for specific performance. The appellants cite a number of cases to the rule stated in Mansfield v. Pickwick Stages, 191 Cal. 129, 131, 215 P. 389, 390, that the doctrine of election is but an extension of the general principles of equitable estoppel. From this they argue that they were entitled to assume that the trustee would proceed to sell under the provisions of section 2924 of the Civil Code and thus permit them to collect the income pending sale. The argument is based upon an incomplete statement of the rule. In the Mansfield Case the Supreme Court emphasized that the "disadvantage" to the adversary upon which he might claim an estoppel "must be a real injury, such as would, in contemplation of law, amount to a fraud upon the party invoking the estoppel."

But we do not find any basis for invoking the doctrine of estoppel to the facts of this case. The rule applicable is fully stated in the quotation in the Mansfield Case from 20 C. J. p. 2: " 'Election of remedies has been defined to be the right to choose or the act of choosing between different actions or remedies where plaintiff has suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a plaintiff to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to or a repudiation of the other.' 20 C. J. p. 2."

Here the deeds of trust gave the trustee the right to enter "at any time" to manage, repair, and operate the properties and to collect the rents and income therefrom. The deeds authorized the trustee "at any time" to commence and maintain suit to enforce these rights. The remedies thus afforded for the immediate protection of the properties from dissipation and loss were not inconsistent with the power to sell under the deeds.

[3] Finally, it is argued that the court erred in making the order because the evidence offered by appellants showed that the value of the properties exceeded the indebtedness and that the security was not materially affected by the deterioration of the property. The motion was made upon the complaints which were treated as affidavits for that purpose. The evidence offered by appellants on the values of the properties was so inherently impossible that it might well have been rejected in full. Their evidence relating to the condition of the premises corroborated that of respondents. The evidence on the whole fully supports the order.

The order in each case is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



3 Cal.App.2d 476

PEOPLE v. O'ROURKE.

Cr. 2613.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1935.

Criminal law ⇐1134(10)

Where written notice of appeal from judgment and from order denying motion for new trial was given after time had expired within which notice of appeal from order could be given, appeal was reviewable only as appeal from judgment.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Thomas F. O'Rourke was convicted of driving an automobile upon a public highway while under the influence of intoxicating liquor, and he appeals.

Affirmed.

Lawrence W. Allen, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

On trial before the court without a jury, the defendant was convicted of the crime of violation of section 112 of the California Vehicle Act (St. 1923, p. 553, § 112, as amended by St. 1929, p. 537), in that he was guilty of driving an automobile upon a public highway while under the influence of intoxicating

liquor. The written notice of appeal states an appeal from the judgment, and from an order denying defendant's motion for a new trial. But as this notice was given after the time had expired within which notice of appeal from the order could be given, it follows that the appeal before us is only an appeal from the judgment. There was not any notice of appeal given at the time when the order was made.

Although stated in several ways in appellant's brief, the real and only ground of appeal presented in his behalf is based upon his contention that the evidence identifying defendant as the person who was driving the car is insufficient to prove that he was the driver. His own contention at the trial was that he was the man sitting beside the driver.

The brief for appellant does not in any instance give reference to the places in the transcript where the court might find any of the parts of the evidence to which the brief refers. We are given merely counsel's version of the evidence, without any of the required means of verification. But even on counsel's own statement of the case there appears to be evidence sufficient to sustain the conviction.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.



3 Cal.App.2d 154

COOPER v. COOPER (COOPER, Intervener).

SAME v. COOPER et al.

Civ. 5256, 5257.

District Court of Appeal, Third District, California.

Dec. 18, 1934.

Hearing Denied by Supreme Court Feb. 14, 1935.

1. Evidence ⇐462

Maker of note could prove by oral evidence that note was not executed or delivered as evidence of indebtedness to payee, but only as memorandum and receipt of sum of money appearing therein (Civ. Code, § 3097).

2. Evidence ⇐462

Oral evidence is competent to prove that purported note or written contract was executed as mere artifice affecting relationship or conduct of parties thereto, and that it was not parties' intention that it should become binding upon them (Civ. Code, § 3097).

3. Evidence ⇐432

Maker of note could show by oral evidence that note was executed without consideration except for small proportion of amount thereof which had been fully paid (Code Civ. Proc. § 1962, subd. 2).

4. Pleading ⇐237(6)

Where evidence introduced in defense was competent under original answer, permitting defendant to file amendment to answer to conform to proof was not error.

5. Pleading ⇐237(6)

Permitting amendment to answer to conform to proof at trial was proper though amendment was inconsistent with original answer (Code Civ. Proc. § 441).

6. Pleading ⇐237(6)

In action on note, where evidence supporting defense of want of consideration was competent under original answer though asserted invalidity of note was not otherwise adequately alleged, permitting defendant to amend answer to conform to proof of invalidity of note adduced at trial was not error (Code Civ. Proc. § 441).

7. Trusts ⇐25(1)

Use of term "trust" was not necessary in creating of relationship between father and son constituting oral declaration of trust (Civ. Code, § 2221).

8. Trusts ⇐38

That son did not specifically or orally accept terms of trust imposed by oral declaration at time father made gift of corporate stock to son did not show nonexistence of trust, since any conduct of trustee indicating with reasonable certainty that he understood and accepted terms of trust was sufficient (Civ. Code, § 2222).

9. Appeal and error ⇐1011(1)

Where evidence as to existence of trust created at time son received gift of corporate stock from father was conflicting, District Court of Appeal could not interfere with decision of trial judge that trust existed.

10. Trusts ⇐44(1)

In action against father on note given to son to cover alleged balance due to son as capital stock dividend on stock given to him by father, evidence supported findings and judgment that title and proceeds of stock were held by son in trust for father so as to render note invalid for lack of consideration.

11. Limitation of actions ⇐37(1)

Wife's suit to quiet title to community interest in corporate stock *held* barred by

limitations as to shares of stock transferred to son by her husband in 1919 and 1922 with her knowledge and consent (Code Civ. Proc. § 338).

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Stuart F. Cooper against Milton G. Cooper, in which Hattie May Cooper intervened; and action by Hattie May Cooper against Stuart F. Cooper and others, consolidated and tried together. From adverse judgments rendered in both actions, Stuart F. Cooper appeals.

Affirmed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

Barker & Keithly, of Los Angeles, and Dunne & Dunne, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The above-entitled cases were consolidated for the purpose of trial. Separate findings and judgments were rendered in each case. Separate appeals were perfected from the respective judgments. They were brought to this court and presented on a single transcript of evidence. The determination of the main issues of both cases depends on the same evidence.

The plaintiff Stuart F. Cooper has appealed from a judgment in the first case which was rendered against him in a suit on a promissory note. The court found that the alleged note was given without consideration and that it is therefore void, and directed that it be canceled.

The defendant and the intervener are husband and wife. The plaintiff is their son. All of the corporation stock and money which are involved in this suit were the community property of the defendant and his wife. Since 1895 the parties to this action have been residents of Los Angeles. Until October 1, 1926, the defendant Milton G. Cooper maintained an incorporated grocery business in Los Angeles under the name of Milton G. Cooper Dry Goods Company, having 20,000 shares of capital stock of the par value of $100 per share. Milton G. Cooper was the president of the corporation. On the date last mentioned the capital stock of the corporation was reduced to 12,000 shares of the par value of $100 per share. The defendant owned 65 per cent. of the stock of this corporation. October 22, 1919, he gave to his son 150 shares of his stock, and on December 26, 1922, made him a present of 100 other shares. About the time of the original gift of stock to the son, he was taken into the business, and later became an officer therein.

This cause was tried by the court sitting without a jury. The court found that prior to November 20, 1924, the defendant Milton G. Cooper purchased a large number of shares of stock from other stockholders, for which he became obligated to pay the sum of $400,000; that he is still indebted for a considerable portion of that purchase price of the stock; that, on the last-mentioned date, the defendant transferred to the plaintiff 250 shares of his stock with the oral agreement that this stock together with all dividends subsequently paid thereon were to be held by his son in trust until the defendant's indebtedness was fully paid, and until, in the opinion of the defendant, his financial standing warranted him in requesting the plaintiff to reconvey the last-mentioned stock and accrued dividends to him; that by the terms of the oral trust agreement the defendant was authorized to use all such stock and accrued dividends as collateral security for any debts or obligations of the defendant; that pursuant to the same trust agreement the defendant on December 3, 1925, transferred to the plaintiff 250 additional shares of stock, and on the last-mentioned date there were issued and delivered to the plaintiff under that trust agreement 1666 other shares of stock as dividends on the stock held by the plaintiff; that subsequently 1,600 shares of this dividend stock were transferred to the defendant Milton G. Cooper, and pledged by him to the Pacific Finance Company to secure a debt which he then owed that company; that these 1,600 shares of dividend stock were redeemed by the defendant and reconveyed to the plaintiff subject to the same trust agreement, on December 30, 1927; that at the time of the reduction of the capital stock of the mercantile company, September 21, 1927, the plaintiff surrendered 1,000 shares of the stock which stood in his name, leaving only approximately 1,500 shares in his name, all of which were subject to the trust agreement, except 250 shares thereof which belonged to him; that at the time of the reduction of the capital stock cash dividends on the shares owned and held in trust by the plaintiff were declared and paid to him as partial liquidation, the sum of $62,500: that $20,833.33 of this sum belonged to the plaintiff, and the balance belonged to the trust fund in his hands; that immediately thereafter, and on December 31, 1927. the defend-

ant executed and delivered to the plaintiff the promissory note for $37,962.89, which is the subject of this suit, solely as a memorandum of the liquidating transaction, and not otherwise; that this note was signed by the defendant without consideration and is void; and that the defendant was not then indebted to the plaintiff, and never has been indebted to him in that sum or in any sum whatever. Thereupon the court rendered judgment against the plaintiff canceling the promissory note and directing that he take nothing by this suit. From this judgment the plaintiff has appealed.

The appellant contends that the court erred in admitting evidence of an oral declaration of trust in conflict with the terms of the promissory note; that the court erred in permitting the defendant to file an amendment to his answer to conform to the proof at the trial; and that the judgment is not supported by the evidence.

[1, 2] Oral evidence was competent in this case to prove that the alleged promissory note, for the payment of which this action was instituted, was not executed or delivered as an evidence of indebtedness to the payee thereof, but that it was signed and delivered only as a memorandum and receipt of the sum of money appearing therein which was paid by the plaintiff to the defendant at the time of the reduction of the capital stock of the corporation and the partial liquidation thereof. This oral evidence does not vary the terms of the promissory note, but tends to indicate that it was not intended by the parties thereto to become a promissory note, and on the contrary that it was signed and delivered as a mere receipt for money paid to the defendant pursuant to the terms of a verbal declaration of trust with respect to the capital stock and the dividends therefrom which were held by the plaintiff.

Oral evidence is competent to prove that a purported promissory note or written contract was executed as a mere artifice affecting the relationship or conduct of the parties thereto, and that it was not the intention of the parties that it should become binding upon them. Under such circumstances the reception of oral evidence does not have the effect of varying the terms of the written instrument, but rather tends to prove the invalidity of the challenged document. P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411, 412; Texas Co. v. Berry Garage, 121 Cal. App. 455, 9 P.(2d) 241; Gleeson v. Dunn, 113 Cal. App. 347, 298 P. 119; Allen's Collection Agency v. Lee, 73 Cal. App. 68, 238 P. 169; section 3097, Civ. Code. In the Smith Case, supra, it is said in that regard: "Evidence that parties never intended a writing to constitute a contract, but that in lieu thereof another contract was entered into between them, is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect."

[3] The oral evidence was competent on another theory of defense. The answer of the defendant affirmatively alleged the note was executed without consideration except for a small proportion of the amount thereof which had been fully paid. It has been frequently held that oral evidence is always competent to show want of consideration, or even partial lack of consideration, for an instrument. This rule is invoked for the reason that such evidence does not result in varying the terms of the written instrument, but really amounts to an impeachment of the character of the document. Richardson v. Lamp, 209 Cal. 668, 290 P. 14, 15; Wurdeman v. Waller, 88 Cal. App. 393, 263 P. 558; section 1962, subd. 2, Code Civ. Proc.; Brannan's Neg. Instr. Law (4th Ed.) p. 254, § 28. In the Richardson Case, supra, it is said in that regard: "While the truth of the facts recited in a written instrument is conclusively presumed between the parties thereto, or their successors in interest by a subsequent title, this rule does not apply to the recital of a consideration. * * * The true consideration or the want of consideration may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts to show a valuable consideration."

And with respect to a partial failure of consideration, the text referred to in Brannan's Negotiable Instruments Law, supra, says: "Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise."

[4] The court did not err in permitting the defendant to file an amendment to his answer to conform to the proof adduced at the trial. This amendment merely set up, in greater detail and more specifically than the allegations of the answer did, the alleged invalidity of the promissory note. But the oral evidence which was received at the trial was competent under the original answer with respect to both the issues of the invalidity of the note and as to the lack of consideration therefor,

independently of the challenged amendment of the answer. The original answer did allege circumstances from which it may be reasonably assumed the stock and dividends and money involved in the note in question were all held by the plaintiff in trust, from which it follows that the defendant was not indebted to the plaintiff and that the note was therefore invalid for lack of consideration.

[5, 6] It is asserted the amendment is inconsistent with the original defense alleged in the answer. We are of the opinion the amendment to the answer was unnecessary, since the original answer alleged facts sufficient to support the findings and judgment of the court. But even though it be deemed to be inconsistent with the original answer, the defendant was entitled to allege as many different defenses as he possessed. Section 441, Code Civ. Proc.; 21 Cal. Jur. p. 134, § 90. Since the oral evidence was competent under the issue of want of consideration, even though the asserted invalidity of the note was not otherwise adequately alleged, it was proper to permit the defendant to amend his answer to conform to the proof adduced at the trial. Burrow v. Carley, 210 Cal. 95, 290 P. 577.

While there is an irreconcilable conflict of testimony, we are of the opinion the findings and judgment are adequately supported by the evidence. It is claimed the acts and conduct of the defendant, together with certain written documents which were introduced in evidence, refute the theory of the existence of an oral declaration of trust with respect to the corporation stock and dividends therefrom which were held by the plaintiff in his name for the benefit of the defendant.

[7] It was not necessary that the term "trust" should have been employed in the creating of a relationship between father and son which may be deemed to constitute an oral declaration of trust. Logan v. Ryan, 68 Cal. App. 448, 456, 229 P. 993, 996. In the case last cited the court quotes with approval from the case of Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 P. 765, as follows: "Any words which indicate with sufficient certainty an intention or purpose to create a trust will be effective in so doing, without the use of the words trust or trustee."

Section 2221 of the Civil Code provides in part:

"A voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

"1. An intention on the part of the trustor to create a trust, and,

"2. The subject, purpose and beneficiary of the trust."

[8-10] Nor was it necessary for the plaintiff to have specifically or orally accepted the terms of the trust. Any acts or conduct on the part of the trustee which indicates with reasonable certainty that he understands and accepts the terms thereof are sufficient to create the trust. Section 2222, Civ. Code; Drinkhouse v. German Savings & Loan Soc., 17 Cal. App. 162, 118 P. 953; American Bible Soc. v. Mortgage Guarantee Co., 217 Cal. 9, 17 P.(2d) 105; Becker v. Schwerdtle, 141 Cal. 386, 74 P. 1029. The fact that the plaintiff specifically denied the existence of the trust in the course of his testimony at the trial merely creates a conflict of evidence and raises a question which was solely within the province of the trial judge to determine. Owing to the conflict of evidence regarding that subject, this court may not interfere with the decision of the trial judge in that regard. 2 Cal. Jur. p. 921, § 543. The record is replete with positive statements repeatedly made by the defendant to the effect that the 500 shares of stock which were delivered to the plaintiff on November 20, 1924, and on December 3, 1925, together with the dividend shares and cash dividends thereon, were to be held by the plaintiff as trustee for the benefit of the defendant. The defendant testified in that regard that he transferred to his son the 500 shares of stock which stood in his own name, to be held in trust by his son, together with the proceeds therefrom, until the father was free from debt. The defendant said with respect to the first transaction:

"At the time of transfer when I handed him the stock * * * in the store, * * * I told Stuart I was transferring these 250 shares to him; that as long as I was in debt for the stock that I had bought out from my former partners, that any proceeds of those shares at that time would come to me until I was out of debt and in a position to know whether I could financially let him have all those shares and their returns thereafter.

"Q. Did your son tell you that he would not accept such transfer on those terms? A. No, he did not. * * *

"Q. Did you hand it (the stock) to him at the time of this conversation? A. Yes sir.

"Q. And he accepted it? A. Yes sir."

The defendant testified further that he was still in debt for the shares which he had purchased from his former partners; that there

was no consideration for a gift of the stock to his son; and that he positively told him the shares of stock and the proceeds therefrom were to remain his property until he was out of debt. The inference was that he might then give them to his son. He subsequently testified to the same effect in that regard as follows: "Well, (I told my son) that I was transferring those 250 shares to him and that while I had payments to make on those stocks that I had bought, the proceeds of whatever came from the shares would come to me until I was in a position, a financial position to have him keep the stock outright and enjoy all the privileges of it thereafter." Similar evidence was adduced with respect to the other 250 shares of stock which were transferred to the plaintiff. The evidence is therefore adequate to support the findings and judgment to the effect that the title to none of this stock or the proceeds therefrom passed to the plaintiff, but on the contrary that it was conveyed to him in trust to be held for the use and benefit of the defendant, and that there was therefore no consideration for the promissory note on which this action is based. The findings and judgment in this case are therefore adequately supported by the evidence.

We will now consider the appeal of Stuart F. Cooper from that part of the judgment which was rendered against him in the second above-entitled case. This is a suit on the part of Hattie May Cooper to quiet title to her undivided community interest in all of the stock and the proceeds therefrom which were involved in the first action. There is no dispute regarding the finding of the court in this suit that all of the stock in question is the community property of the plaintiff and her husband Milton G. Cooper. Mrs. Cooper alleged and contends that the purported gifts of this stock to their son Stuart were in conflict with the inhibition of section 172 of the Civil Code, and therefore void. This suit was brought against the plaintiff's son, her husband, and the corporation. A separate answer was filed by each defendant. The court adopted findings in exact accordance with those which were filed in the preceding case with respect to the 500 shares of stock which were transferred to Stuart F. Cooper on November 20, 1924, and on December 3, 1925, and the proceeds therefrom of cash and dividend stock subsequently delivered to him.

[11] With respect to the 150 shares of stock transferred to the defendant Stuart F. Cooper on October 22, 1919, and the 100 shares transferred to him on December 26, 1922, and the proceeds therefrom, the court found that these shares were given to the son by his father with the knowledge and consent of this plaintiff and that her suit to quiet title thereto was therefore barred by the provisions of section 338 of the Code of Civil Procedure. A judgment was rendered accordingly.

None of the parties to this suit are questioning on appeal the last-mentioned findings of the court or the validity of the transfer to Stuart F. Cooper of the 250 shares of stock therein referred to. The finding that this action is barred by the statute of limitations with respect to these 250 shares of stock is not challenged on appeal. The title to that stock and the proceeds thereof should therefore be, and it is hereby, confirmed in Stuart F. Cooper, and the judgment is affirmed in its application thereto.

For the same reasons heretofore assigned in the first cause of action with relation to the 500 shares of stock which were transferred to Stuart F. Cooper by his father November 20, 1924, and on December 3, 1925, and the cash and dividend stock which he received as the proceeds thereof, we are satisfied the findings and judgment in this case that this property was transferred to the son and is held by him pursuant to the oral declaration of trust above referred to, are adequately supported by the evidence. It follows that the defendant Stuart F. Cooper is without any right, title, or interest in this last-mentioned property, and he may therefore not complain of the judgment in this case which quiets title to the community interest of the plaintiff in and to that property.

Both judgments are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

3 Cal.App.2d 469

HARRISON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9703.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1935.

1. Courts ⇐122

Complaint alleging that plaintiff was damaged in sum of $6,000 as result of false representations of brokers as to future price of stock purchased *held* within jurisdiction of Superior Court, notwithstanding plaintiff's failure to plead actual value, where there was no indication that claim of damages was not made in good faith (Code Civ. Proc. § 89 (a), as added by St. 1933, p. 1811, § 12).

2. Mandamus ⇐172

Reviewing court in mandamus proceeding to require Superior Court to assume jurisdiction of action as involving jurisdictional amount will not pass on sufficiency of complaint (Code Civ. Proc. § 89 (a), as added by St. 1933, p. 1811, § 12).

3. Mandamus ⇐44

Mandamus *held* proper remedy to require Superior Court to assume jurisdiction after its transfer of cause to municipal court (Code Civ. Proc. § 89 (a), as added by St. 1933, p. 1811, § 12).

Original proceeding by Mary E. Harrison against the Superior Court in and for the City and County of San Francisco and the Honorable Timothy I. Fitzpatrick, as Judge of department thereof, for mandamus.

Peremptory writ issued.

Edmund J. Holl and Ivan N. Maroevich, both of San Francisco, for petitioner.

Harold E. Haven, of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an original proceeding in mandamus to require the respondent court to assume jurisdiction of and to set for trial a cause of action for damages for fraud and deceit.

The petitioner herein, as plaintiff below, commenced an action in the Superior Court for $6,000 damages alleged to have been suffered through the purchase of corporate stock. The defendants Abry, Kebler & Co. and their agent Krause were stockbrokers who conducted the sale. The indemnity company was sued as surety on the brokers' bond. Upon their motions the respondent court transferred the cause to the municipal court upon the ground that the action involved a demand less than $2,000. The complaint alleged that the plaintiff had paid $600 for 6,000 shares of stock upon the false representations of the brokers "based upon certain confidential inside information exclusively had and obtained by said defendant, that said stock would be selling in the open market and upon the San Francisco Stock Exchange or the Curb Exchange at San Francisco, at a price of One Dollar, or more, per share; that the par value of said stock was to be increased, due solely to certain confidential inside information obtained and had exclusively by said defendant Abry, Kelber & Company; furthermore, that as soon as the aforesaid stock was listed on the aforesaid exchanges or exchange, that the said stock would, with certainty, sell in the open market and have a definite and certain value to plaintiff herein of at least One Dollar or more per share." It was then alleged that, by reason of these representations, the plaintiff had been damaged in the sum of $6,000, for which sum judgment was prayed.

[1, 2] The jurisdiction of the municipal courts is limited to cases at law "in which the demand, exclusive of interest, * * * amounts to two thousand dollars or less." Code Civ. Proc. § 89 (a), as added by St. 1933, p. 1811, § 12. The plaintiff justifies the demand for $6,000 on the theory that the measure of such damages is the difference between the actual value of the stock purchased and the value it would have had if the representations had been true. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Hines v. Brode, 168 Cal. 507, 143 P. 729; Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P.(2d) 643. The respondent argues that the rule is not applicable because the price paid, and not the actual value of the stock, is pleaded. But the allegation that plaintiff was damaged in the sum of $6,000 is more than a conclusion of law, and, if there is any doubt about the pleading, it might be amended. There is no indication that the claim of damages was not made in good faith and hence the allegation is the "demand" which determines the jurisdiction within the Code section. 7 Cal. Jur. p. 692. The question before us in this proceeding is simply one of jurisdiction—we do not pass on the sufficiency of the complaint. That is a question which the Superior Court, having jurisdiction of the entire proceeding, may de-

termine at the appropriate time without regard to what is said herein in regard to the complaint as it has been reviewed for the sole purpose of determining the question of jurisdiction.

[3] Mandamus is the proper remedy because, if the order of transfer is an appealable order as respondents contend, appeal is nevertheless an inadequate remedy. Christ v. Superior Ct., 211 Cal. 593, 595, 296 P. 612; San Francisco Gas & Elec. Co. v. Superior Ct., 155 Cal. 30, 39, 99 P. 359, 17 Ann. Cas. 933; Hennessy v. Superior Ct., 194 Cal. 368, 374, 228 P. 862.

Let a peremptory writ issue as prayed.

We concur: STURTEVANT, J.; SPENCE, J.



3 Cal.App.2d 512

DINGMAN v. J. E. FRENCH CO. et al.

Civ. 9389.

District Court of Appeal, First District, Division 2, California.

Jan. 8, 1935.

Rehearing Denied Feb. 7, 1935.

Hearing Denied by Supreme Court March 7, 1935.

1. Evidence ⇐518

In personal injury action by incompetent, who had signed release alleged to have been fraudulently procured, exclusion of physician's testimony whether there was anything in order of plaintiff's commitment indicating case was other than alcoholic case, offered to show that commitment as insane person did not necessarily mean plaintiff was incompetent to transact business, *held* not error, since question was one of law.

2. Appeal and error ⇐1066

Error in instruction relating to scope of release with regard to unknown claims, which instruction in statutory language had no application to facts of case because release signed expressly included unknown claims, was harmless, where plaintiff did not sue for or recover on unknown claims (Civ. Code, § 1542).

3. Release ⇐59

In personal injury action, instruction that, if release signed by plaintiff was obtained through fraud of parties not acting as agents of plaintiff then defendants could not take advantage of unfair settlement, *held* not error.

4. Trial ⇐194(20)

In personal injury action, refusal to instruct that jury should deduct from verdict sum of $1,000 which had already been paid plaintiff *held* not error, where evidence was that such amount had not been paid.

5. Appeal and error ⇐930(4)

Jury's verdict will be assumed to have covered only actual damages shown to have been suffered by plaintiff in personal injury action.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Action by Boyd Dingman, an incompetent, by his guardian, Jennie Glines, against the J. E. French Company and another. From an adverse judgment, defendants appeal.

Affirmed.

Bronson, Bronson & Slaven and John H. Painter, all of San Francisco, for appellants.

Ingemar E. Hoberg, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff had a verdict for $8,000 for personal injuries suffered by him when struck by defendants' truck. The defense rested on a purported release and satisfaction signed by plaintiff two days after the accident. This the plaintiff rescinded in due time upon the grounds that he was incompetent and that it had been procured by fraud.

The negligence of defendants causing the injuries is scarcely disputed. Plaintiff's evidence supporting the verdict was that, while he was crossing in the pedestrian lane at the intersection of Van Ness avenue and McAllister street in San Francisco, he was struck by defendants' truck, which was traveling at an excessive speed and contrary to the electric traffic signals. The sufficiency of the evidence of the fraudulent procurement of the release is not questioned by the appellants. Three persons representing themselves as lawyers went to the hospital ward where plaintiff was confined and tendered him a written document which they represented to be contract of employment. The plaintiff had lost his glasses in the accident and asked a patient to read the document to him. This patient testified that the paper read by him was in fact a contract employing counsel to handle plaintiff's case on a basis of 25 per cent. No such document could be found or produced thereafter. The defendants did produce a similar printed paper signed by the plaintiff

in which he released defendants from all claims known and unknown on payment of the sum of $1,000. Some time after this occurrence, one of the three tendered a check to plaintiff for the sum of $800, which the latter refused to accept.

Since the appellants do not question the sufficiency of the evidence either on the issue of their negligence or on the issue of the fraudulent procurement of the release, and since they do not attack the proof of respondent's injuries nor the size of the verdict, the points which they raise become highly technical.

[1] Their first point relates to a ruling made in the examination of a witness. The respondent had been committed to the Mendocino State Hospital in July, 1929, as an inebriate; he had been committed to the Napa State Hospital in July, 1930, as an insane person; while at Napa he had been asexualized under the provisions of the statute authorizing the asexualization of those afflicted with "mental disease"; he had been released from Napa about six months before the accident. After proof of these facts and testimony of five physicians that respondent was mentally unable to understand the nature of the contract of release when it was signed, the appellants called as a witness one of the examining physicians upon whose testimony the respondent had been committed to the Napa hospital. This witness was asked if there was anything in the order of commitment which indicated that the case was other than an alcoholic case. An objection to this question was sustained. It was the purpose of the appellants to show by this witness that the commitment as "an insane person" did not necessarily mean that the respondent was incompetent to transact business. This was a question of law which should have been covered by appropriate instructions. There was no error in the ruling.

[2] Criticism is made of the instruction relating to the scope of the release with regard to unknown claims. The instruction was in the words of section 1542 of the Civil Code, but it had no application to the facts of this case, because the release signed expressly included unknown claims. As the respondent did not sue for or recover upon any unknown claims, the error of the instruction was harmless.

[3] The instruction holding that, if the release was obtained through the fraud of the parties not acting as agents of the respondent then the appellants could not take advantage of the unfair settlement, followed a settled rule of law that a principal may not profit through a contract knowingly obtained through the fraud of a third party for his benefit. 12 R. C. L. p. 402; Wilson v. Terminal Railways, 48 Cal. App. 343, 349, 191 P. 975.

[4, 5] There was no error in the court's refusal to give appellants' proposed instruction to the jury that it should deduct from its verdict the sum of $1,000, "which amount he had already been paid." The evidence was that such amount had not been paid to respondent. The jury's verdict will be assumed to have covered only the actual damages shown to have been suffered by the respondent. Prior to the trial he offered to restore to the appellants anything which he may have received through the fraudulent release. This may be done upon the settlement of the judgment if it should appear that respondent has received anything of value which should be restored.

Other assignments do not require consideration.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.



3 Cal.App.2d 471

WALLING v. RUGEN et al.

Civ. 9468.

District Court of Appeal, First District, Division 2, California.

Jan. 2, 1935.

Rehearing Denied Feb. 1, 1935.

Hearing Denied by Supreme Court March 1, 1935.

1. Trial ⇐296(3)

Instruction that automobile guest's action was for damages suffered by host's "negligence" *held* not misleading, in view of instructions, given at host's request, defining willful misconduct and advising jury that guest must prove host's willful misconduct.

2. Appeal and error ⇐1064(1)

In action against driver and owner of automobile wherein plaintiff was riding, where driver was charged with willful misconduct and owner on theory of imputed negligence, instruction authorizing recovery against owner on charge of negligence in knowingly permitting incompetent driver to operate automobile *held* not prejudicial, un-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

der facts, as against contention that statute imposes liability upon owner in absolute terms and owner was not liable unless driver were guilty of willful misconduct (Civ. Code, § 1714¼).

Facts disclosed that jury found driver guilty of willful misconduct upon concededly sufficient evidence, that a very small verdict was returned, indicating that the jury did not levy any penalty upon the owner because of any special negligence in permitting the driver to operate the automobile, and that the objection to the instruction was on the ground that the jury must have been confused.

Appeal from Superior Court, Marin County; Thomas D. Johnston, Judge.

Action by Vivian Walling, a minor, by Margery Masterson, her guardian ad litem, against Frederick Rugen and others. From a judgment against them, named defendant and another appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

Martinelli & Gardiner, Jordan L. Martinelli, and Samuel W. Gardiner, all of San Rafael, for respondent.

NOURSE, Presiding Justice.

The plaintiff suffered injuries while riding as the guest of defendant Rugen, who was at the time operating an automobile owned by the defendant Schlessinger. She sued the defendant Rugen, charging willful misconduct on his part, and joined the defendant Schlessinger on the theory of his imputed negligence as owner under section 1714¼ of the Civil Code, and pleaded a separate cause charging him with independent negligence on the theory that he willfully permitted Rugen, an incompetent driver, to operate his car. The cause was tried with a jury, and the plaintiff had a verdict for $1,000 against both defendants.

[1] In the oral presentation of their appeal the appellants conceded that the willful misconduct of Rugen was properly pleaded and proved and hence no statement of the facts concerning the accident is necessary. They first complain of the instruction, wherein the jury was told that the action was brought for damages suffered "by reason of the negligence of the defendants." It is argued that, inasmuch as the respondent was the guest of Rugen at the time of the injuries, her action must be one based upon his willful misconduct and not one resting in negligence alone. The argument is academically sound so far as it goes, but it is fully answered by the instructions which were given at the request of the appellants defining willful misconduct and advising the jury that, unless the respondent proved by a preponderance of evidence the willful misconduct of the defendant Rugen, their verdict should be in favor of the defendants. Herein the trial court gave to the jury all the instructions on this subject requested by the appellant, and it is impossible to conceive how the jury could have been misled by any inadvertent reference to simple negligence in the portions of the instructions complained of.

[2] Complaint is also made of the portion of the instructions relating to the third cause of action—Schlessinger's asserted knowledge of Rugen's reputation as a careless and reckless driver. It is argued that because section 1714¼ of the Civil Code imposes liability upon the owner in absolute terms, it was error to instruct the jury that the owner might be liable under the theory pleaded in the third cause of action. From this it is argued that, since Rugen could be liable only for his willful misconduct, the owner should not be held liable unless such willful misconduct was proved. This argument also is academic. The jury found the driver guilty of willful misconduct, and the appellants concede that the evidence supported that finding. The very small verdict returned indicates that the jury did not levy any penalty upon the owner because of any special negligence as pleaded in the third cause of action. The appellants do not argue that they were prejudiced in any way by the instruction; they argue that the jury must have been confused. We find no prejudicial error.

Other points raised do not require consideration. The cause was fairly tried, the jury was fully and fairly instructed, and from the admissions of the appellants, the verdict for the respondent was the proper and logical result of the trial.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

PEOPLE v. HERBERT'S OF LOS ANGELES, Inc., et al.

Civ. 10010.

District Court of Appeal, Second District, Division 1, California.

Jan. 3, 1935.

Rehearing Denied Jan. 30, 1935.

Hearing Denied by Supreme Court March 4, 1935.

1. Courts ⇐97(6)

Decision of federal District Court that state Retail Sales Tax Act imposed tax on retailer and not on consumer, while not binding on state court, is persuasive (St. 1933, pp. 2599, 2600, 2602, 2606, 2609, §§ 2 (f), 3, 8½, 9, 22, 24, 27).

2. Licenses ⇐28

Retail Sales Tax Act imposing tax for privilege of selling, furnishing, preparing, or serving tangible personalty *held* to impose tax on retailer and not on consumer notwithstanding that, ultimately, fund out of which payment is made has been obtained by dealer from his customers (St. 1933, pp. 2599, 2600, 2602, 2606, 2609, §§ 2 (f), 3, 8½, 9, 22, 24, 27).

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the People of the state of California against Herbert's of Los Angeles, Inc., a corporation, and M. W. Engleman. From a judgment for plaintiff, second-named defendant appeals.

Affirmed.

Craig & Weller and M. L. Granger, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

The "Retail Sales Tax Act of 1933" is a statute approved July 31, 1933, and which was to "take effect immediately." Stats. 1933, p. 2599; Deering's 1933 Supplement, Act 8493, p. 2359. This action was brought by the state to enforce the payment of taxes claimed under the provisions of that act. Defendant Engleman appeals from the judgment, which was entered against him upon his failure to answer after the court had overruled his demurrer to the plaintiff's complaint.

Appellant makes the following statement of the question involved in his appeal: "If a cafe operator, having enjoyed a retail sales business producing gross receipts of a certain volume, fails to pay a tax of two and one-half per cent. thereon, under chapter 1020 of Statutes of 1933, and thereafter executes a common law assignment for the benefit of creditors, what preference, if any, shall be given the tax, and is such tax the basis for impressing a lien upon property in the hands of the assignee?"

Appellant rests his case first upon the proposition that the exaction imposed by the sales tax is not upon the retailer but upon the consumer. He admits that the other points made by him on this appeal are corollaries of the first, and must stand or fall according to the decision of this court with reference to the first point.

The title of the act in question reads as follows: "An act imposing a tax for the privilege of selling tangible personal property and for the privilege of furnishing, preparing or serving tangible personal property, providing for permits to retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof, and providing this act shall take effect immediately."

Appellant admits that the title of this act indicates an intention on the part of the Legislature to impose a tax on the retailer and relate it entirely to his privilege of selling tangible personal property at retail. His claim, however, is that the provisions of the act do not correspond to the legislative intent as expressed in the title, and that, on the contrary, the bill was drafted to directly impose the burden of payment upon the consumer. We think that this claim is not well founded.

[1] To see that the tax imposed is a tax on the retailer and not on the consumer, it is only necessary to observe the declarations to that effect which recur frequently in the statute; as, for example, in sections 3, 9, 22, 24, and 27 (Stats. 1933, pp. 2600, 2602, 2606, 2609). This was the opinion of the United States District Court for the Northern District of California, where three judges were sitting as a statutory court. Meyer Construction Co. v. Corbett, 7 F. Supp. 616. That decision, while not of binding authority here, has persuasive force.

[2] The argument against this conclusion, as presented by appellant, rests upon certain provisions of the statute which point out the procedure by which the retailer making the sale is required to collect the tax from the consumer "in so far as the same can be done"

(section 8½ [Stats. 1933, p. 2602]); and especially upon the definition of "gross receipts" (section 2, subd. f [Stats. 1933, p. 2599]), and the provision therein that "for the purpose of this act the total amount of the sale price above mentioned shall be deemed to be the amount received exclusive of the tax hereby imposed; provided, that the retailers shall establish to the satisfaction of the board that the tax imposed hereunder had been added to the sale price and not absorbed by the retailer." These provisions do, of course, indicate the source from which the retailer is authorized to reimburse himself for the tax which he must pay to the state "for the privilege of selling tangible personal property at retail." Section 3. The tax is upon the privilege of transacting the business. But we find in the statute nothing which imposes the tax upon the consumer, or which conflicts with the clearly expressed imposition of tax upon the retail dealer and upon him only. That in ultimate effect the fund out of which payment is made may be or in fact has been obtained by the dealer from his customers does not make the tax a levy upon the consumer.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

3 Cal.App.2d 437

SANBORN v. SANBORN.

Civ. 8983.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 28, 1935.

1. Husband and wife ⇐281

In action by former wife to recover past-due monthly installments, secured by lien on rents from former husband's realty, pursuant to contract antedating divorce, where provisions relating to lien were pleaded by reference only and did not show that instrument on its face constituted a mortgage, complaint was not subject to general demurrer on ground that plaintiff's sole remedy was a foreclosure proceeding (Civ. Code, §§ 158, 159; Code Civ. Proc. § 726).

2. Husband and wife ⇐279(1)

Where contract providing for monthly payments to wife and securing them by lien on rent from husband's realty contained no words of conveyance or transfer of an interest in property, contract was not a "mortgage," and former wife, after divorce, was entitled to enforce payment of past-due installments without foreclosure of the lien (Civ. Code, §§ 158, 159; Code Civ. Proc. § 726).

[Ed. Note.—For other definitions of "Mortgage," see Words & Phrases.]

3. Trial ⇐140(1)

Mere contradictions of testimony of a witness will not suffice to destroy its weight so as to justify court in disregarding such testimony.

4. Husband and wife ⇐281

In former wife's action for past-due installments accruing under contract antedating divorce, evidence sustained finding that former wife had made no promise to obtain a divorce as consideration for the contract (Civ. Code, §§ 158, 159).

5. Divorce ⇐249(2)
Husband and wife ⇐279(1)

In actions other than for divorce, property settlement contracts between husband and wife are judged by the same rules as other contracts between persons occupying fiduciary relations, and, if valid, will be enforced, whereas in actions for divorce where such contracts are pleaded they are binding only when approved by the court (Civ. Code, §§ 158, 159).

6. Husband and wife ⇐278(1)

Property settlement contracts between husband and wife are valid if untainted by fraud, collusion, and undue influence and are not against good morals (Civ. Code, §§ 158, 159).

7. Husband and wife ⇐280

Property settlement contract between husband and wife before divorce *held* valid though not approved by divorce decree where complaint of wife suing for divorce alleged that there was no community property and validity of agreement was not involved (Civ. Code, §§ 158, 159).

8. Divorce ⇐172

Where wife suing for divorce alleged that there was no community property nor children and alleged no facts relating to support, allegations that property settlement contract had been entered into and incorporation of contract in complaint were irrelevant and default decree, silent as to property rights, was not res judicata that contract was invalid (Civ. Code, §§ 158, 159).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Jessie Sanborn against Max Merrill Sanborn. From a judgment for plaintiff, defendant appeals.

Affirmed.

Fred Horowitz, of Los Angeles, for appellant.

J. H. De La Monte and Ralph D. Brown, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The parties herein, formerly husband and wife, executed an agreement authorized by sections 158 and 159 of the Civil Code, wherein provision was made for monthly payments by appellant to respondent in a specified sum for support, and wherein it was agreed that the obligation to make such payments "is secured by a lien upon the income" of certain real property owned by appellant, and that "the rents, issues and profits therefrom are charged and impressed with the payment of the amounts hereinbefore provided to be paid." Upon this contract respondent brought suit to recover alleged arrearages. A general demurrer was interposed and overruled. Appellant in his answer pleaded lack of consideration, illegality of the agreement by reason of a contemporaneous oral promise of respondent to obtain a divorce as consideration for execution thereof by appellant, and res adjudicata by reason of subsequent divorce proceedings. Judgment was entered for respondent, from which this appeal is taken.

[1] The general demurrer was properly overruled. The agreement was incorporated in the complaint by reference, and appellant contends that the complaint therefore revealed that the agreement sued upon constituted a mortgage and that respondent's sole remedy was to foreclose under the provisions of section 726 of the Code of Civil Procedure. The provisions relating to the lien in the agreement are pleaded by reference only, and, as pleaded, the instrument does not show upon its face in direct terms all the facts essential to constitute the same a mortgage; nor was any construction put upon it by other averments in the complaint to establish the lien therein described as a mortgage. Silvers v. Grossman, 183 Cal. 696, 192 P. 534. In the absence of a special demurrer on the ground that it was doubtful or uncertain therefrom whether the debt sued upon was secured by mortgage, the complaint was sufficient to support a judgment for debt. Hibernia Savings & Loan Society v. Thornton, 117 Cal. 481, 49 P. 573.

[2] Resort to the terms of the instrument reveals that the language describing the lien therein provided did not contain the essentials to constitute a mortgage lien. No words of conveyance or transfer of an interest in property as security appear therein. Every lien is not a mortgage, and the lien described in the instrument herein is clearly not a mortgage and respondent was free to enforce payment of the debt arising under this agreement without any foreclosure of the lien. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 P. 1029. There is nothing in the decision in Higgins v. Higgins, 121 Cal. 487, 53 P. 1081, 66 Am. St. Rep. 57, relied upon by appellant, in conflict with the views above expressed. In that action the wife sued to foreclose a similar lien, and the sole question on appeal was whether the property subjected to the lien was sufficiently described. The court therein did not decide whether the lien in that case was a mortgage lien or not, nor was section 726 of the Code of Civil Procedure mentioned therein.

[3, 4] The trial court, upon a substantial conflict of evidence, found that no promise to obtain a divorce was made by respondent as consideration for the agreement. This finding appellant attacks upon the ground that the testimony of respondent and her witness was so inherently improbable as to be unworthy of belief or to possess weight, and that appellant's contrary testimony should prevail. Mere contradictions of the testimony of a witness will not suffice to constitute inherent improbability or to destroy its weight. The weight and sufficiency thereof were peculiarly within the province of the trial court for decision (People v. Raich, 26 Cal. App. 286, 146 P. 907; People v. Becker [Cal. App.] 35 P.(2d) 196), and, under the well-known rule, this court will not disturb a finding of the trial court on a fact concerning which there is a substantial conflict in the evidence. The evidence herein is quite sufficient to support the questioned finding, and, as there is nothing in the agreement which on its face shows that it is contra bonos mores, it follows that the court's conclusion that it was legal and valid is supported.

[5-7] Appellant contends that inasmuch as the court in its decree in the divorce action between the parties did not expressly approve the agreement in question, it is for that reason invalid, and cites a number of cases decided by our appellate courts wherein it is said that "such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and

derive their sanction from a decree made by the court with a knowledge of the facts." The foregoing quoted expression first appeared in the case of Loveren v. Loveren, 106 Cal. 509, 39 P. 801, 802, and was a quotation from a Missouri decision (Speck v. Dausman, 7 Mo. App. 165). It has been quoted and used several times since in other decisions of our appellate courts but always in a divorce case. There is a marked distinction between the rule which governs in an action, other than divorce, on a contract executed under authority of sections 158 and 159 of the Civil Code and the rule which governs such contracts when presented to a divorce court. In the former instance, they are judged by the same rules as any other ordinary contract between individuals occupying fiduciary relations, and, if found to be valid, are binding on the parties and are recognized and enforced by courts; while in the latter instance, because of the unlimited power vested in the divorce court to make disposition of community property and to award support, such contracts, when pleaded and relied upon, are not binding or conclusive on the divorce court until subjected to examination of the court in the divorce action and approved. Moog v. Moog, 203 Cal. 406, 264 P. 490. Contracts between husband and wife under the provisions of sections 158 and 159 of the Civil Code, being authorized by law, are valid if untainted by fraud, collusion, undue influence, or not contra bonos mores, or the like. Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; Murray v. Murray, 28 Cal. App. 533, 153 P. 248. It has never been held that to acquire and possess validity such contracts must necessarily first be approved by a divorce court. The effect of the decisions relied on by appellant is simply that, as against the power of the divorce court in the matter of disposition of community property and awarding support, such contracts have no effect or control in the divorce case until sanctioned and adopted by the court either in whole or in part. Such sanction, however, is not necessarily a prerequisite to validity of such an agreement when sued upon in an independent action to enforce its terms.

[8] Appellant further contends that the validity of the agreement was an issue in the divorce case, and that the divorce court, having failed to expressly approve the same in its decree, in effect decided that such agreement was void and that the doctrine of res adjudicata bars relief herein. Respondent claims that on the same divorce case record it appears that the agreement was approved by the court. We do not agree with either of these contentions. The divorce complaint stated a cause of action for divorce on the ground of desertion, alleged there was no community property, no children, and did not allege any facts relating to support. There was an allegation that respondent had made a property settlement with appellant, and the complaint incorporated the agreement here in question by reference. The prayer was for divorce and general relief, couched in the conventional form. Default of the appellant was entered for failure to answer. After a trial, the court found that all the allegations of the complaint were true and that respondent was entitled to a divorce. The usual interlocutory and final decrees were entered. It is clear from this record that the issue of validity of the agreement was not before the court. The reference in the complaint to the agreement was irrelevant, redundant, and surplusage, and conferred no jurisdiction upon the court to entertain and pass upon the same. Jurisdiction to consider and approve such agreements in a divorce court depends on the power to dispose of community property or to award support. Where in a default divorce case it is admitted by the pleadings that there is no community property and no application for support is made by the complaining party, the court has no power in such case to consider those matters; and this necessarily results in excluding power to consider and determine the validity of any previous property settlement of the parties. The trial court herein adopted and followed this conception of its powers and ignored the agreement. It was neither approved nor disapproved and is, therefore, not subject in this action to any of the limitations of the doctrine of res judicata.

Finding no error in the action of the trial court, the judgment must be affirmed, and it is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.

PARKER et al. v. JAMES E. GRANGER, Inc., et al.*

Nos. 8745–8752.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Rehearing Denied Jan. 30, 1935.

Hearing Granted by Supreme Court Feb. 27, 1935.

1. Jury ⇐127

Denial of plaintiffs' request for leave to challenge for cause a juror who stated after jury was sworn, but before any evidence was offered, in actions for deaths caused by collision between airplanes, that his views as to right of persons going up in airplanes to protection depended on whether they were passengers or were being paid big salaries and knew what they were "going up against," *held* not abuse of discretion, where juror stated that he would follow court's instructions.

2. Evidence ⇐325

Document, issued by Federal Department of Commerce, containing regulations as to licensing of aircraft and rules of air traffic, *held* properly excluded from evidence as incompetent, irrelevant, and immaterial in actions for death caused by collision between airplanes during intrastate flight (St. 1929, p. 1874).

3. Evidence ⇐47, 48

Court takes judicial knowledge of official acts and regulations of department of federal government, and proof thereof by evidence is not required (Code Civ. Proc. § 1875, subd. 3).

4. Trial ⇐136(3)

All questions of law and construction of statutes and other writings must be decided by court, which must declare to jury court's knowledge, when made evidence of fact (Code Civ. Proc. § 2102).

5. Commerce ⇐13

State has exclusive power to prescribe rules for operation of aircraft in purely intrastate flights (St. 1929, p. 1874).

6. Negligence ⇐22

Conduct of pilots and others involved in collision between airplanes during intrastate flight will be judged only under general law and rules of negligence applicable to case, in absence of state law prescribing air traffic rules (St. 1929, p. 1874).

7. Evidence ⇐508

Questions to expert witnesses as to meanings of aeronautical terms in trial of actions for deaths caused by collision between airplanes *held* proper.

8. Evidence ⇐553(1)

Overruling of plaintiffs' objections to hypothetical questions, assuming facts concerning which there was evidence of supporting tendency, framed in accordance with theory of defense and in line with defenses, as were answers thereto, *held* not error prejudicial to plaintiffs.

9. Negligence ⇐129

Conversations between motion picture director and president of corporation contracting to furnish film company airplanes and licensed pilots for use in filming picture *held* admissible in actions against such corporation, film company, and others for deaths of pilots, director, and other employees of film company.

10. Trial ⇐139(1)

Plaintiff may move for directed verdict, where cause of action alleged in complaint is supported on whole evidence and no support is given any of defenses alleged.

11. Trial ⇐143

Plaintiff's motion for directed verdict may not be granted, where there is substantial conflict in evidence as to basis of plaintiff's cause of action or any defense thereto.

12. Trial ⇐139(1)

To authorize direction of verdict, evidence must be undisputed or so conclusive that court, in exercise of sound discretion, would be compelled to set aside contrary verdict.

13. Appeal and error ⇐973

Trial court's ruling as to whether given state of facts shows negligence as matter of law or sustains defense will not be disturbed on appeal, in absence of clear showing of abuse of discretion.

14. Appeal and error ⇐997(1, 3)

Evidence in conflict or reasonably supporting different inferences on trial of action for deaths of occupants of colliding airplanes *held* to preclude appellate court from disturbing trial court's discretionary ruling denying parties' motions for directed verdicts and plaintiffs' motions for judgments notwithstanding verdicts.

15. Trial ⇐177

Rule that, where both parties request directed verdicts and neither asks determination of any fact issue by jury, they will be presumed to have waived right to jury trial, cannot be invoked under California Constitution, procedure, and practice (Code Civ. Proc. §§ 592, 631; Const. art. 1, § 7).

16. Jury ⇐28(5)

Trial by jury may be waived only in manner designated by statute, which does not include requests by both parties for directed verdicts (Code Civ. Proc. §§ 592, 631; Const. art. 1, § 7).

*For subsequent opinion see 52 P.2d 226.

17. Negligence ⇐136(12)

Court properly instructed jury on res ipsa loquitur doctrine in action for deaths of occupants of colliding airplanes, where plaintiffs' evidence left it doubtful as to whether defendants' negligence was ultimate cause of collision.

18. Negligence ⇐121(2)

Application of res ipsa loquitur doctrine depends on explanation of cause of accident by either party, when other necessary conditions are established by evidence making prima facie case of negligence.

19. Negligence ⇐121(2)

When prima facie case of negligence is established by evidence, duty devolves on defendant, under res ipsa loquitur doctrine, to explain how accident occurred and show that he was without negligence or that accident resulted from causes beyond his control.

20. Negligence ⇐138(2)

Instructions on res ipsa loquitur doctrine *held* erroneous as telling jury that no explanation of cause of accident by either party would make doctrine inapplicable and destroying benefit thereof, where neither party explains or each party has equal knowledge or means of knowledge of cause of accident.

The instructions were that res ipsa loquitur doctrine is based on theory that burden of showing exactly how accident occurred should rest on person having better knowledge or means of knowledge thereof; that doctrine can not apply where both parties have equal knowledge or means of knowledge or neither party has any knowledge or means of knowledge as to how accident occurred; that plaintiff must first show existence of certain conditions for doctrine to apply; that person against whom doctrine is invoked must have possessed superior knowledge or been in better position to obtain such knowledge as to cause of accident, so that duty of explaining it should rest on him; that doctrine does not apply where defendant did not have such knowledge, in which case happening of accident raises no inference of negligence; and that plaintiff must prove by preponderance of evidence that accident was caused by defendant's negligence.

21. Appeal and error ⇐1064(1)

Erroneous instruction that no explanation of cause of accident by either party to death actions would render res ipsa loquitur doctrine inapplicable *held* prejudicial to plaintiffs, whose case rested on inference of defendants' negligence under such doctrine and defendants' failure to show that accident happened without negligence on their part.

22. Negligence ⇐121(2)

Res ipsa loquitur doctrine is founded partly on theory that defendant possessed superior knowledge of cause of accident, not on fact as to whether he possessed such knowledge.

23. Negligence ⇐121(2)

Res ipsa loquitur doctrine having attached under plaintiff's evidence, inference of defendant's negligence arises and prevails, unless offset or overcome by defendant's explanation of cause of accident.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Eight actions, consolidated and tried together, by Thomas H. Parker and others, against James E. Granger, Incorporated, and others. From orders, denying plaintiffs' motions for judgment notwithstanding verdicts for defendants, and judgments for defendants, plaintiffs appeal.

Orders affirmed, and judgments reversed.

Lasher B. Gallagher, Burnett Wolfson, Chotiner, Recht & Chotiner, Ford & Coles, Frank M. Benedict, Philip Cohen, and A. A. Rotberg, all of Los Angeles, for appellants.

Arthur W. Eckman, Wm. B. Himrod, and Kidd, Schell & Delamer, all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

Eight separate actions were commenced by the heirs or personal representatives of persons who lost their lives in a collision between two airplanes. The cases were consolidated and tried together, and from judgments in favor of defendants these appeals are taken.

On January 2, 1930, Fox Film Company, engaged in the business of producing motion pictures, entered into a written contract with respondent James E. Granger, Inc., to furnish one Lockheed Vega cabin plane and two "Whirlwind planes" as camera planes, at stated prices per day, in first-class condition and with licensed pilots to operate the same, to be used under direction of Kenneth Hawks as director and Max Gold as assistant director of the Fox Film Company in the filming of a picture showing a parachute jump over the Pacific Ocean. James E. Granger, Inc., obtained and furnished the services of a Lockheed Vega plane with Captain Roscoe Turner as lawfully licensed pilot thereof, and made arrangements to hire from Tanner Motor Livery, a corporation, also a respondent

herein, two Stinson planes for use as camera planes, with licensed pilots to operate the same, agreeing to pay therefor a hire fixed in terms of dollars per hour. These planes and pilots were offered by James E. Granger, Inc., to Fox Film Company and by it approved and accepted for use in making the picture. After dual controls were installed in the Stinson planes and cameras mounted therein, and Hawks had given detailed directions as to the course of the flight and the positions of the planes when photographing was to be done, the flight of the three planes commenced. Captain Turner was pilot of the Lockheed Vega, carrying the parachute jumper; Hallock Rouse, a regular employee of Tanner Motor Livery and a lawfully licensed pilot, was pilot of one Stinson plane, with Max Gold sitting beside him at the dual control, and Ross Cook, also a regular employee of Tanner Motor Livery and a lawfully licensed pilot, was pilot of the other Stinson plane, with Hawks sitting beside him at the dual control. Neither Hawks nor Gold was a licensed pilot. Six other employees of Fox Film Company, participating in the picture making, were divided between the two Stinson planes. While flying out over the bay in a general southwesterly direction on a designated course to be followed for a distance with return thereon, the Lockheed Vega was in the lead, one Stinson to its left and rear, the other to the left and somewhat to the rear and below the first Stinson. The Lockheed Vega allowed the two Stinsons to pass and then made a left turn to follow the return course. Thereupon the two Stinsons commenced to make a left turn, when the leading one appeared to slide sideways, the tips of the wings on the two planes touched, then their noses came together, there was an explosion, and both planes fell into the ocean carrying to their death all the occupants thereof.

The foregoing is but a brief sketch of the occurrence, no effort being made to state details which are embodied in over 1,000 pages of testimony and other evidence. On the evidence and under the instructions given, the jury found for defendants, respondents herein. On this appeal appellants embody their contentions in three questions as comprising those involved in the case, and have presented the same under some sixteen points. As many of these points naturally fall into separate groups, we will not attempt to follow the order of their statement in the briefs, but will state the same, and dispose of them in the order of occurrence or position in the course of the trial proceedings.

[1] 1. After the jury was sworn and before any evidence was offered, a juror voluntarily stated from the jury box that he had certain views as to the status of persons going up in airplanes in respect to right to protection, depending on whether they went up as passengers or as one who is being paid a big salary and knew what he was "going up against." Appellants requested leave to interpose a challenge for cause. This the court denied after interrogating the juror, who announced that notwithstanding his views of the law he would follow the instructions of the court. We find no abuse of discretion in this ruling.

[2-6] 2. During presentation of their cases defendants offered in evidence a document issued by the Department of Commerce of the United States containing air commerce regulations relating to the licensing of aircraft and rules of air traffic. The court sustained an objection to its introduction into evidence made on the grounds that the same was incompetent, irrelevant, and immaterial. The ruling of the court was correct. The document offered purported to contain copies of official acts and regulations of a department of the United States. Of these the court takes judicial knowledge (section 1875, subd. 3, Code Civ. Proc.) and proof thereof by evidence is not required. Varcoe v. Lee, 180 Cal. 338, 181 P. 223. All questions of law and the construction of statutes and other writings are to be decided by the court; and whenever the knowledge of the court is made evidence of a fact, the court is to declare such knowledge to the jury. Section 2102, Code Civ. Proc. In charging the jury the court may state to them all matters of law which it thinks necessary (section 608, Code Civ. Proc.), and either party may request special instructions to be given covering any law pertinent and applicable to the case (section 609). If the regulations offered in evidence contained law pertinent to and controlling in the case, appellants were privileged to request special instructions thereon; but no such request was made. We have examined the regulations offered and find nothing therein of which the court was charged with judicial knowledge and which the court was called upon to declare to the jury. The flight of the planes herein mentioned was intrastate, and under the Federal Constitution and the California Aircraft Act enacted in 1929 (St. 1929, p. 1874), the state of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intrastate flights. No such rules had been made by the Legislature when the accident herein occurred, and

the conduct of the pilots and others involved in the accident would be measured and judged only under the general law and rules of negligence pertinent and applicable to the case.

[7, 8] 3. During the trial expert witnesses were called by respondents and objections by appellants to certain questions propounded to them were overruled. The first two sought to elicit definitions of aeronautic terms and were clearly proper. The others to which objections were made were of a hypothetical nature, and appellants contend they were not based in whole on facts in evidence and called for guess or conjecture rather than opinion. We have examined the same and find no error in the court's rulings which could in any degree be deemed prejudicial to appellants. The questions were predicated on assumption of facts, concerning which there was evidence, possessing supporting tendency, and were framed in accordance with respondents' theory of defense; and the questions and answers thereto were clearly in line with respondents' defenses.

[9] 4. Appellants also claim error in the admission in evidence over their objection of conversations between the director, Hawks, and James Granger, president of James E. Granger, Inc. We find no error in the court's rulings. The evidence elicited was clearly relevant and material to a clearer exposition of the facts touching the question of performance of the contract between the Fox Film Company and James E. Granger, Inc., and the acceptance and approval by the Fox Film Company of the arrangements for the hiring and use of the two planes and pilots made with Tanner Motor Livery.

[10-14] 5. At the close of the evidence and after all parties had rested, appellants each moved for a directed verdict in their favor, respectively, and all such motions were denied. Such motion may be made by a plaintiff where, upon the whole evidence, the cause of action alleged in the complaint is supported and no support is given to the defense or any of the defenses alleged by defendant. But such motion may not be granted where there is a conflict in the evidence of a substantial kind, relating either to the basis of plaintiff's cause of action or any defense thereto. Kohn v. National Film Corp., 60 Cal. App. 112, 212 P. 207. To authorize the granting of such a motion the evidence must be undisputed or of such conclusive character that the court, in the exercise of a sound discretion, would be compelled to set aside a verdict returned in opposition to it. The rule is established in this state that the ruling of a trial court as to whether a given state of facts presented before it does or does not amount to negligence as a matter of law will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649. The same rule of course attaches to the question of whether facts presented in support of a defense do or do not sustain the same. Under this rule, and after examination of the record herein, we cannot disturb the discretionary ruling of the court on the motions for directed verdicts. And for the same reasons, and based on the same foundation, we cannot disturb the court's ruling denying the subsequent motions for judgments in favor of plaintiffs notwithstanding the verdicts in favor of defendants. The foregoing conclusions apply with equal force to many specifications of insufficiency of the evidence to support various issues and defenses in the case, all of which were submitted to the jury on the evidence, which was either in conflict or of such character as to support different inferences reasonably to be based thereon.

[15, 16] 6. Respondents also made a motion for a directed verdict in each case, which was likewise denied. In their reply brief herein appellants contend that it is the law that when both parties move for a directed verdict the trial court is under the duty of taking the case from the jury. In support of this contention appellants cite a note in Ann. Cas. 1913C, page 1342, wherein the following appears: "The general rule seems to be that where both parties have requested the court to direct a verdict, and neither has asked to have any fact in issue determined by a jury, the parties will be presumed to have waived the right to a trial by jury, and to have constituted the judge a trier of questions both of law and of fact." A rather formidable list of authorities from other jurisdictions are therein cited in support of such statement of the rule: We are of the opinion that such rule cannot be invoked and applied under the Constitution and procedure and practice in California. Trial by jury may be waived only in the manner designated in section 631 of the Code of Civil Procedure, in which request by both parties for a directed verdict is not included. It has been held in this state that a jury trial cannot be waived by implication. Smith v. Pollock, 2 Cal. 92; Platt v. Havens, 119 Cal. 244, 51 P. 342; People v. Metropolitan Surety Co., 164 Cal. 174, 128 P. 324, Ann. Cas. 1914B, 1181. In Swasey v. Adair, 88 Cal. 179, 25 P. 1119, it was held that the right to a jury trial secured to a party under the provisions of section 592 of the

Code of Civil Procedure could be waived only by such party in one of the modes prescribed in section 631 of that code. Section 7 of article 1 of the Constitution of this state provides that: "The right of trial by jury shall be secured to all, and remain inviolate. * * * A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." The manner prescribed by law is that contained in section 631 of the Code of Civil Procedure. Under a practice similar to that of California, the Supreme Court of Illinois in Wolf v. Chicago Sign Printing Co., 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369, held that waiver of jury trial could not be had by implication, that motions for directed verdicts by both parties did not operate as a waiver of jury trial, and that the rule above quoted was inapplicable to the practice in Illinois. Clearly the rule quoted is not applicable under the law and practice in California.

7. Upon the issues framed by the pleadings, including several separate defenses, and under the evidence, the court gave instructions covering the doctrines of res ipsa loquitur, volenti non fit injuria, joint enterprise, inevitable or unavoidable accident and contributory negligence, in addition to general and special instructions usual in such cases as these. Appellants complain of many given at the request of respondents and of several refused on their own request. We have carefully examined the same as given and refused, both in respect to contents and in connection with the instructions as a whole, and find no error in the action of the court which would be likely to operate to the prejudice of appellants, excepting, however, from this statement, for purpose of separate consideration, certain instructions hereinafter discussed.

[17] Plaintiffs herein charged defendants with negligence in general terms, and introduced proofs tending to show that the two planes which came into collision were owned by defendant Tanner Motor Livery, which was engaged in the business of renting planes with licensed pilots as a private carrier, and that through James E. Granger, Inc., the Tanner Motor Livery had hired the two planes with pilots to the Fox Film Company, employer of the deceased persons represented herein by plaintiffs, to carry such persons as passengers for hire on a picture-making trip over the Pacific Ocean and return; that the planes collided in flight, resulting in the death of all the occupants thereof; and that the planes and pilots were at the time under the control of defendants. No explanation of the cause of the collision was furnished by plaintiffs' evidence, but such evidence clearly left it doubtful as to whether or not the ultimate cause of the collision was the negligence of the defendants. Under such state of the cases it was proper to instruct the jury as to the doctrine of res ipsa loquitur. Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; Damgaard v. Oakland High School Dist., 212 Cal. 316, 298 P. 983. At plaintiffs' request it gave the usual and approved form of such instructions setting forth the doctrine as defined and used in this state. Following such instruction, at the request of defendant Tanner Motor Livery, the court gave the following instructions: R3 in part: "In other words, the doctrine [res ipsa loquitur] is based upon the theory that the burden of showing exactly how the accident occurred should rest upon the person who has the better knowledge or means of knowledge as to how it did occur. Therefore, if both plaintiff and defendant have equal knowledge or equal means of knowledge as to how the accident occurred, the doctrine cannot apply. Likewise, if neither plaintiff nor defendant has any knowledge or means of knowledge as to how the accident occurred, the doctrine also cannot apply." R4 in part: "In order that the doctrine of res ipsa loquitur should apply to a given case the plaintiff must have first shown by a preponderance of the evidence that certain conditions existed; amongst these conditions are the following: * * * 4. The person against whom the doctrine is invoked must possess or have possessed superior knowledge as to the cause of the accident or must be or have been in a better position to obtain that knowledge, so that the duty of explaining the accident should, in fairness, rest upon him on account of that greater knowledge or greater means of knowledge." R8 in part: "The doctrine of 'res ipsa loquitur' does not apply to any of the following situations: * * * 5. Where the defendant or his agent has not now nor has had superior knowledge or means of knowledge of the cause of the accident. In any one or all the above cases the doctrine does not apply, and the happening of the accident raises no inference whatsoever of negligence on the part of any person, with the result that a plaintiff, to recover against a defendant, must prove by a preponderance of the evidence the actual cause of the accident and that said accident was caused by the negligence of that defendant."

[18-20] When the other conditions upon which the doctrine of res ipsa loquitur is

founded are established by evidence so as to make a prima facie case of negligence, the ultimate application thereof to a given case after the evidence is all in depends on the factor of explanation of cause of the accident. This explanation may be established by either party. Manuel v. Pacific Gas & Elec. Co., 134 Cal. App. 512, 25 P.(2d) 509. A prima facie case of negligence having been once established by the evidence under the operation of the doctrine in question, the duty devolves upon the defendant to explain how the accident occurred, and to show that he was without negligence or that it was the result of causes beyond his control, in order to secure relief from responsibility. Steele v. Pacific Electric R. Co., 168 Cal. 375, 143 P. 718. By giving the instructions above quoted the jury was told that no explanation by either party of the cause of the accident would make the doctrine inapplicable. This is not the law. The instructions quoted have the effect of entirely destroying the benefit of the doctrine in cases where neither party explains, or where each party has equal knowledge or means of knowledge of the cause of the accident. Under the qualification of the doctrine and its application as expressed in these instructions, all that a defendant need do to overcome the prima facie case would be to declare ignorance of the cause or show that the parties had equal knowledge or means of knowledge thereof, or that neither had any knowledge thereof. That this is not the rule has been decided in Ireland v. Marsden, 108 Cal. App. 632, 291 P. 912, 917, in which case a petition for hearing was denied by the supreme court. Therein the court said: "Does the fact that the defendant and all of his witnesses did not know the cause of the accident explain the occurrence so as to avoid the inference of negligence? * * * 'I do not know' does not explain anything; throws no light upon what causes an accident; is no explanation. Under the doctrine of res ipsa loquitur, defendant must explain in some degree, that degree being sufficient to rebut the inference of negligence, which comes to the aid of the plaintiff's cause under the doctrine of res ipsa loquitur."

[21-23] As the case of plaintiffs herein rested on the inference of negligence furnished by the doctrine in aid of plaintiffs' case, and depended for its continued vitality on failure of defendants to explain it away by showing that the accident happened without negligence on their part, or that it happened from causes over which they had no control, the effect of the instructions above quoted was highly prejudicial, as they operated to relieve defendants of the duty to so explain and to overcome or offset the inference of negligence supplied by the doctrine. The doctrine is in part founded on the *theory* that defendant possesses superior knowledge of the cause of the accident, not on the *fact* as to whether he does so possess it or not. And the doctrine once having attached under plaintiff's evidence, the inference of negligence arises thereunder and prevails unless it is offset or overcome by defendant's explanation.

The orders denying the motions for judgment notwithstanding the verdicts are affirmed. The judgments are reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 340

COATS v. GENERAL MOTORS CORPORATION et al.

Civ. 9035.

District Court of Appeal, First District, Division 1, California.

Dec. 26, 1934.

Rehearing Denied Jan. 25, 1935.

Hearing Denied by Supreme Court Feb. 21, 1935.

1. Master and servant ⇐55

Master is generally sole judge of his satisfaction with employee's services, irrespective of reasonableness of master's decision, if contract requires employee to perform to master's satisfaction.

2. Master and servant ⇐43

Employer given right by contract to discharge employee whose services are unsatisfactory to employer must act in good faith, and question is for jury if there is evidence that discharge was due to reasons other than dissatisfaction.

3. Corporations ⇐308(11)

Whether officer of operating corporation was dismissed because his service was unsatisfactory to executive committee of holding company operating stock bonus plan for employees and officers *held* question for jury under evidence in action brought by officer after discharge to recover value of bonus stock held for his benefit under contract permitting forfeiture thereof in case of discharge for unsatisfactory service.

4. Corporations ⇐308(3)

Promise of vice president and general manager of subsidiary of corporation operating stock bonus plan for employees and officers that officer of third corporation controlled by subsidiary would receive his stock, *held* not binding on parent corporation, in absence of evidence of express authority.

5. Evidence ⇐211

Statement of plaintiff's counsel on cross-examination that there was no desire to impute unfairness to defendant corporation's president *held* not an admission that defendant corporation acted in good faith in discharging plaintiff.

6. Evidence ⇐246

Mere incidental or ambiguous statements of counsel made informally are not binding on or admissible against client as admissions.

7. Evidence ⇐409

While release is generally within parol evidence rule, mere fact that it purports to be "in full of all demands" does not preclude admission of explanatory parol evidence.

8. Evidence ⇐458

Evidence of circumstances of execution of release is admissible for purpose of showing what matters entered into settlement, where writing is ambiguous.

9. Release ⇐58(1)

Intention of parties as to coverage of release is question of fact, where release is ambiguous and conflicting parol evidence is introduced in explanation thereof.

10. Evidence ⇐462

Parol evidence *held* admissible to show that written release given by beneficiary under corporation's stock bonus plan "in full settlement of bonus award" was given merely in settlement of beneficiary's claim to dividend stock, where corporation prepared instrument and had declared stock dividend and bonus plan gave beneficiary right to receive dividends (Civ. Code, §§ 1541, 1638, 1654).

11. Corporations ⇐308(11)

Delay of beneficiary under corporation's stock bonus plan in commencing suit to recover value of bonus stock following discharge did not bar recovery, where delay was for shorter period than statute of limitation.

12. Evidence ⇐265(1)

Effect of plaintiff's delay in commencing suit for period less than statute of limitation is for jury in considering weight of evidence.

13. Corporations ⇐308(1)

Failure of beneficiary under corporation's stock bonus plan to protest against treasurer's ruling requiring similar distribution of dividend and bonus stock did not preclude beneficiary from claiming that his release given corporation covered merely dividend stock, where his discharge followed shortly after treasurer's ruling.

14. Contracts ⇐170(1)

Practical construction placed on doubtful contract by parties is evidence of its meaning, and legal effect of unequivocal conduct of parties is for court's determination.

15. Release ⇐58(1)

Whether release given by beneficiary "in full settlement of bonus award" to corporation operating stock bonus plan covered all bonus stock or merely dividend stock *held* question for jury under evidence.

16. New trial ⇐97

Refusal of new trial on ground of surprise *held* not abuse of discretion, where defendant failed to apply for continuance during several days intervening between close of evidence and direction of verdict.

17. Trial ⇐139(1), 140(1)

Trial court in passing upon motion for directed verdict cannot weigh evidence or judge of credibility of witnesses.

18. Trial ⇐142

Trial court should not take case from jury unless it can be said as a matter of law that only one conclusion is reasonably deducible from evidence.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Fred N. Coats against the General Motors Corporation and others. From the judgment, plaintiff appeals, and defendant named cross-appeals.

Portions of judgment appealed from reversed.

Fitzgerald, Abbott & Beardsley, of Oakland, for plaintiff.

Pillsbury, Madison & Sutro, of San Francisco, and Donahue, Hynes & Hamlin, of Oakland (Alfred Sutro, Eugene M. Prince, and Eugene D. Bennett, all of San Francisco, and O. D. Hamlin, Jr., of Oakland, of counsel), for defendant General Motors Corporation.

Hearing denied by Supreme Court; WASTE, C. J., and PRESTON, J., dissenting.

PER CURIAM.

An action to recover the value of certain shares of corporate stock.

According to plaintiff's complaint, all the capital stock of Chevrolet Motor Company of California was owned by Chevrolet Motor Company, and all the capital stock of the lat-

ter corporation was owned by defendant General Motors Corporation.

Plaintiff on January 1, 1924, to January 1, 1926, inclusive, was employed by the California corporation as vice president and one of its general sales managers. He alleged: That in consideration of his services the defendants, pursuant to a bonus plan which they had adopted, awarded to him certain shares of the common stock of the General Motors Corporation. That these shares were so awarded during the years 1924, 1925, and 1926, it being agreed that certificates representing the same should issue as follows: One-quarter thereof at the time of the award and one-quarter on or about the 1st day of January of each year thereafter until all had been issued. That on or about September 11, 1926, the defendant General Motors Corporation declared a stock dividend on the stock previously awarded. It was further alleged that from time to time, pursuant to amendments to the articles of incorporation of the General Motors Corporation, stock of different par values and of different proportions was substituted for the stock previously authorized by its articles, and that, when he was discharged from defendant's employ, he was entitled to have issued to him 131 shares of dividend stock and 723¼ shares of bonus stock, and that defendants refused to deliver the same or any part thereof, to his damage in the amount of its market value with interest.

Defendants answered separately. They denied certain portions of plaintiff's complaint, and averred as a special defense that, under the stock bonus plan relied upon by plaintiff, all stock awards were subject to the condition that, should the employee be dismissed because of unsatisfactory service—of which the executive committee of General Motors Corporation was to be the sole judge—all stock which had not been issued to the employee reverted to the bonus fund, and that plaintiff was dismissed because of unsatisfactory service; further, that upon the termination of his employment certain money was paid to him, which he accepted in full payment and satisfaction of all his claims against defendant under the bonus plan.

It was stipulated at the trial that the shares claimed by plaintiff and which the General Motors Corporation refused to deliver were the property alleged in the complaint; further, that the value of the dividend shares was $25,395.73, and of the bonus shares $103,927.25, and that accruing interest had increased plaintiff's total claim to $129,323.18.

After a trial before a jury, the court directed a verdict in favor of plaintiff and against General Motors Corporation for the value of the dividend shares with interest, and in favor of said corporation in respect of plaintiff's complaint for the bonus shares. It also directed a verdict in favor of the other corporate defendants. The respective motions for a new trial made by plaintiff and defendant General Motors Corporation were denied.

Plaintiff has appealed from so much of the judgment entered upon the verdict as denies him the value of the bonus stock, and the General Motors Corporation has appealed from the portion in favor of the plaintiff and against it.

It was provided by a resolution of the board of directors of General Motors Corporation (which corporation adopted the bonus plan) that a bonus custodian should be appointed, to whom all stock allotted to each beneficiary should issue and by whom certificates should be delivered to the beneficiaries from time to time in accordance with the plan. The resolution further provided:

"Paragraph 5. If a beneficiary leaves the service of the corporation of his own volition, or is dismissed because of unsatisfactory service (of which the executive committee shall be the sole judge) that portion of his bonus represented at the time by the debit balance of his account shall revert to the bonus fund, and a certificate for the portion of his bonus represented by the total credits in his account shall be delivered to the beneficiary free from all restrictions, provided, however, that no fractional shares shall be issued. Any fractional share to which the beneficiary is so entitled shall be purchased at the then market value thereof out of the money in the bonus fund. All amounts forfeited by such beneficiary shall revert to the bonus fund.

"Paragraph 6. Should a beneficiary be dismissed from the service of the corporation for no fault of his own with an entirely satisfactory record (of which the executive committee shall be the sole judge) he may continue a beneficiary under the bonus plan to such an extent as the executive committee may determine. * * *

"Paragraph 8. Subject to the rights of the bonus custodian to retain possession of the stock certificates, or to transfer the stock as herein provided, an award shall vest the beneficiary with all the rights of a stockholder in the stock awarded, including the right to vote and to receive dividends thereon, but ex-

cepting, however, the right to sell, assign or pledge his interest in the stock."

On February 11, 1927, following plaintiff's discharge the executive committee of defendant General Motors Corporation (which corporation will be hereinafter referred to as the defendant), after reciting therein that plaintiff had left the service of the company, resolved "In view of the fact that the services of Mr. F. N. Coats were terminated January 1, 1927, because his work had not been satisfactory to the corporation all bonuses due him be canceled as of that date."

Defendant concedes that the awards of stock were not intended as gifts, but constituted compensation in addition to the employee's regular salary, and that, as to the percentage of the award which under the bonus plan was to issue at the time the award was made, the ownership thereof vested unconditionally in the employee, but, as to the remaining three-fourths, it is contended that an employee's right was qualified and conditional, and that upon his discharge because of unsatisfactory service his rights to all undelivered stock terminated.

As stated, the bonus plan provided that one-fourth of the bonus stock awarded should be immediately delivered, and the remainder in equal parts at the end of the first, second, and third years thereafter, and, further, that certificates for the undelivered stock should issue to a bonus custodian who should hold the same for the beneficiary. The latter was, however, required to execute to the custodian an irrevocable power of attorney, authorizing the retransfer of the undelivered stock in case the beneficiary should leave the service of the company or be dismissed. Subject to these provisions and paragraph 5 of the plan quoted above, the award vested in the beneficiary all the rights of a stockholder, including the right to vote the stock and to receive dividends thereon, but not "the right to sell, assign or pledge his interest in the stock."

[1] It is the general rule that a stipulation that the performance of a contract where fancy, taste, sensibility, or judgment are involved, and one party agrees to perform to the satisfaction of the other, the latter is the sole judge of his satisfaction without regard to the reasonableness of his decision (13 Cor. Jur. "Contracts," § 768, p. 675; 6 Cal. Jur. "Contracts," §§ 249, 250, pp. 417, 419), and the rule applies to the employment of servants (Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, 182 P. 428, 6 A. L. R. 1493; Van Demark v. Cal., etc., Ass'n, 43 Cal. App. 685, 185 P. 866; Schuyler v. Pantages, 54 Cal. App. 83, 201 P. 137; Brenner v. Redlick Furniture Co., 113 Cal. App. 343, 298 P. 62; Clark v. New England T. & T. Co., 229 Mass. 1, 118 N. E. 348; Joseph Campbell Preserve Co. v. Holcomb, 67 Kan. 48, 72 P. 552, 554; Liebenor v. Philippine Vegetable Oil Co., 37 Philippine, 60). The relation of master and servant is private, confidential, intimate, and personal, and a stipulation that an employee is to perform the duties of his position so as to be deemed satisfactory to his employer is equivalent to an agreement that his engagement is dependent upon his service being agreeable to the employer. Glyn v. Miner, 6 Misc. 637, 27 N. Y. S. 341; Kramer v. Wien, 92 Misc. 159, 155 N. Y. S. 193. It was said in Tiffany v. Pacific Sewer Pipe Co., supra, that the reasonableness of the employer's dissatisfaction should seldom be a question for the jury unless there are special provisions in the contract or extraordinary circumstances in the situation of the contracting parties requiring such a construction of the contract. In that case, however, as pointed out by the court, there was evidence of dissatisfaction with the quality of the employee's work and no sufficient evidence to the contrary.

[2] It is equally well settled that the employer must act in good faith; and, where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question is one for the jury. Trevellick v. Western, etc., Ass'n, 237 Ill. App. 493; Chicago, etc., Ry. Co. v. Blanchard, 35 Ill. App. 481; Gwynne v. Hitchner, 67 N. J. Law, 654, 52 A. 997; Summers v. Colver, 38 App. Div. 553, 56 N. Y. S. 624; Diamond v. Mendelsohn, 156 App. Div. 636, 141 N. Y. S. 775; Beiner v. Goetz, 81 Misc. 244, 142 N. Y. S. 530; George A. Fuller Co. v. Brown (C. C. A.) 15 F.(2d) 672; McCartney v. Badovinac, 62 Colo. 76, 160 P. 190, L. R. A. 1917A, 1146; Winship v. Colbath, 123 Me. 70, 121 A. 236.

[3, 4] Plaintiff claims that there was evidence sufficient to support a finding in his favor on this issue, and that consequently the direction of a verdict in favor of the defendant was erroneous.

The evidence on which he relies consists of certain letters which he received during the years 1923, 1924, 1925, and 1926 from Sloan, the president of defendant, announcing the awards of bonus stock and commending his work. The last letter from the president was dated December 7, 1926; and, in addition, he received during the same month a letter from the president of the Chevrolet Motor

Company, stating his appreciation of plaintiff's work during the year 1926. Shortly after the receipt of the letters mentioned plaintiff was notified to attend a sales conference of the zone managers of the Chevrolet Company at Detroit, where he arrived on January 2, 1927. Upon his arrival he was told by Grant, the vice president and general manager of the last-named company, who was plaintiff's immediate superior, that he had decided to make a change of management on the Pacific Coast. Plaintiff testified that Grant stated that he personally had no fault to find with plaintiff's work, but that "there has been so much pressure brought to bear upon me from the higher-ups in the General Motors that I don't feel that I can go against it any longer"; further, that Grant then assured him that he should receive the stock which had theretofore been awarded to him but not delivered. Grant was not an officer of the General Motors Corporation. Plaintiff also narrated a conversation between himself, Knudsen, and Grant in July, 1925, wherein the latter stated in substance that one Fisher, a member of the executive committee of the defendant company, was dissatisfied because plaintiff had refused to give the exclusive agency for Chevrolet cars in Los Angeles to one Baldwin, one of Fisher's friends. Grant testified in this connection that complaint had been made by Baldwin to Fisher regarding plaintiff's business methods. In his brief plaintiff refers to two letters dated in December, 1926, which passed between the president of defendant company, who was also a member of its executive committee, and another member of the same committee, questioning plaintiff's qualifications for the position he held. The two concluded that the question of plaintiff's retention should remain in abeyance pending further investigation. The record contains no direct evidence that in making their finding that plaintiff's discharge was due to dissatisfaction with his services the committee was not acting in good faith. However, plaintiff contends that this might reasonably be inferred, from Sloan's statements and the previously expressed satisfaction with his services by Knudsen and Grant, that there was no dissatisfaction with his work, and that his discharge was the result of his refusal to grant the privileges mentioned to Baldwin.

In the absence of evidence of his authority, the promise by Grant, who was an officer of a subsidiary controlled by defendant corporation, that plaintiff should receive the stock, was not binding on the latter corporation or the executive committee. 14a Cor. Jur. "Corporations," § 1862, p. 94; Campbell v. Hanford, 67 Cal. App. 155, 227 P. 234. The same rule applies to the president or manager of the corporation. 6a Cal. Jur. §§ 655, 657, 659, pp. 1153, 1159, 1160; Black v. Harrison Home & Co., 155 Cal. 121, 99 P. 494. Nevertheless both Knudsen and Grant were plaintiff's immediate superiors, and appear to have had authority to employ or discharge persons holding positions of the kind occupied by plaintiff with the Chevrolet Companies. As testified by Sloan, the chief executive of Chevrolet Motor Company "had complete authority" over all the operations of the Chevrolet Motor Company of California, and he (Sloan) had none except through the chief executive. Sloan also testified, "I am in a sense in the relationship to the chief executive as a large stockholder would be to a corporation, but he operates on his own initiative," and, further, that the recommendation as respects plaintiff's discharge and the matter of his unmatured bonuses came from the executive mentioned, and that the executive committee would not necessarily know that the discharge of an employee was contemplated or the fact of his discharge until after the event.

While the testimony of Sloan and the other witness called by defendant taken most favorably to the latter would justify the finding of the executive committee, the jury would not have been bound by this testimony; and sufficient appears to justify the conclusion that plaintiff's discharge was not due to dissatisfaction with his services rendered the company or companies by which he was employed but to dissatisfaction with his business policy by a member of the committee who sought an advantage for the benefit of his friend. There being evidence tending to show this, the question, other things being equal, would be for the jury.

[5, 6] In this connection defendant claims that a remark by plaintiff's counsel during the cross-examination of the witness Sloan, whose deposition was being taken, constituted an admission that defendant acted in good faith.

The witness was asked if the cancellation or continued delivery of bonus stock to a discharged employee was determined by the arbitrary will of the executive committee. The witness excepted to the use of the word "arbitrary" as implying unfairness, and counsel replied: "There is no desire to impute that to you, Mr. Sloan." Mere incidental or ambiguous statements by counsel will not bind or

be admissible against the client where there is no such formality in the making of the statements as to indicate an intention that they should be taken as admissions. Obviously such was not the purpose here, and the remark lacked the force or effect of an admission. Thornton, Attorneys at Law, vol. 1, pp. 343, 346; Wutchumna Water Co. v. Pogue, 151 Cal. 105, 109, 90 P. 362; Bakersfield, etc., R. R. Co. v. Fairbanks, etc., Co., 20 Cal. App. 412, 414, 129 P. 610; Adelstein v. Greenberg, 77 Cal. App. 548, 247 P. 520; Sichterman v. R. M. Hollingshead Co., 117 Cal. App. 504, 4 P.(2d) 181; Dollar v. Northwestern Improvement Co., 72 Wash. 1, 129 P. 578, 580; McKeen v. Gammon, 33 Me. 187.

In March, 1927, the plaintiff received from the defendant a check for $41.88 in lieu of a fractional share of its common stock to which, according to defendant's interpretation of the bonus plan, plaintiff was entitled. At the same time he signed a writing which was as follows:

"Settlement:

"The undersigned beneficiary, having examined the above statement, hereby acknowledges the receipt from the bonus custodian of General Motors Corporation of the following securities or cash (or both) in full settlement of bonus awards:

"Check No. 5409 to the order of the undersigned $41.88.

"Certificate of General Motors Corporation stock.

"Number Shares Class

"(Sign here) (signed) Fred N. Coats.

"(Sign exactly as name appears at top of page.)

"Witness (signed) L. E. Whitmere

"Date March 30, 1927."

[7-9] Attached was a statement showing the bonus stock awarded and issued to plaintiff and also of the dividend stock. A letter from defendant addressed to a bank which delivered the check referred to the same as "covering final bonus settlement." Defendant contends that the writing constituted a release of all claims both to bonus and dividend stock, and was sufficient to have this effect without a new consideration. Civ. Code, § 1541. Plaintiff testified that he had previously received other checks covering fractional shares which under the bonus plan defendant had the right to purchase; that he understood the writing to be merely a receipt for another fractional share to which he was entitled.

Part performance of an obligation either before or after breach, when expressly accepted by the creditor in writing in satisfaction though without any new consideration, extinguishes the obligation (Civ. Code, § 1524); and it has been held that no particular form or set of words is essential to the validity of a release either at law or in equity (53 Cor. Jur. "Release," § 5, p. 1197). Usually a release is an instrument of such a contractual nature that it is within the rule prohibiting parol evidence to vary or contradict it. 22 Cor. Jur. "Evidence," § 1526, p. 1140. But such a writing may be so similar in its character to a receipt that the rules of evidence applicable to receipts may be applied, and it may be explained, qualified, or contradicted by parol. San Pedro Lumber Co. v. Schroeter, 156 Cal. 158, 103 P. 888; Carpenter v. Markham, 172 Cal. 112, 155 P. 644. While ordinarily a receipt in full if uncontradicted or unexplained stands as conclusive (McKenzie v. Ray, 168 Cal. 618, 143 P. 1018), the mere fact that it expresses on its face that it is "in full of all demands" or of certain demands does not make it of such a contractual nature as to preclude admission of parol evidence (22 Cor. Jur. "Evidence," § 1525, p. 1140; Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86; Jersey Island, etc., Co. v. Whitney, 149 Cal. 269, 86 P. 509, 691). Moreover, the general rule for the interpretation of contracts applies to writings alleged to have the effect here claimed (22 Cal. Jur. "Releases," § 10, p. 760) as well as to receipts (Brown v. Crown Gold Milling Co., supra); and, where the intention is ambiguously expressed, the writing must be construed most strongly against the party who drew it (Civ. Code, § 1654). In such cases evidence of the circumstances of its execution is admissible [First National Bank v. Bowers, 141 Cal. 253, 74 P. 856; Lemm v. Stillwater L. & C. Co., 217 Cal. 474, 19 P.(2d) 785] for the purpose of showing what matters entered into the settlement (Jersey Island, etc., Co. v. Whitney, supra; Snyder v. Regan, 5 Cal. App. 64, 89 P. 852; Cal. Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507, 92 P. 509). And where conflicting parol evidence in explanation is introduced, the question is one for the jury. Davis v. Diamond Carriage, etc., Co., 146 Cal. 59, 79 P. 596; Brusseau v. Potter's Estate, 217 Mich. 165, 185 N. W. 836; Feldman v. Comensky (Mo. App.) 249 S. W. 430; Edblad v. Brower, 178 Minn. 465, 227 N. W. 493. This rule is not affected by the claim that the writing constituted an accord and satisfaction. The

question of intention in such cases is one of fact [Lewis v. Covillaud, 21 Cal. 178; Everhardy v. Union Finance Co., 115 Cal. App. 460, 1 P.(2d) 1024], and the writing is open to explanation (Carpenter v. Markham, supra; Pacific Coast Casualty Co. v. Home Telephone, etc., Co., 11 Cal. App. 712, 106 P. 262).

[10] We are satisfied that under the above rules evidence in explanation or qualification of the writing in question was admissible. This is peculiarly true with respect to the contention that it was the intention to make a final settlement of plaintiff's claim to the dividend stock. As shown by paragraph 8 of the bonus plan, those receiving bonus stock subject to the powers of the bonus custodian and the restriction upon the power of the beneficiary to sell, assign, or pledge his interest in such stock were given "all the rights of a stockholder therein * * * including the right of * * * to receive dividends." A number of cash dividends on the bonus stock awarded plaintiff were declared and paid in full; the stock dividend was the only one of the kind during the period of plaintiff's employment and was declared on August 12, 1926, a little over four months prior to plaintiff's discharge. It is not contended that this or the other dividends were not declared from profits earned by the defendant; and the dividend declared on the above date was not confined to bonus stock. So far as shown, the directors in declaring the same made no attempt by their resolution to limit the rights of the holders of such stock to receive the dividend in full in the same manner as other shareholders. On September 9, 1926, after the stock dividend was declared, a letter from the treasurer of defendant company was addressed "to beneficiaries under the bonus plan of the General Motors Corporation." Therein they were told that the stock dividend so far as they were concerned would be distributed according to the method pursued under the bonus plan for the delivery of the bonus stock. The letter stated that "the consistent operation and execution of the provisions of the bonus plan" required this. No authority for this course appears, but the defendants contend that the bonus plan indicates an intention that such dividends should be withheld in the same manner as the bonus stock. The bonus plan makes no mention of stock dividends, but, as stated, it does with specific exceptions give to owners of bonus stock, whether the same be delivered or not, all the rights of stockholders therein, "including the right to receive dividends." The language appears clear and explicit and should govern accordingly. Civ. Code, § 1638. Moreover, it being conceded that the plan was prepared and its language chosen by defendant, it must in case of uncertainty be interpreted most strongly against it. Civ. Code, § 1654. We are unable to find anything in the wording of the plan which reasonably supports the conclusion that stock dividends were to be treated in any manner different from other dividends, or that it was the intention that either should be withheld from the beneficiaries.

Plaintiff claims that, if defendant had the right to terminate his interest in the bonus stock, the evidence shows that this was waived, or that defendant was estopped to assert it. This is based upon statements by Grant and Sloan which are referred to above; but neither was shown to have had authority to bind the corporation or its committee by any promises or declarations with respect to the bonus plan, nor does the record disclose any facts which would estop the defendant, as no act of the corporation preceding or following his discharge can reasonably be said to have caused him to change his position or to rely thereon to his detriment. The corporation's right to discharge the plaintiff is not disputed, and he was informed of its action immediately thereafter, namely, on January 2, 1927.

[11-13] The defendant claims that plaintiff's delay in the commencement of his suit and his conduct preceding and following his discharge show that he acquiesced in the company's action, and that the allegations of his complaint tend to show that no distinction was made by either party between the bonus and dividend stock.

Even in equity mere delay in commencing suit for a period less than that limited by statute is no ground for refusing relief unless prejudice is shown (Newport v. Hatton, 195 Cal. 132, 231 P. 987), and in actions at law the statute rather than laches furnishes the rule of decision (Brownrigg v. De Frees, 196 Cal. 534, 238 P. 714; San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 239 P. 319). If relevant as a fact in the nature of an implied admission tending to cast doubt on the existence of plaintiff's alleged right, the question of its weight was for the jury. 22 Cor. Jur. "Evidence," §§ 507, 508, p. 426; McGregor v. Knowlden, 102 Cal. App. 42, 282 P. 438. The same is true of the fact that plaintiff made no protest against the treasurer's declaration that the distribution of dividend stock should be governed by the same rules as the bonus stock. In this connection it was shown that plaintiff's employ-

ment terminated very shortly after the declaration, and under the circumstances we cannot say that he was precluded by his silence.

[14-16] As urged by defendant, the practical construction placed upon a doubtful contract by the parties is evidence of its meaning (6 Cal. Jur. "Contracts," § 184, p. 304; Lemm v. Stillwater L. & C. Co., supra), and the legal effect of the conduct of the parties where it is not equivocal is for the court to pronounce (Creighton v. Gregory, 142 Cal. 34, 75 P. 569; Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 134 P. 989). It has been held that, where undisputed extrinsic facts and circumstances are introduced to aid in the construction of a contract, it is the duty of the court and not the function of the jury to consider the instrument in the light of such evidence. Cal. W. D. Co. v. Cal. M. O. Co., 178 Cal. 337, 177 P. 849; O'Connor v. West Sacramento Co., 189 Cal. 7, 207 P. 527, 532. As stated in the O'Connor Case, "if such circumstances are in dispute, and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury." As observed by Professor Williston (Williston on Contracts, § 616): "It is obvious that the meaning of language is a question of fact. The code or standard by which it is sought to test the meaning must be discovered frequently by evidence of the facts and circumstances concerning the making of the contract. Even though the question concerns merely the normal meaning of a word as found in the dictionaries, it is still a question of fact if the word fact is used in a literal sense. But, as Professor Thayer has said, (Preliminary Treatise on Evidence, 202), 'the judges have always answered a multitude of questions of ultimate fact, of fact which forms part of the issue. It is true that this is often disguised by calling them questions of law.' The reason for this seems to have been a distrust of the jury's ability to answer questions of fact which call for nice discrimination—an educated mind. The construction of written documents has largely been withdrawn from the jury in this way. The general rule is that construction of a writing is for the court. Where, however, the meaning of a writing is uncertain or ambiguous, and parol evidence is introduced in aid of its interpretation, the question of its meaning is for the jury." See, also, Page on Contracts (2d Ed.) § 2022; Hope v. Maccabees, 91 N. J. Law, 148, 102 A. 689, 1 A. L. R. 455; Waldrep v. Exchange State Bank, 81 Okl. 162, 197 P. 509, 14 A. L. R. 747; Geoghegan Sons & Co. v. Arbuckle Brothers, 139 Va. 92, 123 S. E. 387, 36 A. L. R. 399. That the question is essentially one of fact has also been recognized in principle by the courts of this jurisdiction. Kautz v. Zurich, etc., Ins. Co., 212 Cal. 576, 300 P. 34; Thompson v. Leak, 135 Cal. App. 544, 27 P.(2d) 795.

The same rule with respect to the function of a jury applies where the question is the construction placed upon a writing by the parties and their acts in that connection are equivocal or reasonably susceptible of different interpretations. Thompson, Trial (2d Ed.) § 1081; Page on Contracts (2d Ed.) §§ 2063, 2064; 64 Cor. Jur., Trial, § 353, p. 363; Reissner v. Oxley, 80 Ind. 580; Reedy Elevator & Mfg. Co. v. Mertz & Hale, 107 Mo. App. 28, 80 S. W. 684; Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137; Camp v. Wilson, 97 Va. 265, 33 S. E. 591. This is in accord with the general rule that, although there is no conflict in the evidence, if the inferences fairly deducible therefrom are such that different conclusions might rationally be drawn, the conclusion reached by the jury will not be disturbed. 2 Cal. Jur. "Appeal and Error," § 549, p. 934.

We find no error in the court's denial of the defendants' motion for a new trial on the ground of surprise. The affidavits on this question were conflicting. That filed on behalf of plaintiff shows sufficiently that defendants' counsel was apprised of the matters of which he complains. Moreover, it appears that all the evidence in the case was in at noon on November 10, 1932; the motions for directed verdicts were argued during the afternoon of that day and on November 13. On the following Monday a verdict was directed. There was ample time for an application for relief by way of continuance, but no motion therefor was made. Under the circumstances, we cannot say that the denial of a new trial was an abuse of discretion. 20 Cal. Jur. "New Trial," §§ 53, 141, pp. 75, 216.

We are satisfied in view of the evidence that different inferences might fairly be drawn therefrom, even in the many instances where the same was not directly conflicting, and that conclusions either way would be supported. Such being the case, the issues should have been determined by the jury, and a directed verdict was erroneous.

[17, 18] In passing upon a motion for a directed verdict the trial court may not weigh the evidence or judge of the credibility of the

witnesses; and, unless it can be said as a matter of law that there is but one conclusion reasonably deducible from the evidence, the trial court is not justified in taking the case from the jury. Estate of Flood, 217 Cal. 763, 21 P.(2d) 579.

The portions of the judgment appealed from are reversed.



3 Cal.App.2d 374

KEMPTON et al. v. APPELLATE DIVISION OF SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 10066.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

1. Courts ⇐164

Where complaint in municipal court did not allege that note set out in complaint was secured by deed of trust, though note so stated, municipal court had jurisdiction of cause of action as set forth in complaint, and fact that note was secured by trust deed would be affirmative defense which must be pleaded.

2. Courts ⇐190(1)

Right of appeal from municipal court to superior court *held* to preclude certiorari sought in District Court of Appeal on claim that municipal court exceeded jurisdiction (Code Civ. Proc. § 1068).

3. Certiorari ⇐1
Courts ⇐190(1)

Where petition for certiorari in District Court of Appeal alleged that respondent municipal court exceeded jurisdiction in granting judgment, but did not allege that superior court, also made a party respondent, exceeded its jurisdiction in affirming municipal court's judgment, writ could not be granted against superior court nor against municipal court; the proceeding being attempt to obtain second review of municipal court's judgment on matters reviewed by court of competent appellate jurisdiction (Code Civ. Proc. § 1068).

4. Courts ⇐190(½)

In certiorari proceeding based on alleged lack of municipal court's jurisdiction, private parties *held* not proper parties respondent, since writ lies only to review action of a tribunal, board, or officer exercising judicial functions (Code Civ. Proc. § 1068).

Certiorari proceeding by James B. Kempton and another against the Appellate Division of the Superior Court in and for Los Angeles County and others.

Petition dismissed.

James E. Pawson, of Long Beach, for petitioners.

Roderick M. Sherwood, of Long Beach, for respondents Ward.

Everett W. Mattoon, County Counsel, of Los Angeles, for respondents Municipal Court of Long Beach and Appellate Division of Superior Court.

CRAIL, Justice.

[1] Petitioners seek a writ of certiorari contending that the municipal court of Long Beach exceeded its jurisdiction in granting judgment on a complaint wherein a promissory note was set up in hæc verba, and which note contained the following recital: "This note is secured by a deed of trust." There was no allegation in the complaint that the note was so secured. Judgment went by default, and there were no findings of fact. The evidence upon which the judgment was obtained is not before us. An appeal was taken by petitioners herein from the judgment of the municipal court to the superior court of Los Angeles county, and was affirmed.

The municipal court had jurisdiction of the parties and the cause of action as it was set forth in the complaint. That the note was secured by a trust deed would be an affirmative defense which must be pleaded. Hibernia S. & L. Soc. v. Thornton, 117 Cal. 481, 49 P. 573. In such an action, if the pleadings raise no issue regarding security, a finding that the debt was secured would be outside the issues and would not sustain a judgment for the defendant. If the defendant had set up the alleged trust deed in bar of the action, it is possible that the plaintiff might have shown that a right to recover on the note existed nevertheless (18 Cal. Jur. 248; Crescent Lumber Co. v. Larson, 166 Cal. 168, 135 P. 502), and even then the municipal court would have had jurisdiction to determine the fact as to whether the note was secured.

[2] So far as the municipal court is concerned, the writ must be denied for the reason that the right of appeal precludes the right to a writ of certiorari. Section 1068, Code Civ. Proc.; Denninger v. Recorders' Court, 145 Cal. 629, 79 P. 360.

[3] While the superior court of Los Angeles county is made a respondent, there is no allegation in the petition that that court exceeded its jurisdiction. On the contrary, it was the petitioners herein who invoked the jurisdiction of that court, and the action it took was upon the insistence of petitioners for action. This proceeding is an attempt to obtain a second review, not of the judgment of the superior court, but of the judgment of the municipal court upon matters which have been reviewed by a court of competent appellate jurisdiction. Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317. Before the writ of certiorari be granted against the superior court, there must have been an excess of jurisdiction by that court. 4 Cal. Jur. 1022.

[4] The private parties who are made respondents herein are not proper parties in a petition for writ of certiorari, for the reason that the function of the writ is limited to a review of a tribunal, board, or officer exercising judicial functions. Code Civ. Proc. § 1068.

Petition dismissed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.

3 Cal.App.2d 395

In re JONES' ESTATE.

SENNING et al. v. WARD.

Civ. 9958.

District Court of Appeal, Second District, Division 1, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 28, 1935.

1. Adoption ⇐21

In determining right of adopted child to inherit, courts must look to laws of succession and statutes on adoption, and statutes of adoption must be read into succession laws (Probate Code, §§ 108, 225, 257; Civ. Code, §§ 228, 229).

2. Wills ⇐506(5)

Under will bequeathing testatrix' estate to her husband or his heirs, adopted daughter of brother of testatrix' husband *held* not entitled to take, since she was not an "heir" of testatrix' husband (Probate Code, §§ 108, 225, 257; Civ. Code, §§ 228, 229).

> The word "heirs" means the persons who would be entitled to succeed at decedent's death to his estate in case of intestacy, by virtue of statutes relative to succession, and the term is also defined as those whom the law appoints to succeed to decedent's estate in case he dies without disposing of it by will.
>
> [Ed. Note.—For other definitions of "Heirs," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Proceeding by Winifred Alden Senning and another against Spencer Ward, guardian ad litem of Helen Elaine Jones, otherwise known as Odessa Belle Jones, to contest the will of Isabelle S. Jones, deceased. From an adverse judgment, contestants appeal.

Reversed.

Sylvester Hoffmann, Mitchell, Silberberg & Knupp, and Ross R. Hastings, all of Los Angeles, for appellants.

William A. Conover, of Los Angeles, for respondent.

HAHN, Justice pro tem.

Isabelle S. Jones died in Los Angeles county, of which she was a resident, on December 7, 1931, leaving a will dated March 17, 1915, which contains the following paragraph: "Second: After the payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved husband, Charles E. Jones, or his heirs, all my property, of every nature and description, real, personal and mixed, wherever situated."

Charles E. Jones, husband of testatrix, predeceased her in 1927. At the time of his death he left as next of kin his father, Wm. R. Jones, two brothers, George A. Jones and Harry L. Jones, and a niece, Winifred Alden Senning, a daughter of a predeceased sister.

Prior to the death of the testatrix, W. R. Jones, father, and Harry L. Jones, brother of Charles E. Jones, died. Harry L. Jones died without blood issue, but leaving an adopted daughter, Helen Elaine Jones, respondent herein. Upon a hearing of petitions of both appellants and respondent to deter-

mine interest in the estate of Isabelle S. Jones, the court found that respondent Helen Elaine Jones was the legally adopted daughter of Harry L. Jones, and therefore was entitled to receive one-third of the estate of Isabelle S. Jones. From this part of the judgment, George A. Jones, brother, and Winifred Alden Senning, a niece of Charles E. Jones, deceased, whose right to receive the other two-thirds of the estate is not questioned, prosecute this appeal, urging two grounds for a reversal of the judgment: First, that the evidence does not support the finding that Helen Elaine Jones was the legally adopted daughter of Harry L. Jones; and second, even if she were such adopted daughter, she is not an heir of Charles E. Jones, and therefore not entitled to share in the estate of Isabelle S. Jones.

In view of our conclusion on the second point raised by appellants, which necessarily disposes of the appeal, we will proceed at once to the primary question: Is respondent Helen Elaine Jones an heir of Charles E. Jones?

[1] In finding an answer to this query, we must look to our laws of succession and our statutes on adoption. In re Estate of Watt, 179 Cal. 20, 175 P. 415; Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547, 549; In re Estate of Pence, 117 Cal. App. 323, 4 P.(2d) 202.

Section 108 of the Probate Code reads as follows:

"*Disposition to Heirs, etc. Words of Donation.* A testamentary disposition to 'heirs,' 'relations,' 'nearest relations,' 'representatives,' 'legal representatives,' 'personal representatives,' 'family,' 'nearest (or next) of kin' of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of division II of this code. Such terms are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person."

"The word 'heirs' * * * means the persons who would be entitled to succeed at his death to his estate in case of intestacy, by virtue of our statutes relative to succession." In re Estate of Wilson, 184 Cal. 63, 193 P. 581, 582; Ginochio v. San Francisco, 194 Cal. 159, 228 P. 428; In re Estate of Watt, supra.

"The 'heirs' of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will." Hochstein v. Berghauser, supra.

Section 225 of the Probate Code relating to succession reads as follows: "*No Surviving Spouse nor Issue.* If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representation."

Sections 228 and 229 of the Civil Code and section 257 of the Probate Code, which determine the legal relation of the adopted child to the blood and adoptive parents after adoption, read as follows:

"§ 228. *Effect of Adoption.* A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

"§ 229. *Effect on Former Relations of Child.* The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."

"§ 257. *Adopted Child.* An adopted child succeeds to the estate of one who has adopted him, the same as a natural child; and the person adopting succeeds to the estate of an adopted child, the same as a natural parent. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption, nor does such natural parent succeed to the estate of such adopted child."

In Re Estate of Pence, 117 Cal. App. 323, 4 P.(2d) 202, in considering the claim of an adopted son to share in the estate of the sister of the predeceased adoptive parent, this court held he had no right to so inherit, because, under the provisions of the statutes of adoption and our laws of succession, his right of inheritance was limited to the estate of his adoptive parent, and that he was not an heir of his aunt by adoption.

In the case of In re Estate of Darling, 173 Cal. 221, 159 P. 606, 608, after a comprehensive survey of the authorities from this and other jurisdictions on the question of the right of an adopted child to inherit from blood and adoptive parents and the kin of such parents, the court says: "So far as we have been able to find, there is no decision given under statutes anything like ours, to

the effect that the adopted child has any right of inheritance as to the ancestors or collateral kindred of the adopting parents, or is deprived by the adoption of any right of inheritance that he had as to the ancestor and collateral kindred of his parents by blood." This limitation of relation, so far as it affects the right of inheritance, has been given recognition by the commonly expressed declaration that an adopted child may inherit from his adoptive parent but not through him. In re Estate of Pence, supra; In re Estate of Darling, supra.

In 1 Corpus Juris, 1401, it is said: "In a few states the statutes expressly provide that an adopted child may inherit from certain relatives of the adoptive parent. In the absence, however, of such special provision, an adopted child cannot inherit from the collateral kindred of its adoptive parent, nor from the ancestor of such parent, nor from his natural children."

In the case of Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585, 588, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, in discussing this question, the court said: "In fact, it may be laid down as a general conclusion that, while the statute of adoption must be read into the statute of dower and that of descent and distribution, it is with this singularity, always to be observed, viz., that the adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent, and the door to inheritance is shut and its bolt shot at that precise point."

To the same effect is the holding in Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; Estate of Sunderland, 60 Iowa, 732, 13 N. W. 655; Merritt v. Morton, 143 Ky. 133, 136 S. W. 133, 33 L. R. A. (N. S.) 139. In the following cases the right of an adopted child to inherit from the brother of a predeceased adopting parent was denied: Van Derlyn v. Mack, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879; Moore v. Estate of Moore, 35 Vt. 98; Hockaday v. Lynn, supra.

Respondent takes the position that the question of her right of inheritance in the intestate estate of Charles E. Jones is not germane to the question here involved, as she claims her right to take, not "by inheritance or substitution, but by virtue of the very force and vigor of the will and intention of the testatrix as expressed in her will and in the language of the succession statutes as an aid to her will."

In support of her position, respondent cites among a number of cases that of Dickey v. Walrond, 200 Cal. 335, 253 P. 706. The court in that case had for decision the sole question as to the quantum of estate the appellant was entitled to take as an heir of his wife. The question arose after her death in connection with the distribution of a trust estate created by the will of W. J. Dickey, first husband of decedent. The devise in the will of W. J. Dickey, upon termination of a trust therein created, was to his wife, or, in the event of her death before the termination of the trust, "to her heirs at law." The trial court distributed the trust estate in equal shares to appellant and the three sons of his deceased wife. In sustaining appellant's contention that as an heir of his wife under the statute of succession he was entitled to one-third of the estate, the court declared that the heirs took under the will, "not by virtue of their relation to her (deceased wife of appellant) but as a designation of persons to take originally in their own right."

[2] Conceding, as we do, the authority of this declaration in the interpretation of the language there under consideration, and conceding that the quoted language may well be applied to the devise before us, it does not provide an answer to the question here presented, for we have the element of adoption as a vital factor in the instant case which was not involved in the Dickey Case, and the additional fact that we are not seeking to determine the heirs of a deceased spouse and parent, as was the question in the cases cited by respondent, but the heirs of a collateral kin by adoption. Our statutes of adoption, according to the weight of authority, must be read into our succession laws, and, when so considered, we find a barrier erected as against an adopted child which precludes him from being included among the heirs of any kin of the adoptive parents.

Hence, in determining who are the heirs of Charles E. Jones, whether it be for the purpose of distributing an estate to persons designated "to take originally in their own right," or for the purpose of determining who have a right of inheritance in his estate, recourse must be had to the same rule or measure, to wit, the law of succession and the statutes of adoption. If because the statutes of adoption when read into the law of succession close the door to Helen Elaine Jones, adopted daughter of Harry L. Jones, deceased, so that she has no right of inheritance in the estate of her adoptive uncle, then, by the same token, she is shut out from being in-

cluded as one of his heirs. It is because one is an heir of a deceased person dying intestate that he is given the right of inheritance in such estate, and, conversely, if he is denied such right of inheritance, it is because he is not an heir.

We therefore conclude on this branch of the appeal that the trial court erred in decreeing that respondent Helen Elaine Jones was entitled "to a one-third distributive share of said estate."

Inasmuch as our conclusion on the question discussed requires a reversal of the judgment, a discussion of the point urged by appellant that the adoption proceedings were defective, and therefore that respondent was not the legally adopted daughter of Harry L. Jones, would seem unnecessary.

In view of the fact that our decision is upon a question of law which is determinative of the right of the parties, a new trial of the cause will serve no useful purpose. It is therefore ordered that the judgment and decree is reversed, and that the trial court enter a judgment decreeing that Helen Elaine Jones, respondent, is not entitled to any share in said estate, and that appellants are entitled thereto in equal shares.

We concur: HOUSER, Acting P. J.; YORK, J.

CITY OF LONG BEACH v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 10026.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Hearing Denied by Supreme Court Feb. 28, 1935.

1. Municipal corporations ⇨57

City of Long Beach is, in all municipal affairs, subject only to provisions of its charter and the Constitution.

2. Municipal corporations ⇨79

Creation and organization of police department of city of Long Beach is a municipal affair, and provisions of city charter prevail over the general law.

3. Master and servant ⇨364

Employee of private detective agency, who was injured while attempting to assist police officers of city of Long Beach in making arrest, was not "employee" of city so as to be entitled to compensation therefrom, where he was not employed on authority of city manager as provided in city charter (St. 1931, p. 2068, § 8).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

4. Master and servant ⇨364

Compensation Act should be liberally construed, but no governmental agency may extend its provisions so as to include injury to a person not employed by city as required by charter (St. 1917, p. 877, § 69).

Proceeding under Workmen's Compensation Act by Verlin K. Agal, claimant, opposed by the City of Long Beach. Petition by the City of Long Beach to review a decision of the Industrial Accident Commission awarding compensation to claimant.

Award annulled.

Geo. W. Trammell, Jr., and Edmund J. Callaway, both of Long Beach, for petitioner.

Everett A. Corten, of San Francisco, for respondent Commission.

STEPHENS, Presiding Justice.

Respondent Verlin K. Agal, employee of a private detective agency in Long Beach, observing two men acting peculiarly in a parked automobile and suspecting them of being "up to something," called his employer on the telephone, reporting what he had observed, and was told by his employer to call the police and to assist them if he could do so. As he returned, he saw the two men go into a nearby building. He hailed a uniformed police officer, and told him what he had seen. This officer told him to "keep an eye on that car," and called the police station on the telephone. In a short time a police sergeant in plain clothes arrived, who directed the uniformed officer to get out of sight and told Agal to stay there and "watch for these fellows and maybe we can shake them down." By this latter expression the sergeant said he meant to stop the men to question them and see if they had any guns on them. Presently the two men came out of the building, and Agal pointed them out to the sergeant. One of the men started towards the auto, but, on the approach of the sergeant, he fled, pursued by the latter. The other man started down the walk and Agal followed. After proceeding some ten or fifteen feet, Agal passed the man, who then turned and started back towards the au-

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 51 P.2d 1089.

tomobile. Agal thereupon grasped him from behind on the coat sleeve, jerked him around, and said, "I would like to check on you, buddy." The man jerked his arm loose and made motions as though to draw a gun, when Agal, who had no weapon, hit him a glancing blow on the head and arm with his "sap." At the same instant the man fired his gun three times, wounding Agal, and then fled.

On this state of facts respondent commission concluded that Agal was an employee of the city of Long Beach and had sustained injury arising out of and in the course of said employment, and that both he and the city of Long Beach were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended), making the award which is here for review.

[1, 2] In all municipal affairs the city of Long Beach is subject only to the provisions of its charter and the Constitution. Voorhees v. Morse (Cal. Sup.) 34 P.(2d) 153. The creation and organization of the police department of that city was a municipal affair, and the charter provisions prevail over the general law. 21 Cal. Jur. 389, 390. Section 159 of its charter provides that "no person shall act as special policeman, detective or other special officer for any purpose whatever except on written authority of the city manager," who is the executive head of that department. By section 160 of the charter the powers conferred by law on sheriffs in this state are given to the chief of police of the city in suppressing riots, public tumult, disturbance of the public peace, or organized resistance against the laws or public authority.

[3] Under the facts here, with these charter provisions in view, there is no basis whatever for finding that Agal was an employee of the city at the time of his injury. He had other private but similar employment at the time. By reason of his own affairs as employee of a detective agency, he became suspicious of these men. His employer had told him to help the police if he could. Accordingly, he voluntarily and courageously co-operated with the police.

[4] The term "employer" is defined by section 7 of the act (St. 1917, p. 835, § 7, as amended by St. 1929, p. 306) to include any city which has any person in service under any appointment or contract of hire, express or implied, oral or written. The term "employee" is defined in section 8 thereof (St. 1917, p. 835, § 8, as amended by St. 1931, p. 2068) to include, among others, the persons described as under hire in section 7, and all appointed public officers. While the act should be liberally construed to fully embrace its beneficent purposes (see St. 1917, p. 877, § 69), in the face of the charter provisions and the definitions of the act itself above quoted, and the undisputed facts herein, no governmental agency has the legal right to extend its provisions so as to cover this case.

The award is annulled.

I concur: CRAIL, J.



3 Cal.App.2d 495

IRWIN v. CITY OF LOS ANGELES et al.

Civ. 9014.

District Court of Appeal, Second District, Division 2, California.

Jan. 4, 1935.

1. Municipal corporations ⇐185(3)

Service of notice of removal on police officer certified as permanent employee, by leaving copy with wife at residence, *held* sufficient if officer could not be found on that day; and subsequent appearance at police headquarters of discharged employee would in no way invalidate service legally made on prior date.

2. Municipal corporations ⇐185(14), 186(4)

Delay of more than year and a half by discharged police officer between date of discharge and filing of petition to secure back pay and reinstatement *held* to preclude recovery.

3. Evidence ⇐83(2)
Municipal corporations ⇐185(5)

Wide discretion must be lodged in police commissioners in determining what conduct by members of department is injurious to efficiency of department, and it must be presumed that board in removing officer will act in good faith for welfare of service and not for purposes of oppression.

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Petition by George H. Irwin for writ of mandate against the City of Los Angeles and

others. From the judgment, both petitioner and defendants appeal.

Reversed.

Ray L. Chesebro, Frederick Von Schrader, and G. Ellsworth Meyer, all of Los Angeles, for respondents-appellants.

Lewis E. Whitehead, and Caryl Warner, both of Los Angeles, for petitioner-appellant-respondent.

SCOTT, Justice pro tem.

Petitioner was employed by defendant city as a police officer being certified as permanent employee under classified civil service in 1924. On October 27, 1930, the chief of police of said city issued a written order directed to petitioner removing him from his position for conduct unbecoming an officer in issuing several bad checks and failure to pay his debts. At 11 a. m. October 29, 1930, a copy of said order was left with petitioner's wife at his residence. On October 30 or 31, 1930, petitioner talked with the assistant chief of police in police headquarters and was told by the latter that he was fired.

On May 24, 1932, petitioner filed his petition for writ of mandate herein asking $200 per month from date of discharge. Alternative writ was granted, and, upon hearing July 20, 1932, the trial court found that the service of notice of removal was insufficient, that petitioner was entitled to six months' back pay totaling $1,200, and to be restored to his position. Peremptory writ was thereupon issued. Petitioner has appealed, claiming he was entitled to $2,800 instead of $1,200 back pay. Defendants have appealed, protesting the payment of any back salary and claiming that petitioner is not entitled to be restored to his position because the service of the order on petitioner was sufficient and he was guilty of laches in not sooner pressing his claim for reinstatement.

Section 202 of the charter of defendant city at the time of removal of petitioner provided that service of notice of such suspension must be upon the person of the employee or "by leaving a copy thereof at his last-known place of residence if he cannot be found." The court found that Police Sergeant Gilpin went out to the house which was the last-known residence of petitioner and there talked with the latter's wife; that she said petitioner had gone to his father's place at Lancaster, Cal. The sergeant testified that she said that she could not give the address, but she would see petitioner in two or three days and give him the papers. The order was thereupon left with the wife, affidavit of service as above indicated was made by Gilpin, and the order and return was filed with defendant commission.

[1] The court further found that petitioner was in police headquarters and talked with the assistant chief on October 30 or 31, 1930, and that "it is not true that he (petitioner) could not be found for the purpose of serving said statement upon him and on the contrary he could have been found for that purpose in the City of Los Angeles within a day or two as well as on other occasions after said attempt to serve him with said statement was made so as aforesaid." The trial court did not find that petitioner could be found on the day service was made. The service was complete under the charter if petitioner could not be found on October 29, 1930, and service by leaving a copy at his residence was then made. Subsequent appearance at police headquarters of the discharged employee would in no way invalidate the service legally made on a prior date, but we may observe it removed any doubt from the employee's mind as to the fact of his discharge.

[2] The issue raised by defendants as to laches of petitioner in not earlier asserting his alleged right to reinstatement was not covered by the court's findings. During the period in excess of a year and a half between date of discharge and filing of the petition herein, certain requests for reinstatement and a written demand for salary were made which had no legal effect and were so patently ineffectual for any purpose as to require us to disregard them. Under the authority of Donovan v. Board of Police Commissioners, 32 Cal. App. 392, pages 399 and 400, 163 P. 69, and Kramer v. Board of Police Commissioners, 39 Cal. App. 396, 179 P. 216, it appears that petitioner's delay is such as to preclude his successful assertion of his claim. The finding on each of these issues on the basis of the record would have to be adverse to petitioner if the case were remanded for further consideration by the trial court.

[3] We have in mind the language used by the court in Cleu v. Board of Police Commissioners, 3 Cal. App. 174, 84 P. 672, 673, and cited in Donovan v. Board of Police Commissioners, supra: "It must be presumed that the board, in enforcing such a rule, will act in good faith for the welfare of the service, and not for purposes of oppression. A wide discretion must be lodged in the board [of police commissioners] in determining what conduct on the part of members of the department is injurious to the efficiency of the department."

In this case petitioner was removed for a cause which indicated he was not qualified to hold his position as a police officer. He failed to ask for a hearing on the merits, after actually knowing he was discharged, until after the lapse of a year and a half he sought to collect salary for all this time when he was doing nothing to earn it and demanded reinstatement, basing his contention on an alleged defect of service of the written order of discharge.

The alternative writ should have been discharged and the peremptory writ denied.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 425

CALIFORNIA MACHINERY & SUPPLY CO., Limited, v. UNIVERSITY CITY SYNDICATE, Inc., Limited, et al.

Civ. 9829.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

1. New trial ⇐164

Where court in ruling on motion for new trial changed and added to findings and conclusions in material and substantial respect and entered modified judgment, modification constituted readjudication amounting to new judgment (Code Civ. Proc. § 662).

2. New trial ⇐111

Any party "aggrieved" by verdict or decision may move for new trial, and party is "aggrieved" by decision or judgment when it operates upon his rights of property or bears directly upon his interest.

[Ed. Note.—For other definitions of "Aggrieved," see Words & Phrases.]

3. New trial ⇐164

Statute authorizing court on motion for new trial to change findings and modify judgment amounted to grant of power to correct judicial errors and readjudicate case on facts and make new decision and judgment (Code Civ. Proc. § 662).

4. New trial ⇐11(1)

Right to move for new trial exists where judgment has been materially modified by changed or additional findings made by court in proceedings on motion for new trial (Code Civ. Proc. § 662).

5. Appeal and error ⇐113(5)

Where second judgment, entered after proceedings on motion for new trial under statute, is material departure from judgment first entered, appeal lies from second judgment (Code Civ. Proc. § 662).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the California Machinery & Supply Company, Limited, against the University City Syndicate, Inc., Limited, and another. From an adverse judgment, defendants appeal. On motion to strike bill of exceptions and motion to dismiss or affirm.

Motion to strike bill of exceptions denied; motion to dismiss appeal from various orders and judgments or to affirm judgment granted in part and denied in part.

Ben S. Hunter and Brown, Bissell & Beery, all of Los Angeles, for appellants.

Harold F. Clary, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The motion to strike the bill of exceptions must be denied. This in turn requires a denial of the motion to dismiss the appeal from or to affirm the second judgment, as this latter motion is predicated on a granting of the first.

[1, 2] In ruling on a motion for new trial addressed to the decision and judgment based thereon first filed and entered in this case, the trial court under authority of section 662 of the Code of Civil Procedure changed and added to its findings and conclusions in a material and substantial respect, and a modified judgment was entered in accordance therewith. This constituted a readjudication of the case. "The authorities are clear that a change which materially affects the judgment and the rights of the parties against whom it is rendered and which involves the exercise of judicial discretion amounts to a new judgment." McConville v. Superior Court, 78 Cal. App. 203, 248 P. 553, 554, and cases there cited. Within ten days after receiving written notice of entry of the second and modified judgment, appellants served and filed their notice of intention to move for a new trial, which motion was heard and denied. The bill of exceptions herein was served and

filed within the time allowed by law and the order extending the same, after notice of the order denying this second motion, and such bill was duly settled and allowed. Any party aggrieved by a verdict or decision may move for a new trial. In legal acceptation, a party is aggrieved by a decision or judgment based thereon when it operates upon his rights of property or bears directly upon his interest. Postal, etc., Co. v. Superior Court, 22 Cal. App. 770, 136 P. 538.

[3-5] Prior to the enactment of section 662 of the Code of Civil Procedure, the power of the court to change or correct its decision and judgment was limited to correction of clerical errors or errors resulting from inadvertence, when the proceedings were still in fieri. Judicial errors could not be corrected. By the enactment of section 662, the power of the court was enlarged, and authority to change or add to the findings and to modify the judgment was thereby granted. This amounted to a grant of power to correct judicial errors and to readjudicate the case on the facts and make a new decision and judgment. Under the law as it existed prior to the enactment of section 662, it was held that a modification of a judgment, made as the result of a motion for new trial or while the case was still in fieri, was in effect the rendition of a new judgment, from which judgment only could appeal be taken and after entry of which time to appeal therefrom began to run. Mann v. Haley, 45 Cal. 63; Bixby v. Bent, 59 Cal. 522. In the case of Bond v. United Railroads, 169 Cal. 273, 146 P. 688, 689, the Supreme Court held that where, on appeal, a judgment against defendant was reversed with directions to the trial court to enter a larger judgment in a specified amount, the defendant had the right to move for a new trial within the statutory period after notice of entry of the second judgment. To the same effect are the cases of Tupman v. Haberkern, 208 Cal. 256, 280 P. 970, and In re Estate of Caldwell, 216 Cal. 694, 16 P.(2d) 139. In the case of Bond v. United Railroads, supra, it is also said: "When that judgment was vacated, and a new one, much more burdensome to the defendant, was entered, an entirely different condition was presented. * * * Upon receipt of the notice of the entry of the new judgment, the defendant had the right to determine whether it intended to move for a new trial, and its time for serving notice of such intention then began to run." In the case of Klauber v. San Diego Street Car Co., 98 Cal. 105, 32 P. 876, 877, the court, in discussing section 650 of the Code of Civil Procedure, relating to bills of exceptions, said: "A judgment is the final determination of the rights of the parties to an action or proceeding, and, as there can be only one final judgment in an action, if for any reason a judgment that has been entered is vacated, and another judgment entered in lieu thereof, this last judgment becomes the only one in the case, and the notice of its entry is the point of time from which the right to have a bill of exceptions settled begins to run." This time is, of course, extended under the provisions of the same section by pendency of proceedings on motion for a new trial.

Section 662 contains a provision at the end thereof reading as follows: "Any judgment thereafter entered shall be subject to the provisions of sections 657 and 659 of this code." This clause clearly includes and embraces the decision on which the judgment is founded, for the ultimate purpose of a motion for new trial, although it is addressed to the decision, is to vacate the judgment based thereon. In Bond v. United Railroads, supra, it is said: "While the proceeding for new trial attacks the verdict or findings rather than the judgment, and is, in a sense, collateral to the judgment, * * * it will, if successful, vacate the judgment, and that is, in fact, its ultimate purpose." We thus see that by the express terms of section 662 of the Code of Civil Procedure the right to move for a new trial is given legislative sanction in cases where the judgment has been materially modified by changed or additional findings made by the court in proceedings on motion for new trial. This conclusion finds support in Holland v. Superior Court, 121 Cal. App. 523, 9 P.(2d) 531. Where the second judgment, entered after proceedings on motion for new trial and under the provisions of section 662, is a material departure from the judgment first entered, an appeal lies from the second judgment only. R. Barcroft & Sons Co. v. Cullen, 213 Cal. 208, 2 P.(2d) 353; Holland v. Superior Court, supra. As a corollary proposition, it follows that the new decision on which such second judgment is founded may be attacked by motion for new trial, to the end that such judgment be vacated without necessity of appeal therefrom, and this without respect to any previous motion for new trial addressed to a prior decision. We fail to note any justifiable ground of discrimination between the recognized right of the party aggrieved by a more burdensome second or subsequent judgment, entered pursuant to remittitur after appeal, to move for a new trial after notice of entry thereof and a right to so move when a second and more burdensome judgment has been entered by the trial court under author-

ity of section 662 of the Code of Civil Procedure. In our opinion, this latter right is given express legislative recognition by the last clause of the section mentioned.

The motion to strike the bill of exceptions is denied. The motion to dismiss the appeal from the modified judgment entered on May 17, 1933, or to affirm said judgment, is denied. The motion to dismiss the appeal from the first judgment, entered on April 19, 1933, and from the orders entered on May 17, 1933, changing and adding to the findings, conclusions, and judgment, is granted.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 713

VILA v. BROVELLI.

Civ. 5183.

District Court of Appeal, Third District, California.

Jan. 18, 1935.

Rehearing Denied Feb. 16, 1935.

1. Trial ⇐398

Findings must be read together, and where clear intent is made plain, mere fact that clause or sentence therein, read alone, would appear to be contradictory, or fails to completely express intent, will not vitiate findings or render them insufficient.

2. Contracts ⇐322(4)

Evidence *held* to support finding that contractor had constructed house in proper and workmanlike manner entitling him to recovery for balance of purchase price, where defects and departures were trivial and remediable.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Joe Vila against Linda Brovelli. From an adverse judgment and order denying new trial, defendant appeals.

Affirmed.

Cowan, Kroyer & Jacobsen, of Santa Rosa, for appellant.

Cecil Norman Lavers, of Albany, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in an action instituted to recover the balance alleged to be due for and on account of a building contract under and in accordance with the terms of which the plaintiff alleged that he constructed a dwelling house for the defendant, and that upon said contract there remained due the sum of $1,662.85. The court awarded judgment to the plaintiff in the sum of $1,395.86. From this judgment, the defendant appeals.

The defendant also interposed a motion for new trial which was denied. From the order denying this motion, the defendant also appeals. As no appeal lies from such order, that portion of the appeal is hereby dismissed.

The findings of the court are to the effect that the plaintiff and defendant entered into a written contract for the construction of a dwelling house by the plaintiff for the defendant for the agreed sum of $4,762.50, construction of such building to be in accordance with plans and specifications agreed upon.

Paragraphs IV and V of the findings being the ones really involved in this action, are herein set forth as follows:

"IV. The court finds that during the construction of said house said plans and specifications, by mutual consent, were in part changed; that plaintiff did construct the said house for the said defendant in a good, proper and workmanlike manner, and in accordance to and with the said plans and specifications and said agreed changes, and did substantially perform the said agreement in all respects and parts, excepting nevertheless in the particulars specified herein as follows: The front porch did not drain properly. The arch between the living room and dining room was mechanically untrue. The exterior plaster was poorly matched in color between courses and not workmanlike in finish. The tile work on the kitchen sink was not delivered to owner in first class condition, being minus some cap tiles, cracked and not properly sloped for drainage. There were several minor deficiencies as follows: failure to finish inside of cupboards and closets the same as rooms, improper placing of medicine cabinet, omission of iron receptacle, poor painting in bathroom, split and warped doors, poorly fitted window, omitted picture molding and shoe molding, omitted screen vents, center runs instead of side runs in drawers, wood instead of side runs in drawers, wood instead of metal shelf brackets, oak thresholds omitted, substitution of medicine cabinet, substitution of electrical materials, 2x8 instead of 2x10 wall cap in garage, and careless workmanship on garage

which permitted nails to perforate sheathing paper causing leaks.

"V. The court finds that the plaintiff did not perform the said listed items in a good, proper, and workmanlike manner, and in accordance with the said plans and specifications and agreed changes thereto, and finds further, that the cost to defendant Linda Brovelli, in placing the said house in a condition as called for under the construction agreement and plans and specifications and agreed changes thereto is $266.99."

While the language found in paragraph IV of the court's findings is not as clear and explicit as might be desired, it does appear from paragraph V of the findings that the defects found in the construction of the building, and failure of the plaintiff to strictly comply with the terms and provisions of the plans and specifications, might be remedied, and that the cost to the defendant of remedying such defects was the sum of $266.99.

Upon this appeal it is strongly urged by the appellant that the language used by the court in finding No. IV can only be construed to mean that the building was not constructed substantially in conformity with the plans and specifications therefor. This contention would appear meritorious if only the following language be considered, to wit: "And did substantially perform the said agreement in all respects and parts, excepting nevertheless, in the particular specified herein, as follows." But if we continue to read the entire paragraph, we find that while the word "trivial" was not used as commonly appears in findings relating to the performance of building contracts where the plans and specifications have not been literally followed, the conclusion seems to us certain that the court had in mind, and did in effect find that the schedule of defects were trivial defects which could be remedied by the expenditure, and which had been remedied by the expenditure of the sum of $266.99.

[1, 2] In construing findings the law is well settled that all of the findings must be read together, and if, when so read, the clear intent and purpose of the findings are made plain, the mere fact that a clause or a sentence therein, read alone, would appear to be contradictory or insufficient, such error or failure, to completely express that which is intended to be stated, will not vitiate the findings or render them insufficient to support the conclusions of law drawn therefrom and the judgment based thereon. Haight v. Haight, 151 Cal. 90, 90 P. 197; 2 Cal. Jur. 871, § 511; Title Ins. & Trust Co. v. Ford, 119 Cal. App. 188, 6 P.(2d) 101.

Thus, when findings IV and V are read together, the fact that the remedying of the listed defects entail an expenditure of $266.99, it is just as apparent that the defects were found to be trivial as though the court had said that the contract was substantially performed notwithstanding certain trivial defects, as follows, to wit, the cost of remedying the same, amounting only to the sum of $266.99.

We do not need to review the authorities cited by the appellant that there must be a substantial performance of the contract, and that recovery cannot be had by a contractor unless the trial court so finds, and that such finding must be supported by the testimony.

The argument of the appellant, however, is based upon the assumption that the findings which we have quoted are not to the effect that the plaintiff has substantially performed the covenants of his contract and erected the building substantially according to the plans and specifications. What we have said, however, we think answers this contention of the appellant and eliminates entirely the appellant's contention that the court failed to find substantial compliance.

Again, outside of the finding that we will call certain trivial defects, though not so listed in finding No. IV, the court does specifically find that the contract in all other particulars was substantially complied with, and reading the list of defects which we have said are shown to be trivial by the mere reading thereof, the finding of the court is all that is required to sustain a judgment based thereon.

The appellant, in addition to the defects listed by the court in its findings, contends that the living room ceiling was crooked and improperly constructed; that the fireplace and chimney were improperly constructed, and constituted a fire hazard, and were not built in conformity with the plans and specifications; that the concrete landing at the rear entrance was 2½ inches lower than shown on the plans, and that one step or riser was omitted; that the sheathing paper under all exterior stucco was changed from 10-pound roofing felt to cheap kraft paper; that the specifications called for Fuller or Bass-Heuter paint, and that the plaintiff substituted an inferior brand; and, finally, that there is no evidence in the record to sustain the finding that the cost of remedying the defects was only the sum of $266.99.

It is true that the court made no specific finding as to these particular defects set forth in appellant's brief. The general finding of the court, however, "that the plaintiff did construct the said house for the said defendant in a good, proper and workmanlike manner, and in accordance to and with the said plans and specifications and agreed changes, and did substantially perform the said agreements in all respects and parts, excepting therefrom the defects which we have stated are shown to be trivial by the mere reading thereof," answers the contention of the appellant that the court did not find that the contract had been complied with so far as the plans and specifications covered the construction of the particular parts of the building alleged by the plaintiff not to have been constructed according to the plans and specifications.

Several witnesses testified on behalf of the defendant that the ceiling in the living room did not conform to the plans and specifications, in that there was a variation in the arched portion thereof of between ¾ and ⅝ of an inch between the respective ends of the room, 16 or 18 feet in length, and measured from the floor to the ceiling, some witnesses testifying that the variation was visible to the eye, while, on the other hand, witnesses for the plaintiff testified that the construction was proper, the variation was not unusual, and that it was not visible to the eyes, or, as one witness expressed it, "not worth mentioning."

There is also testimony in the record that the specifications as to the manner in which the arch should have been constructed, or that is, in the manner in which the material which formed the coved portion of the ceiling, was not strictly followed; but there is also testimony to the effect that that portion of the ceiling, as constructed by the contractor, was a better and stronger construction. It appears that the defendant had the ceiling torn out and reconstructed at a cost of some $317. The court, however, made no allowance for this expense incurred by the defendant, by reason of the general finding to which we have referred that the work was substantially done in the first place, and, therefore, the expense incurred by the defendant in reconstructing the ceiling was unnecessary.

Had the court adopted and followed the testimony introduced by the defendant in relation to the ceiling and the cost of reconstruction, and found that the ceiling was not properly constructed, such a finding would have found ample support in the record. In fact, we may say that the testimony in favor of such a finding set out in the record is very persuasive, but the witnesses were before the trial court, their credibility, and also knowledge and understanding of what they were testifying to were all matters for the trial court to determine and pass upon, and the finding of the trial court contrary to the contentions of the defendant upon testimony to the effect that the construction was proper, and that the variation from the plans was not material, is binding upon us.

The record also shows that the plaintiff and the defendant went to the town of Albany to examine a fireplace, and that it was the agreement of the parties that the fireplace to be constructed should be the same as that viewed by the parties at Albany, the plaintiff contending that the agreement related not simply to the tiling, but also as to the construction. The defendant contended that the agreement related only to the tiling, color of tile, and the mantel. Here again was a conflict of testimony which was resolved in favor of the plaintiff by the trial court. The same is true as to the kind of paper used under the stucco work on the outside of the building. In these particulars, even though the printed record seems to preponderate in favor of the appellant, the finding of the trial court is conclusive here.

The defects found by the court having been remedied, the usefulness of the building appears to be substantially as contemplated by the parties. In some particulars, such as placing of the joists in the construction of the ceiling, the contractor took it upon himself to make some changes from the plans and specifications, but the court has not held such changes fraudulent or such as to materially affect either the strength or the substantial character of the building as contemplated by the plans and specifications. It is true that the defects pointed out by the court were found in several different portions of the building, but they were all, as found by the court, trivial defects and capable of being remedied. Hence, it follows that the alleged defects did not pervade the whole building so as to substantially defeat the objects which the parties intended to accomplish by entering into the contract. Had the court sustained the contentions of the appellant, then the cases of Perry v. Quackenbush, 105 Cal. 299, 38 P. 740, and Morel v. Simonian, 103 Cal. App. 490, 284 P. 694, would be controlling as to the judgment that should be entered in this cause. However, the court did not so find, and, as heretofore stated, the findings being supported by the testimony introduced by the plaintiff must be upheld by this court.

While the findings do not separately set forth the sum allowed for remedying each particular defect, a search of the record has enabled us to compute from the testimony the expense of remedying the defects as amounting to approximately $270. As hereinbefore stated, the court allowed $266.99.

The fact that the defendant took upon herself the expenditure of a sum of money considerably in excess of that allowed by the court in remedying defects does not furnish any cause for reversal in view of the findings of the court that many of the particulars concerning which the defendant expended money, were not adopted by the court as necessary expenses, but were expressly negatived by the finding of the court that the building was substantially constructed according to the plans and specifications, save and except as to certain trivial items which we have mentioned herein not being items on account of which the major portion of the sums alleged were expended by the defendant.

While different findings, different conclusions, and a different judgment would find ample support in the testimony in this case, the findings and conclusions as presented by the record being supported, the judgment must be upheld.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



3 Cal.App.2d 485

TURNER et al. v. DONOVAN.

Civ. 8304.

District Court of Appeal, Second District, Division 1, California.

Jan. 3, 1935.

Hearing Denied by Supreme Court March 4, 1935.

1. Customs and usages ⇐1

"Usage" is uniform practice or course of conduct followed in certain lines of business or professions or some procedure or phase thereof.

[Ed. Note.—For other definitions of "Usage," see Words & Phrases.]

2. Customs and usages ⇐10

Established usage, particularly where known to parties to transaction in which involved, becomes rule of law, which courts will recognize in determining parties' rights in absence of statute determining question.

3. Customs and usages ⇐18

Complaint in attorneys' action against another attorney for portion of money paid latter for legal services *held* sufficient to raise issue of usage as to division of compensation received by attorney to whom legal business is forwarded by another attorney.

The complaint alleged that it is established and universally recognized usage and custom among attorneys that attorney forwarding legal business to another attorney is entitled to third of fee or compensation received by latter; that plaintiffs and defendant were well aware of such usage and custom; that legal business, for performance of which defendant received fee, was forwarded by plaintiffs and received and accepted by defendant with such knowledge; and that it was mutually agreed that compensation received would be divided in accordance with such custom and usage.

4. Evidence ⇐121(1)

Plaintiffs' testimony in attorneys' action against another attorney for portion of money paid latter for performing legal business sent him by plaintiffs as to latter's conversations with client and her husband respecting legal services rendered *held* not inadmissible as hearsay; such conversation constituting part of res gestæ.

Appeal from Superior Court, City and County of Los Angeles; Michael J. Roche, Judge.

Action by John W. Turner and others, engaged in business under the firm name of Turner, Seaberry & Springer, against James Donovan. Judgment for plaintiffs, and defendant appeals.

Affirmed.

James Donovan, of Los Angeles, in pro. per.

Bettin, Painter & Wait and Ray H. Kinnison, all of Los Angeles, for respondents.

HAHN, Justice pro tem.

Defendant appeals from a money judgment rendered against him in an action brought to recover a portion of the money paid him by one Emma G. Latshaw for legal services rendered on her behalf. The complaint is cast in three counts. Count 1 is in form of money had and received. Count 2 alleges that in the state of Texas, which was then the domicile of plaintiffs and Emma G. Latshaw,

the said Emma G. Latshaw employed plaintiffs as attorneys to represent her in any legal proceeding that might be deemed necessary in connection with a proposed contest to the will of her deceased sister Mary R. Merriam Reagan, which was then in process of probate in the superior court of the county of Los Angeles, Cal.; that, pursuant to such employment, and at the request of the said Emma G. Latshaw, plaintiffs employed defendant to assist plaintiffs in representing the interests of the said Emma G. Latshaw in connection with the estate of her sister, and particularly to attend to such matters as were deemed necessary in California. The count further alleges that it was agreed between plaintiffs and defendant that all moneys received in connection with said services were to be divided equally between plaintiffs and defendant. Count 3 repeats the allegations of plaintiff's employment by the said Emma G. Latshaw, and alleges that thereafter, with her consent, they forwarded to defendant who was and is an attorney at law at Los Angeles, Cal., the matter of representing the said Emma G. Latshaw in her proposed contest to the will of her deceased sister, with instructions to take such steps as he deemed wise in filing such contest on behalf of the said Emma G. Latshaw, or in arranging a compromise of her claim; that a compromise was effected, and defendant received as compensation for the legal services rendered in connection with said matter the sum of $7,250; that, at the time plaintiffs forwarded to defendant the legal business of the said Emma G. Latshaw, it was the established and universally recognized usage and custom in the state of Texas, as also in the state of California, among attorneys, that the attorney forwarding any legal business to another attorney would be entitled to one-third of the fee or compensation received by the attorney to whom the business was forwarded; that plaintiffs and defendant were well aware of such usage and custom, and that said business was forwarded by plaintiffs and received and accepted by defendant with such knowledge, and that it was mutually agreed that the compensation received would be divided in accordance with said custom and usage.

The trial court found as true all the allegations of the complaint, except that defendant received for the use and benefit of plaintiffs only the sum of $2,416.67, and rendered judgment accordingly. While the findings would have been more helpful to us in our review of this case if they had found more specifically upon the issues raised, we conclude that they may be fairly interpreted as intended by the court to support plaintiffs' claim as alleged in the third count in the complaint.

Appellant in his opening brief foundations his appeal on the ground of insufficiency of the evidence "to justify the decision of the court," and errors of the court in its rulings on objections made to evidence offered during the trial.

On the question of sufficiency of the evidence "to justify the decision," while there is some conflict in the evidence, we are satisfied from our examination of the record that there is sufficient evidence to support all of the material allegations contained in count 3 of the complaint and the judgment rendered thereon.

[1, 2] As to the claimed errors in ruling on the admission of evidence, several of them relate to testimony bearing on the custom and usage in the matter of division of fees where one lawyer forwards business to the lawyer who renders the legal service directly to the client. Usage is a uniform practice or course of conduct that is followed in certain lines of business or professions, or in some procedure or phase of such business or profession. When established and particularly when such usage is known to the parties to a transaction wherein the usage is involved, it becomes a rule of law which the courts will recognize in determining the rights of parties whose relations come within the usage where there is no statute which determines the question. 17 Corpus Juris, 489; 25 Cal. Jur. 417; Gonyer v. Williams, 168 Cal. 452, 143 P. 736; Luckehe v. First National Bank of Marysville, 193 Cal. 184, 223 P. 547.

[3] The complaint contains the necessary allegations to raise the issue of usage among attorneys in the matter of forwarding legal business by one to the other. The evidence tendered by plaintiffs on this issue was both competent and material. While there is conflict in the evidence as to the arrangement which plaintiffs alleged they had with Emma G. Latshaw in Texas in the matter of retaining them to render legal advice and services in the matter of her proposed contest to the will of her deceased sister, and the arrangement for the employment of defendant in California to handle her matters there, there is sufficient evidence in the record to support the findings as to all of the material allegations of count 3 in the complaint.

[4] Among other rulings of the court which appellant urges were erroneous are several wherein the court overruled defendant's ob-

jections to testimony of the plaintiffs as to conversations had in Texas with Emma G. Latshaw and her husband and other circumstances relating to their services rendered to her in connection with the estate of her sister. These objections were based upon the ground that the conversations were hearsay. There is no merit in this contention. Respondents alleged that they were employed by Emma G. Latshaw to render legal services for her in connection with her sister's estate in California, which formed the basis for sending the business to appellant, and the implied contract between them for a division of the fees. These conversations constituted a part of the "res gestæ" and objections thereto were properly overruled.

As to the other rulings complained of, we find in them no error.

Judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.



3 Cal.App.2d 508

BUTLER v. SUPERIOR COURT IN AND FOR NAPA COUNTY et al.

Civ. 5311.

District Court of Appeal, Third District, California.

Jan. 7, 1935.

Hearing Denied by Supreme Court March 7, 1935.

1. Justices of the peace ⇐166(5)

Superior court should not dismiss action on appeal properly perfected from justice court, since dismissal is in effect a denial of jurisdiction.

2. Justices of the peace ⇐164(6)

On appeal from justice's judgment on questions of law alone, mere transmission of pleadings to superior court without settled statement of case does not authorize superior court's consideration of pleadings (Code Civ. Proc. § 977).

3. Justices of the peace ⇐164(2)

Superior court *held* without jurisdiction of appeal from justice's court on questions of law alone, where no statement of case was settled, pleadings were not shown by certified copy of docket, and justice's judgment was rendered on the pleadings (Code Civ. Proc. § 977).

Original proceedings by William Butler against the Superior Court in and for Napa County, the Honorable Percy S. King, judge thereof, and another for writ of mandamus.

Writ denied.

Hearing denied by Supreme Court; CURTIS and THOMPSON, JJ., dissenting.

Joseph E. Bien and Werner Olds, both of San Francisco, for petitioner.

Herbert N. DeWolfe, of San Francisco, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a petition for a writ of mandamus to compel the superior court of Napa county to try and determine an appeal to that court from a judgment of the justice's court of St. Helena township which was rendered on the pleadings in a suit for unlawful detainer.

It appears that Bernhard Davidow commenced a suit in St. Helena township of Napa county in unlawful detainer against this petitioner, to which an answer was filed. At the time of the trial no evidence was adduced. On motion of the plaintiff the justice's court rendered judgment on the pleadings against this petitioner to the effect that the plaintiff in that suit is entitled to possession of the premises which are involved therein. Notice of appeal from that judgment was duly filed "on questions of both law and fact." An undertaking on appeal was also furnished. A certified copy of the justice's docket, together with the notice of appeal, the undertaking, and the pleadings were transmitted to the superior court. No statement on appeal was settled or filed as required by section 977 of the Code of Civil Procedure. The pleadings were not lawfully before the superior court for any purpose. On the theory that the superior court was without a record upon which it could try or determine the appeal on either questions of law or fact, the cause was dismissed. Upon that record a petition for a writ of mandamus was filed in this court. It is contended the superior court should have determined the appeal on questions of law.

[1, 2] Where an appeal has been properly perfected from a justice's court to the superior court, either upon questions of law or facts or upon both law and facts, the superior court should hear and determine the appeal, and, under such circumstances, a dismissal of the action by the superior court would be erroneous since, in effect, the dismissal is a denial of jurisdiction and a refusal to pass upon the matters properly presented to the upper court. Golden Gate Tile Co. v. Su-

perior Court, 159 Cal. 474, 114 P. 978; Edwards v. Superior Court, 159 Cal. 710, 115 P. 649. In an appeal from a justice's court on questions of law alone, it is necessary to transmit to the superior court "a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed." Section 977, Code Civ. Proc. In the event of an appeal on questions of law alone, the settled statement of the case should necessarily include the pleadings when they are involved in the questions of law to be determined on appeal. Otherwise the pleadings are not properly before the court on appeal so as to entitle them to be considered by that tribunal. Where no statement has been settled in an appeal on questions of law, the mere transmitting of the pleadings to the superior court does not authorize that court to consider them in determining questions of law for the reason that the pleadings are not before that court in the manner provided by statute. If the appeal is taken on questions of fact, or on questions of both law and facts, "a certified copy of his [the justice's] docket, the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal, and the undertakings filed" must be transmitted to the superior court. Section 977, Code Civ. Proc.

[3] It is true that on an appeal from a justice's court on questions of law alone, where the certified copy of the docket contains all the information that is necessary to determine the questions involved, the superior court is not without jurisdiction to hear and determine the appeal, even though no statement on appeal is settled or transmitted to that court. Rauer's Law, etc., Co. v. Superior Court, 26 Cal. App. 289, 152 P. 957; Himovitz v. Justice's Court, 77 Cal. App. 95, 246 P. 82, 263 P. 384; Peacock v. Superior Court, 163 Cal. 701, 126 P. 976. In the present case, the certified copy of the docket was properly before the superior court, although no statement of the case was settled or forwarded to that court. The certified copy of the docket, however, does not contain the necessary information upon which the questions of law may be determined. It does not contain the contents of the pleadings. It merely contains the dates and the fact that the pleadings were filed in the justice's court, and that judgment was rendered on the pleadings. Assuming, without so deciding, that this court, under proper circumstances, would be warranted in issuing a writ of mandamus to compel the superior court to decide the appeal to that court on questions of law, there is no record before that court in the present case upon which it may determine whether the pleadings justified the justice's court in rendering judgment on the pleadings. It is absolutely necessary to resort to the pleadings to determine that fact. No statement was settled or transmitted to the superior court, and the pleadings are not legally before that court. The certified copy of the docket does not contain the necessary facts to determine that question, and the superior court was without jurisdiction and has no adequate record upon which it may decide the questions of law. We are therefore of the opinion the superior court properly dismissed the purported appeal.

The writ of mandamus is denied.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 637

COMEGYS v. NATIONAL UNION ASSUR. SOC. (COMEGYS et al., Interveners).

Civ. 9617.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1935.

1. Insurance ⇐767

Whether plaintiff in action on fraternal benefit certificate, alleged in both complaint and complaint in intervention to have been issued to insured, had insurable interest in latter's life, was immaterial.

2. Insurance ⇐114

One taking out insurance policy on his own life may ordinarily name any person as his beneficiary, regardless of whether latter had insurable interest in insured's life.

3. Insurance ⇐770

Statute, authorizing payment of death benefits under fraternal benefit certificate only to member's wife, husband, or relative by blood to fourth degree, does not preclude insured, having wife, husband, or children, from naming his sister as beneficiary (St. 1931, p. 1354, § 6; Probate Code, § 253).

4. Insurance ⇐770

Statutory provision that fraternal benefit society member, having no wife, husband, or children, may designate any person as

beneficiary, *held* not to preclude insured, having wife, husband, or children, from naming another blood relative within fourth degree, such as his sister, as beneficiary (St. 1931, p. 1354, § 6; Probate Code, § 253).

5. Insurance ⇐797

Insured's minor daughter, to whom divorce decree, procured by her mother, ordered insured to make payments for daughter's support, *held* mere judgment creditor, not entitled to proceeds of fraternal benefit certificate after insured's death as against latter's sister, named beneficiary therein, in absence of fraud.

6. Insurance ⇐797

Life insurance, taken out by insured in another's favor, is payable to named beneficiary as against insured's creditors and personal representatives, in absence of fraud or contrary statutory provision.

7. Insurance ⇐797

Insured's minor daughter *held* not entitled to proceeds of fraternal benefit certificate, naming insured's sister as beneficiary, on ground that insured promised to maintain daughter all her life and take care of her from such proceeds; daughter being mere creditor.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Roberta G. Comegys against the National Union Assurance Society, in which Evelyn Elaine Comegys, a minor, by her guardian ad litem, Minnie A. Spencer, and the latter individually, intervened. From a judgment against the minor intervener, she appeals.

Affirmed.

Manuel F. Sylva, of San Francisco, for appellant.

Orrick, Palmer & Dahlquist, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, a sister of Lloyd C. Comegys, deceased, brought this action against defendant, National Union Assurance Society, a fraternal benefit society, to recover the sum of $5,000 as the proceeds of a certain benefit certificate issued by said society to said Lloyd C. Comegys, during his lifetime. Evelyn Elaine Comegys, a minor, and the daughter of said deceased, intervened. Pursuant to stipulation of all parties and an order of court based thereon, the defendant society paid the proceeds of the benefit certificate to a trustee to abide the result of this litigation between plaintiff and the intervener. The action was thereupon dismissed as to the defendant society. Upon the hearing of the demurrer to the second amended complaint in intervention, the trial court sustained said demurrer without leave to amend. Judgment was entered ordering the dismissal of said second amended complaint in intervention and further ordering that the intervener take nothing in said action. Said intervener appeals from said judgment.

The controversy here is solely between the rival claimants for the proceeds of said benefit certificate. Plaintiff, the sister of the assured, was the named beneficiary. The intervener, the daughter of said assured, was a minor of the age of 19 years. Her mother, who was appointed as guardian ad litem for the intervener, was the divorced wife of said assured. The final decree of divorce had been obtained in 1914, and said decree, as modified in 1920, ordered the assured to pay the sum of $30 per month for the support and maintenance of said intervener. The complaint of plaintiff, the named beneficiary, against the defendant society was in the usual form. The complaint in intervention was in three counts.

The intervener states as follows: "The question involved is—Does intervener's complaint state a cause of action for said proceeds? In substance, the first count alleges that she is a minor and the only child of assured; that pursuant to a divorce decree, assured, her father, was ordered to maintain her. The second count alleges that assured promised to maintain her all her life and that she would be taken care of from said proceeds. The third count alleges that said beneficiary had no insurable or pecuniary interest in life of insured and that intervener was a dependant of assured. All counts allege that insured left no property or funds for said purposes except said proceeds." The intervener contends that each of said counts states facts sufficient to support her complaint in intervention for the proceeds of said benefit certificate, but in our opinion the intervener's contention cannot be sustained as to any one of said counts.

[1, 2] We shall first consider the third count of the complaint in intervention in which it is alleged that plaintiff had no insurable interest in the life of the assured. In both the complaint and the complaint in intervention, it was alleged that the defendant society issued its benefit certificate to Lloyd C. Come-

gys, the assured. The question of insurable interest was therefore wholly immaterial. This is clearly indicated by language in Boyer v. United States F. & G. Co., 206 Cal. 273, at page 279, 274 P. 57, 60, where the court said: "It is a matter of common knowledge that one may not obtain an insurance policy upon the life of another in whom the applicant has no insurable interest. It is not so generally known, however, that the rule is otherwise where the applicant obtains the policy on his own life. 14 Cal. Jur. 468; 14 R. C. L. 920." See, also, Woodmen of the World v. Rutledge, 133 Cal. 640, 65 P. 1105; Vawter v. Purdy, 29 Cal. App. 623, 157 P. 556; 1 Cooley's Briefs on Insurance (2d Ed.) p. 336. These authorities clearly establish the rule that, where one takes out a policy of insurance on his own life, he may ordinarily name any person as his beneficiary, regardless of whether said beneficiary has an insurable interest in the life of the assured.

[3, 4] This general rule has been modified by statute in this state as to fraternal benefit societies. St. 1911, p. 1321, § 6, as amended by St. 1931, c. 628, p. 1354. It is the contention of the intervener that under said statute a sister may be named as beneficiary in a benefit certificate issued by such fraternal benefit society only in the event that the assured has no wife, husband, or children. This contention is without merit. Said statute reads in part: "Payment of death benefits may be made only to the member's wife, husband, relative by blood to the fourth degree. * * *" In the present case, the beneficiary was the sister of the assured, and therefore a relative by blood in the second degree. Probate Code, § 253. After naming the classes of persons to whom payment of death benefits may be made, said statute continues: "Provided, further, that if the member has no wife, husband or children, then such member may designate as beneficiary, direct or in trust, any person or persons, entity, or interest, or the member's estate as may be permitted by the laws of the society." The intervener relies upon this last-quoted portion of said statute, but we are of the opinion that said provision merely eliminates the restrictive provisions of the first-quoted portion thereof in the event that the assured has no wife, husband, or children. It cannot be construed to mean that, if assured has a wife, husband, or children, said assured may not name some other beneficiary within the classes of persons mentioned in the first-quoted portion of the statute.

[5, 6] Turning to the first count of the complaint in intervention, we find that it alleges an obligation on the part of the assured for support of the intervener based upon a decree of divorce procured by her mother. It is not alleged whether the decree ordered payment to the mother or to the intervener, but the parties have treated the intervener, rather than the mother, as the judgment creditor thereunder. Assuming that said decree as modified in 1920 directed that payment be made to the intervener, her position was merely that of a judgment creditor. San Diego Trust, etc., Bank v. Heustis, 121 Cal. App. 675, 10 P.(2d) 158. It is well settled that, in the absence of fraud or a statutory provision to the contrary, any life insurance taken out by the assured in favor of another is payable to the named beneficiary as against the creditors and personal representatives of the assured. Lowenstein v. Koch, 165 App. Div. 760, 152 N. Y. S. 506; United States Mortgage & Trust Co. v. Ruggles, 258 N. Y. 32, 179 N. E. 250, 79 A. L. R. 802; Lehman v. Gunn, 154 Ala. 369, 45 So. 620; In re Donaldson's Estate, 126 Iowa, 174, 101 N. W. 870; Proctor v. MacClaskey, 278 Mass. 238, 179 N. E. 600; 7 Cooley's Briefs on Insurance (2d Ed.) p. 6499. No fraud was alleged here, and our attention has not been called to any statutory provision applicable to the point under discussion. The case of Jacobs v. Strumwasser, 84 Misc. 28, 145 N. Y. S. 916, is relied upon by the intervener, but it is not helpful. It dealt only with the right of a creditor to realize upon the cash surrender value of a life insurance policy during the lifetime of the assured. It did not deal with the question of whether the proceeds of a life insurance policy are subject to the debts of the assured after his death, and the case is entirely in harmony with Lowenstein v. Koch, supra. We are therefore of the opinion that the allegations of the first count of the complaint in intervention were insufficient.

[7] It is somewhat difficult to ascertain the theory of the intervener with respect to the second count of the complaint in intervention. If the intervener is relying upon an alleged agreement of the assured to establish a contractual obligation upon the part of the assured, the most that can be said is that the intervener alleged that she was a creditor of the assured, and the above discussion is a sufficient answer to her contention. She cites and relies upon Silvey v. Hodgdon, 52 Cal. 363. There the assured and the named beneficiary agreed that said beneficiary would hold the proceeds of the policy in trust for the children of the assured, and the court enforced the trust. Here no such

agreement was alleged, and the discussion of the court on page 369 of the decision last cited clearly indicates the insufficiency of the pleading here to show that any valid trust was created.

From what has been said, we conclude that the allegations of the second amended complaint in intervention were insufficient to establish any right on the part of the intervener to the proceeds of the benefit certificate or any part thereof, and that the demurrer thereto was properly sustained.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



3 Cal.App.2d 534

McCOY v. NORTHWESTERN CASUALTY & SURETY CO. et al.

Civ. 8978.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1935.

1. Principal and surety ⇐190½

Where principal on stay bond pledged corporate stock to surety, with power to sell, assign, and deliver the stock and appropriate proceeds to protect itself, and surety's agent, pursuant to merger agreement between corporation in which stock was held and another corporation, delivered the pledged stock and received in exchange money which he appropriated to own use and also stock in absorbing corporation, surety *held* not guilty of conversion, and, for any lack of diligence or good faith in performance of trust as pledgee, surety would be liable to principal only when principal's liability to surety was discharged or latter was released from liability on bond.

2. Trover and conversion ⇐16

Generally, in action for conversion, plaintiff must prove ownership with right of possession, or actual possession at time of alleged conversion.

3. Principal and surety ⇐190½

Principal on stay bond, having pledged corporate stock to surety as collateral security against loss by surety, could not put surety in default for failure to redeliver stock until principal had satisfied his debt to surety, created when surety paid principal's judgment debt, and no conversion by surety could occur until such debt had been satisfied and demand made for return of stock followed by refusal so to do.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Frank McCoy against the Northwestern Casualty & Surety Company and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Kidd, Schell & Delamer, of Los Angeles, for appellants.

Barry & Boehler, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The action herein is for conversion of certain corporate stock, the cause having been submitted to the trial court on the pleadings and a written stipulation of facts. No findings, therefore, being required, the stipulations being deemed in law to constitute the findings, the court's conclusion and order for judgment in favor of plaintiff, respondent herein, was entered on the minutes, and a judgment was entered thereon from which this appeal is taken; the record being brought here by a bill of exceptions. No brief has been filed by respondent.

On respondent's application, appellant Northwestern Casualty & Surety Company (hereinafter called "company") furnished a stay bond in the sum of $10,582.70, in a case appealed by respondent from a judgment for money entered in the superior court of Los Angeles county. As collateral security to protect the company from liability for loss or damages on account of such bond respondent delivered to the company 200 shares of common stock of Acme Fire Insurance Company of the then value of $10,000 and of which he was the owner. This transaction was conducted by respondent and one Channing Follette, since deceased, who was the duly appointed attorney in fact of the company. By the written collateral pledge agreement, dated September 25, 1928, the company was given the right to retain said stock until its liability on the bond had ceased or terminated, with power to sell, assign, and deliver the stock without notice at broker's board, public or private sale, and to appropriate the proceeds to protect itself against any loss on account of said bond. Shortly thereafter the

Acme Fire Insurance Company agreed upon a merger with Pacific American Fire Insurance Company, and, with the approval of the corporation commissioner of California, the stock of the former company was to be delivered into an escrow, wherein each two shares of its stock were to be exchanged for $39 cash and one share of stock issued by the latter company, if and when more than 75 per cent. of the issued stock of the former company had been delivered into such escrow. Such contingency having arisen, the exchange was made, Follette, being in possession of respondent's stock as agent of the company, on December 11, 1928, delivered the same into such escrow, but did so in the guise of attorney in fact of Seaboard Surety Corporation, another bonding company of which he was likewise attorney in fact. On December 28, 1928, the escrow agent delivered to Follette, as agent of Seaboard Surety Corporation, a check for $3,900, payable to the latter company and a certificate for 100 shares of stock of Pacific American Fire Insurance Company issued in the name of Seaboard Surety Corporation. Follette cashed the check and appropriated the money to his private uses. The stock was later delivered into the possession of Seaboard Surety Corporation. This escrow transaction was accomplished without the knowledge of respondent or of the officers of Seaboard Surety Corporation, or of appellants herein, none of whom had actual knowledge thereof prior to July 5, 1931. The value of the 200 shares of Acme Fire Insurance Company stock on December 11, 1928, was $47 per share, or $9,400.

On July 5, 1931, the judgment from which respondent had appealed was affirmed and the company was compelled to pay the amount thereof, which it did on August 17, 1931, in the sum of $6,346.38. On December 2, 1931, on demand of the company, the Seaboard Surety Corporation assigned, transferred, and delivered to it the 100 shares of stock theretofore issued to said Seaboard Surety Corporation by Pacific American Fire Insurance Company, and the stock was thereafter registered on the books of the latter company in the name of appellant Northwestern Casualty & Surety Company. Respondent has never paid or tendered to the latter company the said sum of $6,346.38, or any part thereof, but the company declares its willingness and ability to transfer to respondent the 100 shares of Pacific American Fire Insurance Company stock upon receipt from him of the difference between the sums of $6,346.38 and $3,900.

[1] In its minute order for judgment the trial court incorporated its conclusions of law drawn from the stipulated facts, as follows: "The acts of Follette amounted, in effect, to a sale of pledged property without authorization, and consequently amounted to a conversion, which entitled the plaintiff to recover from the defendants the market value of the stock as of the date of conversion, December 11, 1928." With this conclusion we cannot agree. Nothing in the stipulated facts furnishes proof of the elements which constitute a sale. The transaction was in the nature of an exchange, which was in the ordinary course of corporation mergers and was authorized by the terms of the agreement of pledge above recited. Having full authority to sell, assign, and deliver the stock held as collateral, and to appropriate the proceeds to protect itself against any loss on the bond, the company was not guilty of conversion by reason of the acts of its agent in effecting the exchange of the stock for cash and other stock of presumably equivalent value. In so doing there was no "unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results," as has been held to constitute the foundation of the action of conversion. Poggi v. Scott, 167 Cal. 372, 139 P. 815, 51 L. R. A. (N. S.) 925; Edwards v. Jenkins, 214 Cal. 713, 7 P.(2d) 702. For any lack of diligence or good faith in the performance of its trust as pledgee the company would be liable to respondent only when the latter's liability to the company was discharged or the company released from its liability on the bond. Hyatt v. Argenti, 3 Cal. 151; Lem v. Wilson, 27 Cal. App. 512, 150 P. 641; Tracy v. Stock Assurance Bureau, 132 Cal. App. 573, 23 P.(2d) 41.

[2, 3] Under the facts in this case respondent was not entitled to possession of the stock pledged by him at the time of the alleged conversion or when he commenced this action. It is the general rule, announced by text-writers and by our courts, that in actions of conversion the plaintiff must prove ownership with the right of possession, or actual possession at the time of the alleged conversion. General Motors A. Corp. v. Dallas, 198 Cal. 365, 245 P. 184; Covington v. Grant, 82 Cal. App. 749, 256 P. 213; Winne v. Ford, 88 Cal. App. 308, 263 P. 545; DePuy v. Shay, 127 Cal. App. 476, 16 P.(2d) 158. Respondent, having pledged his stock to the company as collateral security against loss by the company on account of the stay bond, could not put the company in default for failure to redeliver such stock until he had satisfied his debt to the company, created when the company paid respondent's judgment debt; and no conver-

sion could occur until such debt had been satisfied and demand made for return of the stock, followed by a refusal so to do. Scrivner v. Woodward, 139 Cal. 314, 316, 73 P. 863; Thompson v. Toland, 48 Cal. 99, 116; Colton v. Oakland Bank of Savings, 137 Cal. 376, 382, 70 P. 225; Williams v. Ashe, 111 Cal. 180, 185, 186, 43 P. 595; Bell v. Bank of California, 153 Cal. 234, 238, 94 P. 889.

For the reasons above given the judgment should be reversed, and it is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 662

HARRISON v. DE YOUNG et al.
Civ. 9125.

District Court of Appeal, Second District, Division 2, California.
Jan. 17, 1935.

1. Trial ⇐89

In automobile accident case, refusal to strike physician's testimony on ground of admission of disqualification as expert on certain phase of plaintiff's injury *held* not abuse of discretion, where physician had qualified on direct examination.

2. Evidence ⇐510

Physician's testimony as to possible microscopical change in plaintiff's nerve cells resulting from concussion *held* admissible, as conclusions depending on professional or scientific knowledge or skill not within range of ordinary training or intelligence, and not inadmissible as speculative.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by W. B. Harrison against Louis De Young and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

G. W. Myers and A. H. Blum, both of Los Angeles, for appellants.

Orville A. Rogers and L. J. Styskal, both of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action for damages for personal injuries resulting from a collision of automobiles.

The appellants (defendants) contend that the trial court erred in overruling certain objections to hypothetical questions put to medical experts on the ground that such questions assumed facts not in evidence. We have examined the questions and the evidence with regard to the facts assumed, and we find that the rulings of the trial court were proper.

[1] It is next contended that the trial court erred in refusing to grant a motion to strike the testimony of one of the doctors, particularly that part of his testimony dealing with post-traumatic neurosis on the ground that the doctor admitted he was not qualified as an expert witness to testify on that subject. The doctor properly qualified himself at the commencement of his direct examination. Upon cross-examination the following question was asked and answered: "Q. Most everybody that has any kind of automobile accident has post-traumatic neurosis, don't they, Doctor, whether it be a head injury or an arm injury or a foot injury, is that not so? A. I do not believe I am qualified as an expert witness in that regard." This modest answer of the doctor that he was not qualified as an expert witness to answer the above question did not necessarily disqualify the doctor. Certainly it was evidence which might be considered on the question of his qualifications as an expert, but it was to be considered along with all the other facts and circumstances in evidence bearing upon his qualifications. The decision was for the court to make in the exercise of its sound discretion.

[2] Finally, the appellants contend that the court erred in permitting evidence to go to the jury which was purely speculative and not based upon any facts shown from an examination of the plaintiff in the case, and in this regard appellant particularly calls our attention to the following from the testimony of Dr. Werden while he was testifying with regard to a concussion of the plaintiff's brain:

"Q. When you say that a microscopical change may have occurred, what do you mean, Doctor—do you mean after a concussion? A. Yes, sir.

"Q. And this change may—presuming that one would see it under the microscope, what would be the change that you refer to?

"Mr. Blum: Just a second. We object to this line of questioning on the ground there is no proper foundation laid as yet of such an occurrence, and I do not think the testimony

or the questions are competent. * * * There is no testimony in this record that this doctor testified that there is any changes in the brain.

"Mr. Styskal: I submit that there is testimony that this man had a concussion.

"The Court: The objection is overruled. Answer the question, Doctor. A. Changes that occur in the nerve cells following a concussion are, swelling of the nerve cells and loss of their normal pigmentation, that is, the amount of coloring matter there is in the cells, and displacement of the nucleus or yolk of the cell—and displacement of one side of the cell. It may progress to a natural breaking up of both nucleus and the wall of the cell. Those are the stages in the processes of degeneration of the nerve cell following concussion. It may proceed to any one of those various degrees of change."

Frequently it happens when expert witnesses are testifying that conclusions to be drawn from the facts stated depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases not only the facts but the conclusions to which they lead may be testified to by qualified experts. 10 Cal. Jur. 959. Of such a nature were the questions and answers to which appellants refer. We find no error in the trial court's rulings.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



3 Cal.App.2d 655

PEOPLE v. BOYINGTON.

Cr. 2559.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1935.

Criminal law ⊂=525

Exclusion of evidence tending to show mental incapacity, not amounting to insanity, of defendant charged with robbery and offer to assist jury in determining weight to be attached to voluntary confession, *held* reversible error, though defendant had also pleaded not guilty by reason of insanity, in addition to plea of not guilty (Pen. Code, § 1026).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Henry Boyington was convicted on two counts of robbery in the first degree, and he appeals.

Reversed.

Frederic H. Vercoe and William B. Neeley, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant was accused in an information in count 1 of murder, in count 2 of robbery of one Munsell, and in count 3 of robbing one Randall. He pleaded not guilty and not guilty by reason of insanity. He was found not guilty as to count 1. As to counts 2 and 3 he was found guilty, and as to each count it was found to be robbery in the first degree. On the issue of insanity he was found sane. From judgments of conviction and order denying motion for new trial, defendant appeals.

As an essential element of proof as to counts 2 and 3 the prosecution was permitted to introduce testimony of a confession which defendant is alleged to have made to the police officers. Prior to the ruling by the court on its admissibility an offer was made of proof to show mental incapacity of defendant not amounting to insanity, but materially affecting the validity and force of the declarations. The offer was rejected, and the statements were admitted. A further request was made on behalf of defendant that such evidence be admitted to assist the jury in determining the weight to be attached to the confession, but it was again excluded. This ruling of the trial court was error so prejudicial to the defendant as to entitle him to a new trial.

An examination of the evidence shows, as to count 2, that Munsell, a taxi driver, was held up by three men, and that he did not identify defendant at the police station; as to count 3, that Randall, a clergyman, was held up in his home by two men, and that he did not identify defendant as one of the perpetrators of the offense. Defendant was not seen in the company of any other person identified in either case, no stolen property from either crime was found in his possession, and certain other apparent vulnerable

points in the prosecution's case appear, aside from the confession.

Defendant voluntarily and alone walked into the police station and gave himself up, saying a girl had promised to marry him if he would tell the police about any crimes he had committed. The reports of the two crimes of which he was convicted were shown him, and he confessed to the substance of such reports. Evidence as to defendant's mental condition, which the jury should have been permitted to consider as affecting the weight to be attached to the confession, was introduced at the trial on the issue of insanity, when three psychiatrists testified. The first, superintendent of a state hospital for the insane, said defendant was not mentally deficient, but was "constitutionally psychopathic"; that the telling of a wild, improbable story would be an indication of such a condition. Another psychiatrist testified defendant was "unstable," "irresponsible," and "a pathological liar," i. e., one who lies boastfully, for no special purpose, to impress people, and was a little more developed than a child of twelve years. The remaining expert stated that defendant was "mentally subnormal," able to reason as a person of twelve, and that "he carries forward into his adult life the reactions of childhood. All these lies he tells are mere fantasy commonly normal to children. * * * He is mentally defective, always has been. He has always lived in mental poverty." The testimony of certain lay witnesses was also available, confirming the description of defendant's mentality given by the psychiatrists. It is clear that appellant was not insane or irrational, but that he was suffering from a condition of mental inadequacy which under the circumstances was an essential matter for the court and jury to consider in determining the weight to be attached to his statements.

In People v. Goold, 215 Cal. 763, 12 P.(2d) 958, 959, testimony on behalf of defendant was offered to prove that he was at the time of making the confession so mentally deficient as to be unable to understand its meaning. It was refused on voir dire, but was later admitted and submitted to the jury under proper instructions. The court said: "The proper foundation was laid as to the free and voluntary making of the confession, and the attack upon it, on the ground of insanity, need not necessarily have preceded the reading of it. The case of People v. Dias, 210 Cal. 495, 292 P. 459, does not require a different order of proof from that followed here, and *the only essential fact is that ultimately the jury were permitted to consider the evidence of such incompetency* under proper instructions. See People v. Lehew, 209 Cal. 336, 287 P. 337." (Italics ours.) Penal Code, § 1026, does not preclude defendant at the trial on his plea of not guilty from offering to the court or presenting to the jury testimony as to his mental condition at the time of making a statement which is being offered in evidence against him, such testimony being for the limited purpose of enabling the court to rule on its admissibility or the jury to weigh its evidentiary value.

It is apparent that the determination by the jury as to appellant's guilt might have been affected by the testimony concerning his mental condition, which was offered and was excluded by the ruling of the trial court.

Judgments and order reversed.

We concur: STEPHENS, P. J., CRAIL, J.



3 Cal.App.2d 379

PEOPLE v. INGLY.

Cr. 2614.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

Hearing Denied by Supreme Court Jan. 25, 1935.

1. Rape ⇐52(1)

Evidence sustained conviction of statutory rape.

2. Criminal law ⇐1036(1), 1054(1), 1169(11)

In rape prosecution, permitting prosecutrix' sister to testify that accused had placed her upon table and had slightly penetrated her private parts with his *held* not reversible error, where no objection was interposed and no motion to strike was made, and testimony was not inherently improbable.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

William Albert Ingly was convicted of statutory rape, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Judge.

Defendant was convicted of statutory rape alleged to have occurred in April of 1933; the complaining witness then being twelve years of age. He was also convicted of two other such offenses alleged to have been perpetrated in March and April of 1934.

There was evidence to the effect that the complaining witness often went over to defendant's home to play, and other small children were often with her. The testimony was that the act in two instances occurred while the girl sat on his lap, facing away from him and in the presence of the girl's younger sister. On one occasion they were standing. There was no testimony of the acts themselves except that the girl was positive that they occurred and defendant flatly denied them. There was testimony that defendant was in the habit of taking this girl and some of her playmates on his lap, and one of the little girls testified that she saw defendant and complaining witness sitting in an automobile in a garage, and that defendant had his hand up under the latter's skirts. There is uncontradicted testimony that the prosecuting witness had had sexual relations, and she claims that this had occurred only with defendant.

[1] While it is proper that charges of this kind, so easy to make and so difficult to refute, should be viewed with care, this duty devolves principally upon the jury at the trial and the trial judge upon motion for new trial. We cannot say, as a matter of law, that the evidence herein does not support the verdict and judgment.

[2] In the course of the trial, the younger sister of the complaining witness testified that defendant had placed her upon a table and had slightly penetrated her private parts with his. It is claimed that this was reversible error. Under an ordinary case, the familiar rule that, where no objection was interposed and no motion to strike was made, and neither was made here, the error is not of necessity considered reversible, is applicable. The case of People v. Biescar, 97 Cal. App. 205, 275 P. 851, is cited as authority to the point that evidence of appellant's having entertained young women in his cottage for immoral purposes was so damaging that an admonition to the jury (which was not given) "would have been unlikely to remove the harm done." This conclusion, of course, was largely based upon the evidence in that case, and the court denominated the story of the prosecutrix therein as highly improbable. The case of People v. Anthony, 185 Cal. 152, 196 P. 47, also cited by appellant, turned on the point that the district attorney in continuing questions to which objections were sustained created an air of suspicion which an admonition could not remove from the jurors' minds. The cases are so different that they can be of little help in the solution of the problems here presented. The narrative given by the prosecuting witness, corroborated by her companions, as to the habit of appellant in encouraging them to sit upon his lap, together with the testimony that appellant's hand had been observed up under the skirt of such witness, seems to us to be more unusual than inherently improbable or weak. In our review of the whole case, we cannot say that, because of the error complained of, appellant has not been accorded a fair trial.

The ruling on the motion for new trial is sustained, and the judgment is affirmed.

I concur: CRAIL, J.



3 Cal.App.2d 502

Ex parte HICKEY.

Cr. 1834.

District Court of Appeal, First District, Division 1, California.

Jan. 7, 1935.

1. Habeas corpus ⇨22(1)

In habeas corpus proceeding, petitioner may not go behind judgment and offer evidence to impeach facts and matters adjudicated therein, but facts found must be taken as true.

2. Habeas corpus ⇨53

Habeas corpus *held* not to lie to compel sheriff to release petitioner who was imprisoned pursuant to judgment of contempt because of refusal to answer questions as guardian of incompetent person, as against contention that questions tended to incriminate petitioner, where trial court declared that questions propounded were proper, and questions were not set forth in habeas corpus petition (Code Civ. Proc. § 2065).

Application for habeas corpus by David F. Hickey, directed to the Sheriff of the City and County of San Francisco.

Writ denied.

Vincent W. Hallinan and William F. Herron, both of San Francisco, for petitioner.

PER CURIAM.

Application for a writ of habeas corpus. According to the allegations of the petition, David F. Hickey was committed to the custody of, and is being imprisoned by, the sheriff of the city and county of San Francisco pursuant to a judgment of contempt rendered by the superior court. A copy of said judgment is set forth in the petition, and it appears therefrom that Hickey was brought before said court under process of attachment to show cause why he should not be punished for contempt for refusing to render an account as guardian of the estate and person of Patrick Murphy, an incompetent person; that, after being sworn as a witness, he "refused to answer any questions propounded to him touching upon his administration of said estate, and also declined and refused to testify concerning the assets of said estate, and declined to present his account * * * for settlement, upon the ground that any answers given by him might tend to incriminate and degrade him"; that he persisted in such refusal, whereupon he was adjudged guilty of contempt.

[1] Conceding, as petitioner contends, that a person need not give an answer which will have a tendency to subject him to punishment for a felony (Code Civ. Proc. § 2065; In re Sales, 134 Cal. App. 54, 24 P.(2d) 916), the trial court declared in substance in its judgment of contempt that the questions propounded to the prisoner were proper questions. None of said questions are set forth in the petition, nor is there any allegation in the petition to the effect that the answers thereto, if given, would have tended to incriminate the prisoner; it being alleged merely that he refused to answer the same upon that ground. Indeed, it has been held that in a habeas corpus proceeding a petitioner may not go behind the judgment and offer evidence to impeach facts and matters adjudicated therein; the facts found must be taken as true. Ex parte Ewell, 71 Cal. App. 744, 236 P. 205.

[2] Moreover, it affirmatively appears from said judgment that the prisoner went beyond the limitation of the privilege with which the law clothed him, and refused to file any account as ordered by the court, or to answer any questions whatever touching upon his administration as guardian. Therefore, upon these latter grounds alone, the trial court was empowered to adjudge him guilty of contempt.

For the reasons stated, the application for the writ is denied.



3 Cal.App.2d 532

STATE COMPENSATION INS. FUND et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9947.

District Court of Appeal, Second District, Division 2, California.

Jan. 9, 1935.

Master and servant ⚖364

Recipient of work relief as an open welfare case *held* not "employee" within Workmen's Compensation Act, though he was required to work and received cash as part of aid relief (St. 1917, p. 831, as amended; St. 1933, pp. 2613, 2615, §§ 8(a), 12½).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Proceedings under the Workmen's Compensation Act by A. H. Christensen, against the State Compensation Insurance Fund and the City of Pomona. The Industrial Accident Commission awarded compensation, and the State Compensation Insurance Fund and the City of Pomona petitioned for a writ of review.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

CRAIL, Justice.

A. H. Christensen was injured while receiving work relief "as an open welfare case." Except as to dates and names, the facts are identical with those in the case of McBurney v. Industrial Accident Commission, 220 Cal. 124, 30 P.(2d) 414. Under the

rule established in that case, he was not an employee within the meaning of the Workmen's Compensation Act (St. 1917, p. 831, as amended). The contention, based on recent amendments to the act which are designated as sections 8(a) and 12½ (St. 1933, pp. 2613, 2615), that because Christensen was required to work and received cash as part of said aid relief, he was an employee, is fully answered by the case of Los Angeles County v. Industrial Accident Commission and Jones (Cal. App.) 38 P.(2d) 828. As Christensen was not an employee, he was not entitled under the law to compensation.

Award annulled.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.

In re SOBOSLAY'S ESTATE. *

Civ. 9627.

District Court of Appeal, First District, Division 1, California.

Dec. 20, 1934.

Rehearing Denied Jan. 19, 1935.

Hearing Granted by Supreme Court Feb. 18, 1935.

1. Executors and administrators ⇐315(4), 509(7)

Alleged erroneous recitation, in judgment settling final account and decreeing distribution of estate, that all claims against estate had been fully paid and discharged, could be corrected by court rendering decree only by motion under statute after notice to adverse party (Code Civ. Proc. §§ 473, 1491a).

2. Executors and administrators ⇐315(4)

Decree of distribution of testator's estate *held* "judgment" within statute providing that court may on motion after notice to other party set aside void judgment (Code Civ. Proc. § 473).

[Ed. Note.—For other definitions of "Judgment," see Words & Phrases.]

3. Courts ⇐24
Executors and administrators ⇐315(4)

Unless order setting aside decree of distribution of testator's estate was made pursuant to statute providing that court may, on motion, after notice to other party, set aside void judgment or order, court had no jurisdiction to nullify decree, and such jurisdiction could not be conferred by consent (Code Civ. Proc. § 473).

4. Executors and administrators ⇐315(4)

Authority to vacate decree of distribution after approval of executors' account *held* not conferred on court by legatees' motion to vacate decree, where motion was never prosecuted or acted upon and was allowed to lapse (Code Civ. Proc. § 473).

5. Executors and administrators ⇐315(4), 509(1)

Order settling executors' final account and ordering distribution of estate *held* "final judgment" to be nullified only in manner provided by law (Code Civ. Proc. § 473).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

6. Executors and administrators ⇐315(4), 509(9)

Order vacating prior order approving executors' final account and ordering distribution of estate *held* void, where prior order was not void on its face, motion for new trial was not filed, vacating order was not made in independent suit in equity, and action taken by executors in obtaining vacating order was ex parte without notice to other parties and without hearing (Code Civ. Proc. § 473).

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Julius Soboslay, deceased. From an order overruling objections to the final account of Albert J. Fankhauser, executor, and Emma Ungar and another, executrices, and from an order settling the final account and the amendments thereto, and decreeing distribution of estate, the Protestant Orphan Asylum and another appeal.

Orders and decree reversed.

Hubbard & Hubbard, of San Francisco, for appellants.

John R. Tyrrell and W. L. A. Calder, both of San Francisco, for respondents.

HELD, Justice pro tem.

The appeal here is from an order overuling appellants' objections to the final account of respondent executors, and from an order settling the final account and the amendments thereto, and decreeing distribution of the estate.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes
*For subsequent opinion see 47 P.2d 714.

Julius Soboslay, a resident of the city and county of San Francisco, state of California, died testate on the 22d day of April, 1930, leaving estate in said city and county of San Francisco and elsewhere in the state of California. In his will, executed on the 6th day of April, 1929, the decedent made certain cash legacies aggregating $21,000, and also devised to respondents herein a tract of land in the county of Madera, state of California. He directed that the residue of his estate be converted into cash and the proceeds paid in equal shares to Protestans Orszagos Arvahaz (Protestant Orphan Asylum) of Szegenyhaz-er-I sz. City of Budapest, kingdom of Hungary, and to Sarospataki Reformatus Polskola (Protestant College of Sarospatak) in the city of Sarospatak, province of Zemplen, in said kingdom of Hungary. These residuary legatees are the appellants herein.

The respondents Albert J. Fankhauser, Emma Ungar, and Clara Baldizzone were named in said will as executor and executrices thereof, respectively, and, after due proceedings had and on the admission of the will to probate, were so appointed. Letters testamentary were issued on the 15th day of May, 1930. On February 5, 1932, respondents filed their first and final account and petition for distribution, from which it appeared that there remained on hand a cash balance of $60,846.54 available for payment of legacies and expenses incidental to the closing of the estate. The residue of the estate included, in addition to the said sum in cash, the tract of land in Madera county devised to respondents, and certain shares of stocks. No objections were filed to said account, and on the 17th day of February, 1932, an order was made settling the same, and a decree of distribution entered reciting that the estate to be distributed in accordance with the terms of the last will of the deceased consisted of $61,238.35 cash in the hands of the executor and executrices, certain shares of stock described in the decree, and the Madera county property. The decree distributed said residue as follows: Cash legacies aggregating $21,000 to the persons designated in the will, the Madera county property to respondents, and all the rest, residue, and remainder of the estate to appellants.

On May 5, 1932, there was filed on behalf of appellants notice of a motion to be made on May 13, 1932, to vacate and set aside the order settling said account and the decree of distribution, on the grounds said account was incomplete and erroneous and was inadvertently made by the court, and that appellants had failed to appear and object thereto because of surprise, inadvertence, and excusable neglect. Accompanying the notice was an affidavit of the attorney in fact for appellants, setting forth that, subsequent to the entry of said order and decree, affiant had been advised by the executor and executrices that the said account was erroneous and incomplete, and that they refused to make distribution in accordance with the decree. On May 5, 1932, the same day on which appellants' notice of motion and affidavit was filed, an affidavit was filed on behalf of respondents, setting forth that in the preparation of the final account there was inadvertently omitted therefrom two claims filed against said estate by respondents Fankhauser and Baldizzone in the aggregate sum of $30,000, which had been paid by the executor and executrices to two of their number as claimants and which sum should have been deducted from the amounts set forth in the decree as available for distribution. Following the filing of the affidavit on behalf of respondents, and without awaiting a hearing on appellants' motion, the court on May 5, 1932, made an order based on the affidavit filed on behalf of respondents, by which order the decree of distribution theretofore entered was set aside, and an amended decree of distribution "to conform with the true facts and to correct the error in the decree of distribution made and entered herein" was ordered filed. No further proceedings were had on appellants' motion to vacate the order settling the account and the decree of distribution. Thereafter, and on June 3, 1932, respondents filed an "amendment to their first and final account." This amendment set forth that there had been inadvertently omitted from the previous account two claims aggregating $30,000, but that in all other respects said account was correct; also that, instead of a cash balance of $60,846.54 in the hands of respondents, the true cash balance was only $30,846.54, out of which inheritance taxes aggregating $10,129.34 were to be paid, leaving a balance of $20,717.20 in cash available for distribution. This sum, being less than the $21,000 cash legacies provided for by the will, left no cash residue for distribution to appellants.

On June 10, 1932, appellants filed exceptions to certain items set forth in the original account, and also to each of the items set out in the amendment to the account. Subsequently, and on July 8, 1932, appellants, by leave of court, filed amended exceptions to both the first and final account and the amendment thereto. An answer to the amend-

ed exceptions was filed by respondents on August 23, 1932. After the filing of the amendment to the account, and prior to the filing of the exceptions of June 10, 1932, two hearings were held by the court, at which testimony was taken, but these hearings seem to have had for their purpose an inquiry into the necessity of requiring a bond of respondents for the faithful performance of their official duties. However, the account with its amendment, the exceptions thereto, and the answer to these exceptions, came before the court on September 2, 1932. Evidence was taken at that time, and respondents Fankhauser and Baldizzone then for the first time asked, and were granted, permission to amend their claims, and the further hearing of the matter was continued to a later date. On October 4, 1932, amended claims were filed by said respondents Fankhauser and Baldizzone; on October 10, 1932, appellants filed objections to said claims, to which objections said claimants interposed an answer. The matter again came on for hearing before the court on November 2, 1932, and after further evidence was adduced the matter was submitted for decision. Thereafter, and on March 13, 1933, findings were made by the court and a decree ordered overruling the exceptions of appellants to the account and settling said account, and thereafter judgment and decree in accordance therewith was made and entered settling the first and final account and the amendment thereto, and decreeing final distribution. From this judgment and decree appellants prosecute this appeal.

The claims originally filed by respondents Fankhauser and Baldizzone, and for the payment of which they and the respondent Ungar, as executor and executrices, inadvertently omitted to claim credit in their original account, alleged an indebtedness to them from the estate of decedent in the following language: "To money loaned to the decedent at his special instance and request, as evidenced by promissory note, copy of which is hereto set forth." Following which was set forth in the claim of Baldizzone a copy of a promissory note dated April 6, 1928, for $10,000, payable to the claimant, due four years after date, without interest, and signed by the decedent. The claim of Fankhauser contained a copy of a note in identical language, except as to amount, which was $20,000. These claims were filed on July 8, 1930. The date of first publication of notice to creditors was May 17, 1930, and in the original final account and petition for distribution filed on February 5, 1932, it is alleged that notice to creditors was given, that the statement provided by section 1491a of the Code of Civil Procedure had been filed in due time, and that "more than six months have expired since the first publication of notice to creditors." At the conclusion of a hearing on the objections to the amendments to the final account, held on September 2, 1932, the attorney for respondents announced in open court as follows: "I ask now for permission to amend those claims in conformity with the facts as brought out by the evidence here. * * * The claim now states to money loaned to the decedent during his lifetime, but we want to amend it to show that it was money that the decedent held in trust for these people." Objection was made by appellants, and, although the court announced that the amendments would be allowed, the further hearing was postponed. No other application or order was made in reference to filing such amendments and, as said before, amended claims were filed on October 4, 1932. The theory of respondents that the decedent held moneys in trust for the claimants would appear to be predicated upon the following facts: Elisa Soboslay, the wife of deceased, died on March 9, 1928. She left in the possession of her surviving husband a writing dated August 15, 1927, which respondents contend is a will, while appellants claim that it is precatory only, and not testamentary in nature. Because of the conclusions we have reached it is not necessary to determine this question, nor whether, under the rule laid down in Re Estate of Phillips, 203 Cal. 106, 263 P. 1017, the deceased wife had the power of testamentary disposition over any of the community property of the parties. Suffice it to say, that the instrument is addressed "To my beloved family, Emma Ungar, Clara Baldizzone, Albert Julius Fankhauser," and contains this language: "Would like each of above named to receive $15,000.00." Within a month after the death of his wife, Julius Soboslay delivered, to each of the respondents, bank stock of the value of $5,000, and also delivered to respondents the two promissory notes which form the basis of the claims of respondents Fankhauser and Baldizzone. Accompanying the delivery of the bank stock and notes, Julius Soboslay also delivered a letter asking that the recipients accept the bank stock and notes as "a deed of gift * * * in memory of my dear wife and your dear sister Elizabeth Soboslay."

The amended claims so filed on October 4, 1932, each contain a copy of the appropriate promissory note, and also allegations that

Elizabeth Soboslay on August 15, 1927, executed her last will and testament; that the same was duly admitted to probate on August 8, 1932; that Julius Soboslay, in order to carry out the terms of the will of his deceased wife, executed the promissory notes and delivered said bank stock.

To explain the reference in said claims to the admission to probate of the will of Elizabeth Soboslay, it is to be noted that on August 20, 1928, some five months after the death of Elizabeth Soboslay, respondent Fankhauser filed in the superior court of the state of California, in and for the city and county of San Francisco, his petition for letters of administration, and therein alleged that "due search and inquiry have been made to ascertain if said deceased left any will, but none has been found, except a letter or writing of said deceased, which your petitioner alleges is not of testamentary character and is not a will, and according to the best knowledge, information and belief of your petitioner, said deceased died intestate." The witness Politzer, who acted as attorney for the petitioner in said proceeding, testified that on the hearing of said petition he exhibited said writing referred to to Judge Graham, who heard the matter, and that Judge Graham then ruled the instrument was of a precatory nature and not testamentary in character, and thereupon made an order finding that Elisa Soboslay died intestate, and directing the appointment of respondent Fankhauser as administrator. Said respondent testified that the sole purpose of that administration was to enable Julius Soboslay, the husband of Elisa Soboslay, to prosecute an action, which was subsequently filed, to quiet title to certain property in Madera county which stood in the name of both husband and wife. A decree in that action was later made and entered, and no further proceedings were had in that estate proceeding. However, on July 26, 1932, some five months after the original decree of distribution was entered in the estate of Julius Soboslay, deceased, one Robert T. Iberson, filed in the superior court of the state of California, in and for the city and county of San Francisco, a petition that the writing referred to in the prior petition of respondent Fankhauser be admitted to probate as the last will and testament of Elisa Soboslay, deceased, and that he be appointed administrator with said will annexed. The petition recited that Iberson had been nominated as such administrator by respondent Fankhauser. On August 8, 1932, an order was made, admitting said will to probate and appointing Robert T. Iberson as administrator with said will annexed. He duly qualified, and letters were accordingly issued to him.

All the proceedings taken herein, subsequent to the order settling the final account as originally filed and the decree of distribution entered at that time, are predicated upon an order made on May 5, 1932, which reads as follows: "Upon reading and filing the affidavit of John R. Tyrrell, attorney for the executors of the above-entitled estate, from which it appears that two claims aggregating the sum of Thirty thousand ($30,000.00) dollars were not included in the said Final Account now allowed as a credit in the account of the executors, although heretofore approved by this Court, and good cause appearing therefore, it is ordered that the Decree of Distribution heretofore made and entered in the above entitled matter, be and the same is hereby set aside, and that an Amended Decree of Distribution be filed to conform with the true facts and to correct the error in the Decree of Distribution made and entered herein." The proceedings leading up to this order may be reviewed as follows:

1. On May 5, 1932, there was filed, on behalf of appellants, a notice of motion to be heard on May 13, 1932, which notice was accompanied by an affidavit alleging facts showing surprise, inadvertence, and excusable neglect. The notice stated that the motion would be for an order vacating and setting aside the decree settling the first and final account and ordering final distribution; also to require the executors to file a full and complete account of their administration of the estate, and to file adequate bond as executors. This motion was not made at the time stated in the notice or thereafter, and was allowed to lapse.

2. On May 5, 1932 an affidavit by the attorney for the executors was filed, wherein it was alleged that he had prepared the final account and petition for distribution of the estate, and in the preparation thereof he had inadvertently omitted therefrom the claims of Alfred J. Fankhauser for $20,000, and of Clara Baldizzone for $10,000, which claims had been allowed and paid in due course of administration; that the error in omitting said claims was not discovered until after the court had made its decree of distribution. The affidavit stated also that "this affidavit is made in support of a motion to set aside the Decree of Distribution heretofore made and entered, and to make an amendment to said Final Account showing

the allowance of the two claims herein referred to and for the purpose of giving the executors credit in their Final Account for the payment of such claims."

3. On the same day on which this affidavit on behalf of the executors was filed, there was made in open court, and filed, the order above set forth, purporting to set aside the decree of distribution and allowing the filing of an amended decree of distribution.

In the case of Benning v. Superior Court, 34 Cal. App. 296, 167 P. 291, 292, a writ of mandate was sought to compel the superior court to set aside an order settling the final account and decree of distribution in the estate of Manuel S. Nevis, deceased. The writ was sought by an assignee of a creditor of the estate, who had been paid only a portion of an allowed claim. The final account and petition for distribution alleged payment of all allowed claims, although at the time a portion of petitioner's claim still remained unpaid. After due notice and hearing, an order was made by the court settling the account and finding that all debts of the estate had been paid, and a decree of distribution was made and entered. Subsequently, a petition was filed in the said superior court for an order setting aside the decree of distribution. A demurrer to the petition interposed by the distributees of the estate was sustained by the court, and the petition was denied upon the ground that the order settling the final account and the decree of distribution had become final and conclusive against the petitioner. The District Court of Appeal said: "The sole question for consideration is, therefore, whether the petitioner here is entitled to an order of the said superior court setting aside the order settling the final account and the decree of distribution theretofore made. * * *" In denying the writ, it was there held by the District Court of Appeal that an order settling final account and decreeing distribution of the estate is placed upon the same footing as an ordinary judgment in a civil action, and the court said: "It cannot be doubted that a judgment can be nullified by the court which rendered it only: First, on motion for a new trial; second, by a motion under the provisions of section 473 of the Code of Civil Procedure, where the judgment is inadvertently made, and where application is made to set it aside within six months; third, by motion therefor at any time where the judgment is void on its face; fourth, by an independent suit in equity. * * *"

[1] In the case at bar, no motion for a new trial was or could be made. The judgment is not void on its face, nor is this an independent suit in equity to set aside the judgment. Unless the motion made here comes within the terms of section 473 of the Code of Civil Procedure, respondents have not brought themselves within any of the recognized methods of procedure whereby said judgment of the court could be legally avoided or nullified. The judgment set aside herein recites "that all claims against the estate have been fully paid and discharged." The respondents say that this was not a true finding of the facts. However, it was a question which the court was called upon to decide, and, if the court erred in its decision, it could be corrected by that court only by motion under section 473 of the Code of Civil Procedure.

In United Railroads v. Superior Court, 170 Cal. 755, 760, 151 P. 129, 132, Ann. Cas. 1916E, 199, it is said: "Nothing is more firmly settled in this state than the doctrine that the superior court may not revoke, modify, or otherwise disturb its judgments and orders regularly made in pursuance of plain statutory provision, where the statute prescribes the method by which such judgments and orders may be reviewed, except as authorized by statute." To the same effect is In re Estate of Hunter, 99 Cal. App. 191, 278 P. 485.

[2] In Holtum v. Greif, 144 Cal. 521, 78 P. 11, the court quotes approvingly the language of Benning v. Superior Court, supra, restricting the methods by which a judgment may be nullified. That a decree of distribution is in the nature of a judgment is also held in Re Estate of Parsell, 190 Cal. 454, 213 P. 40, 25 A. L. R. 1561. That the court may set aside a decree of distribution under section 473 of the Code of Civil Procedure was assumed in Re Estate of Hudson, 63 Cal. 454. In De Pedrorena v. Superior Court, 80 Cal. 144, 22 P. 71, it was expressly held that a court, at any time within six months, can set aside a decree of distribution on motion upon proper showing. In Re Estate of Hickey, 129 Cal. 14, 61 P. 475, an order settling final account and a decree of distribution was vacated under section 473.

[3] The question then arises whether in this case the order setting aside the decree of distribution was one which was made pursuant to section 473, Code of Civil Procedure. Unless it falls within that section, the court was without jurisdiction to nullify

its judgment theretofore entered, and such jurisdiction could not be conferred by consent. In Smith v. Westerfield, 88 Cal. 374, 378, 26 P. 206, 207, it is said: "The superior court, while sitting as a court of probate, has only such powers as are given it by statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet in the exercise of these powers its jurisdiction is limited and special; and whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision."

[4] It appears that the motion of appellants to vacate the order settling the original account and the decree of distribution was never prosecuted or acted upon by the court, and was allowed to lapse. Colthurst v. Harris, 97 Cal. App. 430, 275 P. 868. No authority was therefore by it conferred on the court to vacate the judgment theretofore entered.

The action taken by respondents in obtaining the order setting aside the judgment was entirely ex parte. No notice was given to the appellants, nor does it appear that they were present, and no hearing of any kind was had, except such as may be inferred from a presentation to the court of the affidavit, with a request for the order vacating the judgment. The affidavit and order were filed on the same day. Section 473 of the Code of Civil Procedure permits the court to allow an amendment to any pleading or proceeding after notice to the adverse party. In the early case of Vallejo v. Green, 16 Cal. 160, the Supreme Court, solely for the reason that it did not affirmatively appear that a copy of the order fixing time was served on the adverse party or that he had notice of the time when the motion would be heard, reversed the order vacating the judgment. The same order was made in Reilly v. Ruddock, 41 Cal. 312. The court there gave as one of the reasons why the default of the defendants for a failure to answer was improperly set aside: "Because there was no service of the moving papers, and the application was heard and decided in the absence of the plaintiff's attorney, who had no notice of the motion. This was error." In Brownell v. Superior Court, 157 Cal. 703, 709, 109 P. 91, it is held that the relief specified in section 473 may not be given until after notice to the adverse party. In Gill v. Peppin, 41 Cal. App. 487, 182 P. 815, 817, it is said: "While the court within the six months upon mere motion may vacate the judgment, the injustice of setting aside a judgment * * * without notice is not sanctioned by the Code." Equally pertinent is the language of the court in Dolan v. Superior Court, 47 Cal. App. 235, 239, 190 P. 469, 471, where it is said: "After a court has acted judicially it may not seek to correct its own errors by changing its judgments and orders without notice to the parties affected. Such action would very shortly deprive all judgments of their character of finality." To the same effect is Vale v. Maryland Casualty Co., 101 Cal. App. 599, 281 P. 1058.

[5, 6] The judgment of the lower court in settling the final account and ordering distribution was final, to be nullified only in the manner provided by law. This was not done. The subsequent order vacating the first order was in the language of the court in Vale v. Maryland Casualty Co., supra, functus officio. The case stands as though the original order had not been disturbed. Scamman v. Bonslett, 118 Cal. 93, 50 P. 272, 62 Am. St. Rep. 226. And this act of the court is one that goes to its jurisdiction. Lang v. Superior Court, 71 Cal. 491, 12 P. 306, 416; Carpenter v. Superior Court, 75 Cal. 596, 19 P. 174; State ex rel. McHatton v. District Court, 55 Mont. 324, 176 P. 608.

The orders and decree appealed from are reversed.

We concur: TYLER, P. J.; CASHIN, J.

3 Cal.App.2d 454

BREA v. McGLASHAN.

Civ. 8959.

District Court of Appeal, Second District, Division 2, California.

Dec. 31, 1934.

Rehearing Denied Jan. 25, 1935.

1. Pleading ⇐192(2)

Objection that pleading is uncertain does not go to failure to allege sufficient facts, but to doubt as to what pleader means by facts alleged (Code Civ. Proc. § 430, subd. 9).

2. Account ⇐17(1)

Complaint in action for accounting need only state facts showing existence of relationship requiring accounting and that some balance is due plaintiff.

3. Principal and agent ⇐78(3)

Complaint alleging that defendant agreed to pay plaintiff stated percentage of moneys received by defendant under contracts procured by plaintiff and that plaintiff did not know what moneys were received stated cause of action for accounting as only method of arriving at amount due.

4. Pleading ⇐12

Pleader is not required to state facts peculiarly within his opponent's knowledge.

5. Pleading ⇐35

Allegation of complaint, sufficiently alleging plaintiff's employment by defendant, manner of compensation, performance of services showing some compensation due, and necessity of accounting to ascertain correct amount, that amount due was stated sum, *held* surplusage not rendering complaint uncertain (Code Civ. Proc. § 430, subd. 9).

6. Pleading ⇐52(2)

Inclusion of allegation that stated sum was due plaintiff from defendant in count of complaint for accounting did not render count vulnerable as stating two causes of action without stating each separately.

7. Principal and agent ⇐102(1)

Agent's power to make employment contract may be inferred from nature and necessities of business intrusted to him or principal's conduct clothing agent with apparent authority to employ.

8. Evidence ⇐265(18)

Admissions, made before controversy arose between parties to action, are entitled to more weight than denials at trial thereof.

9. Evidence ⇐595

Facts may be inferred from admissions of other facts.

10. Principal and agent ⇐123(3)

Radio station owner's admissions, station's literature, and his references to person employing advertising solicitor as station's advertising manager, and failure to mention such person's lack of authority to employ solicitor in conversation with latter, *held* to warrant trial court's finding, in solicitor's action against such owner for accounting, that plaintiff was employed by advertising manager under agreement which latter had authority to make and was known to and approved by defendant.

11. Principal and agent ⇐123(1)

Agent's authority may be implied from acts and circumstances shown when it is unwritten and express oral authority is not satisfactorily shown.

12. Principal and agent ⇐81(2)

Contract to pay advertising solicitor stipulated commission on radio advertising contracts she procured *held* to entitle her to commission on contract procured as result of her efforts, though other agents of employer procured written contracts.

Word "procure" does not necessarily imply formal consummation of agreement, but means "to bring about by care and pains, effect, contrive and effect, induce or cause," and, in its broadest sense, "to prevail upon, induce or persuade person to do something."

[Ed. Note.—For other definitions of "Procure," see Words & Phrases.]

13. Brokers ⇐56(3)
Principal and agent ⇐81(2)

Agent or broker, who is inducing or procuring cause of contract, is entitled to commission for procuring it, though principal takes matter out of agent's hand and completes contract.

14. Brokers ⇐53
Principal and agent ⇐81(2)

Originating cause, which ultimately led to conclusion of transaction, is procuring cause of contract within rule entitling agent or broker who is procuring cause of contract to commission.

15. Appeal and error ⇐1011(1)

Whether agent, suing principal for commission, was procuring cause of contract, is for trial court, whose finding will not be disturbed on appeal, where evidence was conflicting.

16. Principal and agent ⇐78(6)

Evidence, in action against radio station owner for accounting of commissions due plaintiff for procuring radio advertising contracts, *held* to establish her right to commis-

sion, though defendant sent others to secure written contracts solicited by plaintiff.

17. Evidence ⇐258(2)

Agent's admissions are admissible in evidence against principal, where prima facie evidence of agency is introduced, though not themselves evidence of agency.

18. Trial ⇐60(2)

Admission in evidence of alleged agent's declarations as to his authority before introduction of evidence sufficient to establish his agency *held* not error (Code Civ. Proc. § 1870, subd. 5; § 2042).

19. Trial ⇐43

Whether error was committed in admitting testimony depends on its admissibility in light of entire record, rather than as of time when it came in.

20. Trial ⇐51

Testimony may be admitted provisionally, subject to being stricken if not shown to be admissible by facts subsequently adduced.

21. Trial ⇐60(2)

Admission in evidence of admission, by one employing advertising solicitor, that witness was radio station's advertising manager before actual proof of his agency in solicitor's action against station owner for accounting of commissions, *held* not error (Code Civ. Proc. § 1870, subd. 5; § 2042).

22. Trial ⇐395(1)

Trial court's finding that plaintiff was employed by defendant *held* sufficiently specific finding of agency entitling plaintiff to recover commissions on contracts procured by her.

23. Trial ⇐395(5)

Only ultimate facts are required to be stated in trial court's findings.

24. New trial ⇐99

Newly discovered evidence, to justify new trial, must be material evidence, which could not have been discovered with reasonable diligence and produced at trial.

25. New trial ⇐103

To be material, newly discovered evidence relied on as ground for new trial must be such as to render different result probable on new trial (Code Civ. Proc. § 657, subd. 4).

26. New trial ⇐105

Newly discovered merely cumulative and impeaching evidence is not ground for new trial (Code Civ. Proc. § 657, subd. 4).

27. New trial ⇐105

Newly discovered evidence of affiant's denial of plaintiff's statements, on trial of action against radio station owner for accounting of commissions due plaintiff for procuring advertising contracts, that affiant had definitely promised contract to plaintiff, *held* insufficient to warrant new trial; being purely cumulative and impeaching.

Defendant and his witnesses contended throughout trial that contract with client's company was not result of any effort on plaintiff's part.

28. New trial ⇐102(3)

Defendant's motion for new trial of action for accounting of commissions due plaintiff for procuring radio advertising contracts, on ground of newly discovered evidence of affiant's denial of plaintiff's statement at trial that affiant had definitely promised contract to plaintiff, *held* properly denied for want of diligence in procuring and producing such evidence.

Appeal from Superior Court, Los Angeles County; R. Morgan Galbreth, Judge.

Action by Arlene Brea, sometimes known as Arlene Bowen, against Ben S. McGlashan. From a judgment for plaintiff and an order denying defendant's motion for a new trial, defendant appeals.

Affirmed.

Rollin L. McNitt and Edythe Jacobs, both of Los Angeles, for appellant.

John J. Craig and Miriam M. Olden, both of Los Angeles, for respondent.

YANKWICH, Justice pro tem.

The plaintiff sought to recover from the defendant the sum of $8,300. Judgment went for the plaintiff in the sum of $958.75. The amended complaint, upon which the cause was tried, was in two counts. The first count, denominated accounting, in substance set forth the following facts: The defendant is the owner of a radio station known as KGFJ, located in the city of Los Angeles, which he was operating for hire and as an advertising medium and public broadcast. On April 8, 1931, plaintiff and the defendant entered into an oral agreement whereby the defendant employed the plaintiff as a solicitor for the purpose of obtaining radio advertising contracts for the defendant to be broadcast over the radio station. Carl G. McCrillis, who was then in charge of the advertising department of the defendant's radio station, was the representative of the defendant in making the agreement, and was acting within the scope of his employment, on behalf

of the defendant and as his agent. The defendant confirmed the employment two or three days after the contract was made by stating to the plaintiff that the same was satisfactory to him. The terms of the agreement were: Plaintiff would work for the defendant as a radio advertising solicitor for a term of one year; that the plaintiff would use her own discretion as to the manner of soliciting for the radio advertising, and her efforts or prospects would not be interfered with. For her compensation, the plaintiff was to receive 25 per cent. of the sums paid by the advertisers, upon contracts for radio advertising which the plaintiff procured. Plaintiff, in pursuance of the contract, interviewed various and numerous merchants and business houses for a period of approximately four months, for the purpose of procuring from them radio advertising contracts for the defendant. The complaint then alleged:

"That as a result of said interviews and of the work of plaintiff in soliciting said merchants, she began to obtain radio advertising contracts for the defendant, among which were the contracts of The May Company and Weaver-Jackson Company of Los Angeles. Plaintiff alleges that she had no knowledge of the amounts paid by said advertisers to the defendant for the reason the defendant refused to account to the plaintiff in any and all respects, and thereafter at all times the defendant refused to recognize the plaintiff as an advertising solicitor and refused to have any more business dealings with her whatsoever, and has ever since said time, viz.: on or about August 15, 1931, refused to recognize the plaintiff as his agent or employee in the subject hereinabove described; that prior to the time that the defendant refused to recognize the plaintiff any further in said matter the plaintiff had procured the oral consent of numerous other business concerns of Los Angeles to hold themselves in readiness to use time on the radio station of the defendant under the then current advertising rates of said radio station, among which companies were Bordens Milk Company, Simpson Fur Co., Women's Business Association, Welch Candy Company, Sawyers School of Business and Mission Candy Company.

"That the defendant, for the purpose of taking unfair advantage of the plaintiff, in some manner, ascertained the fact that the plaintiff had procured oral contracts for advertising from the above-mentioned companies and sent his agents, who are unknown to plaintiff, to said companies and solicited and obtained their contracts directly and contrary to the terms of his oral agreement with the plaintiff not to interfere with her prospects, and then and there prevented the plaintiff from obtaining said contracts to her damage in the sum of eight thousand dollars ($8,000.00) or more. Plaintiff here alleges that the names of the advertisers, which are advertising on defendant's radio station, as a result of plaintiff's work in soliciting the same and for which the defendant has refused to account to the plaintiff for her commissions under said contract, are unknown to the plaintiff and are within the special knowledge of the defendant, and plaintiff alleges that an accounting is necessary between said parties in order that the exact amount of damages may be ascertained."

The second count, after incorporating some of the allegations just set forth, alleged that the plaintiff suffered damages in the sum of $300, by reason of moneys spent in carrying out the agreement as the agent of the plaintiff. The judgment was upon the first count.

It is the contention of the defendant that the first count of the complaint is uncertain, and that a demurrer to it upon that ground, as well as upon the ground of misjoinder, should have been sustained. The attack is directed particularly at the allegations of paragraph IV of the first count, which we have set forth in full. It is insisted that the allegations are uncertain in that the complaint does not set forth in full the radio contracts secured upon which the commission is sought, the conditions of the contracts as to length of time to run, as to the two firms who are mentioned in the contract, who the other merchants were whom the plaintiff interviewed, who the persons were who held themselves in readiness to enter into advertising contracts, and whether the plaintiff was to receive compensation for merely procuring the persons to hold themselves in readiness, how she was prevented from obtaining contracts from the persons in readiness, and how the $8,000 damages were suffered by her.

[1-6] Our system of pleading aims at certainty. Uncertainty is made a ground of demurrer. Code Civ. Proc. § 430, subd. 9. The objection of uncertainty does not go to the failure to allege sufficient facts. It goes to the doubt as to what the pleader means by the facts alleged. Callahan v. Broderick, 124 Cal. 80, 83, 56 P. 782; Butler v. Wyman, 128 Cal. App. 736, 740, 18 P.(2d) 354. The first count of the complaint was, in reality, a cause of action for an accounting. Under our

system of pleading, a cause of action for accounting need only state facts showing the existence of the relationship which requires an accounting and the statement that some balance is due the plaintiff. Whann v. Doell, 192 Cal. 680, 684, 221 P. 899. Ordinarily, no accounting is necessary between an employer and an employee. But where, as here, the payment is alleged to be in the form of a percentage of the moneys received by the employer, and the complaint alleged that the plaintiff did not know what moneys had been received through contracts procured by her, an accounting would be the only method of arriving at the amount due. See Arbuckle v. Clifford F. Reid, Inc., 118 Cal. App. 272, 275, 4 P.(2d) 978. A pleader is not required to state facts which are peculiarly within the knowledge of his opponent. Here, the complaint alleged sufficiently the employment, the manner of compensation, the performance of services showing some compensation to be due, and the fact that the correct amount could not be ascertained without an accounting. The additional allegation that the amount due was $8,000 was surplusage. Its inclusion did not make the complaint uncertain. Nor did it (as claimed by the defendant) render the count vulnerable, as stating two causes of action, without stating them separately. In San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 P. 309, 312, which was an action for an accounting against an agent, the complaint alleged various acts of misappropriation of moneys and property by the agent, and various acts of misconduct which resulted in losses to the principal, and prayed for an accounting to determine the exact liability. Overruling the contention that these allegations were uncertain, and that several causes of action were stated in one count, the court said: "Such, then, being the nature of the action, and the facts averred warranting the institution of such an action, the points made by appellant that each averment of acts of misconduct by appellant constitutes a separate cause of action, which cannot be properly joined with either of the others, and that the complaint is uncertain, etc., because it does not state more particularly how each item of alleged liability arose, when it was created, and especially its amount, cannot be maintained. The purpose of the action was to call appellant to an accounting touching matters peculiarly within his knowledge, and arising out of the trust reposed in him; and we think that for this purpose the cause of action is stated with sufficient particularity. West v. Brewster, 1 Duer [8 N. Y. Super. Ct.] 647; Green v. Brooks, 81 Cal. 333, 22 P. 849; Rippe v. Stogdill, 61 Wis. 38, 20 N. W. 645; Colonial, etc., Mortgage Co. v. Hutchinson Mortgage Co. [C. C.] 44 F. 219. And the character of the complaint is not changed by the averment that before the commencement of the action an investigation had shown that the respondents had suffered a loss of 'upwards of $65,000.'"

We conclude that the demurrer upon the ground of uncertainty and misjoinder was properly overruled.

Contesting the sufficiency of the evidence to sustain the judgment, the defendant insists that no authority is shown upon the part of Carl G. McCrillis to make the agreement with the plaintiff.

A brief summary of the testimony adduced on behalf of the plaintiff and of certain admissions will suffice to determine the question thus raised.

The plaintiff went to the studio of radio station KGFJ on May 13, 1931, in response to an appointment previously made by her. She walked over to an information desk and asked to talk to the "Advertising Manager." She was referred to Carl G. McCrillis, who was seated at a large desk in an office on the door of which was the sign, "Station Manager." After inquiring about her experiences in soliciting and selling, McCrillis gave the plaintiff a chart showing time and talent open, and stated to her: "We would like to employ you here to go out and sell radio time and talent for us." He assured her that her prospects would not be tampered with, and stated that they did not pay a salary, but that "we pay 25% commission on all time and talent sold by each representative." He asked her to report to him on the telephone every morning concerning her prospects, and gave her a sheaf of pamphlets to use in soliciting. He assured her that she could make $18,000 a year. She began to work the following day. At various times she talked to McCrillis, telling him of the persons whom she had seen. He gave her some blank forms of booking orders, addressed to the defendant, and showed her how to fill them out.

She met the defendant for the first time the latter part of August or the first part of September. She had had an appointment with McCrillis. As he did not keep it, she asked to speak to the defendant concerning interviewing a prospect. The defendant said: "Don't bother to talk to me about it, McCrillis has charge of the sales people. He will handle that for you if you don't mind."

In July she informed McCrillis of the four prospects with whom she had been negotiating, which included the two upon which the trial court allowed her commission. Weaver-Jackson Company and the May Company. After the two prospects were closed, through other persons, and the plaintiff complained to McCrillis and received no satisfaction, she talked over the telephone with the defendant. We quote from the record:

"A. Mr. McGlashan said 'Miss Brea, I am sorry, but there is not anything we can do about this Weaver-Jackson account.' And he said, 'Whoever brings in the account with a name signed on it is the one that is supposed to have it.' And I said, 'Do you mean to say, Mr. McGlashan, that if twenty representatives call on a person, a prospect, that the one who comes in the last of the twenty and signs up a contract would be the one to have it?' I said, 'Mr. McCrillis gave me to understand so distinctly so many times that absolutely my prospects would be protected, I would be protected in my prospects, and he told me that if I ever had any trouble with any of the salesmen to report it to him and he would put the skids under them; he said we do not stand for any foolishness here.'

"The Court: Now, you are giving the conversation you had with Mr. McCrillis. A. I said that to Mr. McGlashan on the phone.

"Q. By Mr. Craig: Did he stay there? A. He stayed right there and listened and Mr. McGlashan said, 'Well, there is not a thing I can do about it, Miss Brea. I am sorry.' He said, 'I appreciate your efforts so much, Miss Brea, and I appreciate that you worked hard with us, and your efforts and all, but there is not anything I can do about that.' I said, 'Is that business, Mr. McGlashan?' I said, 'In fact it is not business at all.' I said to Mr. McGlashan, 'It is an outrage, that's what it is.' I said, 'It is a shame and an outrage.' I said, 'I have worked for four and a half to five months and then you just tell me on the phone that you are sorry, there is nothing you can do about it.' I said, 'It is pretty poor business, Mr. McGlashan.' And he said, 'Well, we are young, Miss Brea, we can afford to make mistakes. In fact,' he says, 'we only have one fifteen minute period left now open.' I said, 'Well, that's strange.' I said, 'A couple of weeks ago you had about half of the time open, Mr. McGlashan.' I said, 'You have made some very rapid progress in the sale of time and talent in advertising that you have only one fifteen minute period open now.' He said, 'Another reason, Miss Brea, is I have understood, Miss Brea,' he said, 'that you were going out and trying to compete with our business with a list of prospects that you have of our business, put them on other stations.' I said, 'Mr. McGlashan, you tell me that's your business when I have talked over each list of names with Mr. McCrillis time and time again?' "

In the testimony of another salesman, Otto F. Gage, is found the statement that the defendant had informed him that McCrillis was in charge of salesmen and sales and that he was the advertising manager. The defendant admitted at the trial that McCrillis had told him that the plaintiff was "going to sell time," but claimed that she was to be merely a broker, acting for McCrillis, for which she was to receive 15 per cent. commission and McCrillis 10 per cent. The assistant manager of the station, H. Duke Hancock, know that she was employed. McCrillis introduced her to him as "one of our new representatives."

Hancock, who is conceded to have had authority along with the defendant to employ agents, in talking to the plaintiff, referred to McCrillis as "your Manager." In one of the pamphlets issued by the radio station and given to the plaintiff, the photograph of McCrillis appears, with the following designation under it: "Carl G. McCrillis, Advertising Department." Along with it, are other photographs of persons, presumably heads of departments, designated as "Publicity Department," "Chief Technician," "Musical Director," and others headed by the photographs of the defendant with the designation "Owner-Manager" and that of H. Duke Hancock designated as "Assistant-Manager." The document evidences the clear intention to list persons in charge of the various branches of the work of the station, and is not consistent with McCrillis' claim that other salesmen wanted their photographs in the booklet but "they did not get them in time and they were left out."

[7] The power to make a contract of employment may be inferred from the nature and necessities of the business intrusted to the agent or when the conduct of the principal is such as to clothe the agent with apparent authority to employ. 2 Cor. Jur. 658; Seymour v. Oelrichs, 162 Cal. 318, 122 P. 847.

[8, 9] The admissions in the record, the literature issued by the station, the references to McCrillis as the advertising manager "in charge of salesmen and sales," would imply the right to employ solicitors of advertising and to agree with them as to compensation.

Admissions made before a controversy arose are entitled to more weight than the denials made at the trial. Moore v. Grayson, 132 Cal. 602, 605, 64 P. 1074; Stuart v. Lord, 138 Cal. 672, 676, 72 P. 142. From admissions of certain facts, others may be inferred. Houck v. General Development Co., 128 Cal. App. 623, 17 P.(2d) 1030; Dooley v. West American Commercial Co., 133 Cal. App. 58, 23 P. (2d) 766; American System of Reinforcing v. Breakers Hotel, 217 Cal. 67, 71, 17 P.(2d) 138. And it is significant to note that while in the last conversation with the plaintiff, the defendant admitted that he knew that she had worked on certain contracts, and claimed that she was not entitled to the commission because others had closed them, he made no mention then of any lack of authority upon the part of McCrillis.

[10] These and other facts and inferences, fairly deducible from the record, warranted the trial court in finding that the plaintiff had been employed as a salesman, that McCrillis had the authority to bind the defendant by the agreement, and that the defendant knew and approved all its terms.

[11] When the authority of an agent is unwritten, and express oral authority is not satisfactorily shown, such authority may be implied from acts and circumstances shown. Anglo-Californian Bank v. Cerf, 147 Cal. 393, 399, 81 P. 1081; Ford v. Lou Kum Shu, 26 Cal. App. 203, 208, 209, 146 P. 199; Spoon v. Sheldon, 27 Cal. App. 765, 771, 151 P. 150; Eade v. Reich, 120 Cal. App. 32, 37, 7 P.(2d) 1043.

[12-15] In setting forth the conditions of her employment, the plaintiff alleged in her complaint that she was to receive the stipulated compensation "upon contracts of radio advertising which the plaintiff procured." By giving to the word "procure" a narrow interpretation, the defendant contends that because the plaintiff did not actually secure a written contract from the advertisers who promised her advertising (and "bring in the check," to use a phrase employed by the defendant's counsel in one of the questions asked at the trial), the finding of the trial court that she was entitled to a commission upon two contracts is not sustained by the evidence. It is to be borne in mind that the contract of employment was not in writing. The defendant (through McCrillis) agreed that the plaintiff should receive 25 per cent. of the moneys received by him from advertising procured by the plaintiff. The word "procure" does not necessarily imply the formal consummation of an agreement. The Century Dictionary gives the following as the meanings of the word: "To bring about by care and pains; effect; contrive and effect; induce; cause, as he procured a law to be passed." In its broadest sense, the word means to prevail upon, induce, or persuade a person to do something. In this sense did the trial court interpret it, when it found in its findings, that the two contracts upon which it allowed a commission were secured "as a result of plaintiff's efforts." This was a correct interpretation of the contract. For otherwise, one might employ an agent to interview persons, and secure from them promises of contracts and then, by having another one "close" the contracts, deny the agent the fruit of his labor. The law does not sanction such action. On the contrary, the rule is that if an agent (or broker) is the inducing or procuring cause of the contract, he is entitled to the commission, even though the principal takes it out of his own hand and completes it. The originating cause, which ultimately led to the conclusion of the transaction, is held to be the procuring cause. Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Bail v. Glantz, 78 Cal. App. 49, 248 P. 258. And where the evidence is conflicting, the conclusion as to the procuring cause is one for the trial court and will not be disturbed on appeal. Jones v. Foster, 116 Cal. App. 102, 108, 2 P.(2d) 582.

[16] The evidence of the plaintiff, which the trial court evidently believed, showed that the May Company contract had been promised her definitely. The testimony of the representative of the Weaver-Jackson Company, Emanuel Stoloroff, gave the plaintiff credit for her efforts with that company. There is also reference in the testimony to a letter written by Stoloroff, at the request of the assistant manager, Hancock, in which he expressed the opinion that the plaintiff had earned a commission for securing the Weaver-Jackson contract, and the statement of the defendant to Hancock that other salesmen had "gotten her (the plaintiff's) business." Under the circumstances, the plaintiff should not be denied the fruits of her labor, merely because her employer saw fit to send others to receive the benefit of her soliciting.

[17-20] What has just been said also disposes of the contention that the trial court erred in receiving testimony relating to McCrillis' declarations as to his authority before agency was actually proved. The order of proof is a matter of discretion, under the control of the trial court. Code Civ. Proc. § 2042. And while the admissions of an agent

are not evidence of agency, they are admissible where prima facie evidence of agency is shown. Dooley v. West American Commercial Insurance Co., supra; Union Construction Co. v. Western Union Tel. Co., 163 Cal. 298, 305, 125 P. 242. In this case, the evidence being sufficient to establish agency, there was no error in receiving the declarations of McCrillis at a time when the record did not, as yet, disclose proof of agency. Ultimately, it is the admissibility of the testimony in the light of the entire record which should determine whether error was committed, rather than admissibility as of the time when the evidence came in. Any other rule might impede rather than expedite the presentation of testimony. So the custom has grown of allowing testimony to come in, provisionally, subject to its being stricken if not connected up. And if this is not abused, and the case is tried without a jury, no harm can result. Were this not permitted, error might be predicated upon the admission of testimony at one stage of the trial, which facts subsequently adduced, made clearly admissible. This view has been adopted generally by our courts, notwithstanding the provision of subdivision 5 of section 1870 of the Code of Civil Procedure to the effect that the acts and declarations of an agent (and partner) may be received in evidence "after proof of a partnership or agency." Bates v. Tower, 103 Cal. 404, 406, 37 P. 385; Jacobson v. Lamb, 91 Cal. App. 405, 417, 267 P. 114; Swanson v. Siem, 124 Cal. App. 519, 525, 526, 12 P.(2d) 1053.

[21-23] There was, therefore, no error in the court's ruling upon the admissibility of the testimony, or in the denial of the motion of the defendant, made at the close of the testimony, to strike the admissions of McCrillis that he was advertising manager. The complaint, as appears from the outline at the head of this opinion, stated the circumstances of the employment of the plaintiff, in a detailed manner. The trial court, in its findings, contented itself with the statement, repeated several times, that the plaintiff was employed by the defendant. We see no merit in the contention that the findings are insufficient because they do not contain a more specific finding of agency. Only ultimate facts are required to be stated in findings. Murphy v. Bennett, 68 Cal. 528, 530, 9 P. 738; Phillips v. Stark, 65 Cal. App. 136, 140, 223 P. 443. The basis of the plaintiff's right of recovery was her employment by the defendant. Her right to receive compensation flowed from it. So when the court found, as a fact, that the plaintiff was so employed, the requirement as to findings upon material issues was complied with.

[24-28] In support of his motion for a new trial, the defendant filed several affidavits. The most important of these was the affidavit of Mr. Gerry Fitzgerald, in which he denied the statement made by the plaintiff, at the trial, that he had definitely promised her the May Company contract. Other affidavits were to the effect that neither the defendant nor his counsel knew, "until after the commencement of the trial" of the Fitzgerald conversation or that Fitzgerald would deny it. In opposition to these affidavits, there was filed an affidavit by one of the plaintiff's counsel which stated that she had subpœnaed Fitzgerald as a witness, but that he had objected so vigorously to being drawn into the case and threatened to use his influence and that of his firm against the plaintiff that she released him from the subpœna.

Newly discovered evidence which justifies the granting of a motion for a new trial must be material evidence which could not have been discovered with reasonable diligence and produced at the trial. To be considered material, it must be of such character as to render a different result probable upon a new trial. Code Civ. Proc. § 657, subd. 4; Oberlander v. Fixen & Co., 129 Cal. 690–692, 62 P. 254; O'Rourke v. Vennekohl, 104 Cal. 254, 256, 37 P. 930; Jones v. Foster, 116 Cal. App. 102, 108, 2 P.(2d) 582. Evidence which is merely cumulative and impeaching is not of this character. Bennington v. National Packing Co., 122 Cal. App. 313, 317, 318, 9 P. (2d) 857. The evidence offered by these affidavits was purely cumulative and impeaching. While it is true that the conversation of the plaintiff with Fitzgerald stood undenied, it was the contention of the defendant and of his witnesses, throughout the trial, that the contract with the May Company was not the result of any effort upon the part of the plaintiff. The Fitzgerald affidavit was simply corroborative of this. Furthermore, there was no showing of diligence. The trial of the case lasted several days. The plaintiff testified to this conversation during the first day. Fitzgerald was employed by one of the leading mercantile establishments in the city of Los Angeles. The defendant could easily have communicated with him and asked him for his version of the conversation, and upon finding that it differed from that of the plaintiff could have compelled his attendance at the trial, to contradict her. The affidavits do not disclose why this was not done. Under the circumstances, the trial court was jus-

tified in finding that no diligence in procuring and producing the evidence was shown. Laurence v. Los Angeles Junk Co., 129 Cal. App. 499, 503, 504, 18 P.(2d) 985. On the whole, there was no abuse of discretion in the denial of the motion for a new trial.

The judgment and order are affirmed.

I concur: STEPHENS, P. J.

I concur in the judgment: CRAIL, J.



3 Cal.App.2d 516

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. HOOVER.

Civ. 9621.

District Court of Appeal, First District, Division 2, California.

Jan. 8, 1935.

Rehearing Denied Feb. 7, 1935.

Hearing Denied by Supreme Court March 7, 1935.

1. Deeds ⇐78

In action by executor to set aside deed, whether deceased was competent or incompetent *held* question of fact for court.

2. Deeds ⇐211(1)

Evidence that deceased was suffering from cancer, that he had undergone serious operation few days before executing deed, that he was under heavy opiates at time and had been continually under opiates for several months previous, *held* to sustain finding of incompetency at time of execution, justifying setting deed aside.

3. Deeds ⇐208(2)

Evidence that deceased grantor had retained possession of deeds and that grantee was not to receive and record deeds until grantor's death *held* to sustain finding of no delivery.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Action by the Bank of America National Trust & Savings Association as executor of the last will of Henry Hoover, also known as H. Hoover, deceased, against Gertrude Hoover. Judgment for plaintiff, and defendant appeals.

Affirmed.

Owen D. Richardson, of San Jose, and John L. McNab, of San Francisco, for appellant.

E. M. Rea and Maurice J. Rankin, both of San Jose, for respondent.

SPENCE, Justice.

This action was originally brought by Henry Hoover, now deceased, to set aside a certain deed executed by said deceased under date of September 10, 1931. After the death of said deceased on December 27, 1931, the executor was substituted as plaintiff herein. The cause was tried upon the issues of undue influence and incompetency as alleged in the amended complaint, and the trial court found in favor of plaintiff on both of said issues. Judgment was entered in favor of plaintiff upon said findings, and from said judgment defendant appeals.

In the opening brief appellant urges but two points for consideration on this appeal. The first point is that the evidence is insufficient to sustain the finding of undue influence, and the second point is that the evidence is insufficient to sustain the finding of incompetency. After a review of the record before us, we believe that there was ample evidence to sustain both of said findings, but, as the judgment should be affirmed in the event that the evidence was sufficient to sustain either of said findings (LaMar v. Bank of America, 218 Cal. 252, 22 P.(2d) 689), we shall discuss only the testimony relating to the issue of incompetency.

At the time of the signing of the deed on September 10, 1931, and at the time of the making of an alteration therein on September 11, 1931, Henry Hoover was 82 years of age and was confined to his bed in the San Jose Hospital suffering from cancer of the bladder. He had been in said hospital continuously since July 27, 1931, and had suffered intensely from his malady. From the time of his admission there, morphine and amytol compound, in constantly increasing doses, had been continuously administered to him to relieve his pain. On September 8, 1931, he underwent a major operation which was so serious that, with the resulting shock to his system, he had not been expected to live. This condition of shock continued until after the signing and alteration of the deed, during which time he suffered the most excruciating pain except when completely stupefied by opiates. During that period he was given 1¼ grains of morphine on at least two occasions each day, was also given 6 grains of amytol compound on at least two occasions each day, The testimony showed that the average dose of these opiates as given to adults is ¼ grain

of morphine and 3 grains of amytol, but the large doses were deemed necessary for the deceased because of the extreme pain which he was suffering. The result of these large doses was to cause him to become dull and stupefied, his respiration became short, and the pupils of his eyes became contracted. The deed was signed on September 10, at about 6 o'clock in the evening, and the alteration was made therein shortly after 7 o'clock on the evening of the following day. The nurse testified that he was "very stupefied" at the time of the signing of the deed. On that day he had 6 grains of amytol at 11 a. m., 1¼ grains of morphine at 11:30 a. m., 6 grains of amytol at 5 p. m., and 1¼ grains of morphine at 6 p. m. The witness Bradley testified that, during the time he was there with the defendant for the purpose of obtaining Mr. Hoover's signature, "Mr. Hoover laid there in bed, half of the time with his eyes closed, moaning and groaning * * * evidently suffering a great deal." This witness testified that he read the deed to Mr. Hoover, but that the latter made no comment; "apparently he did not realize that I had read it." Shortly before the alteration was made on the evening of September 11. Mr. Hoover had been subjected to the painful operation of catheterization and at 6:30 p. m., 1¼ grains of morphine had been administered. Despite the use of the opiates, he was suffering greatly at the time. He lay with his mouth open, his tongue out, and was constantly groaning. Dr. Van Dalsen, who was the attending physician, saw Mr. Hoover at least twice a day during the entire time that the was in the hospital. He testified regarding the condition of Mr. Hoover on September 10 and 11 and gave his opinion that Mr. Hoover "was incompetent at that time to sign legal documents" or to understand or to transact any business.

The deed in question purported to convey to appellant all the real property owned by deceased, which real property was described therein, and "also all other property both real and personal" owned by deceased subject to a life estate reserved by deceased. The property of the deceased consisted of extensive real estate holdings and a large sum of money in bank. On September 16, 1934, being but a few days after the signing of said deed, appellant verified a petition which was filed on September 18, 1931, whereby she sought to have the deceased adjudged an incompetent and to have herself appointed as his guardian. On September 28, 1931, she also brought an action in the superior court seeking to enjoin deceased from disbursing any of the money in bank. The deceased, after having recovered from the shock of the operation of September 8, and after his condition had become somewhat improved, filed this action on October 21, 1931, to set aside said deed. He subsequently died on December 27, 1931, but prior to his death his deposition was taken and was thereafter used upon the trial. It is apparent from a reading of said deposition that the deceased was quite weak at the time of the taking thereof. With respect to the time of the signing of the deed, he testified, "I didn't know a thing, I didn't know a deed from a newspaper." He also stated: "I remember signing some paper, I don't know. * * * I had been operated on two days before and was under the narcotic all the time. * * * I didn't know what I was doing, I was so full of narcotic and pain I didn't know nothing, I would have signed anything." He further testified that he did not know what was in the deed when he signed it; that he remembered that they told him "it was only for the forty-one acres on the Senter Road"; that "they said it was a deed, I didn't know what it was."

[1, 2] The foregoing is but a brief summary of some of the evidence offered on the issue of incompetency. There was conflicting evidence introduced by appellant and there were some inconsistencies in the testimony introduced on behalf of respondent. But considering all of the evidence introduced, we are satisfied that the question of whether the deceased was competent or incompetent was a question of fact to be determined by the trial court, and that the testimony of the deceased, the doctor, the nurse, and the witness Bradley amply sustains the finding that the deceased was incompetent at the time. In some respects the testimony upon which said finding was based is similar to the evidence which was held sufficient in LaMar v. Bank of America, supra.

[3] In the reply brief appellant makes the further contention that "the defendant by the uncontradicted evidence is entitled to a judgment on her affirmative defense adjudging her to be the owner of parcels 2 and 4 as the same are described in the grant under attack." Respondent has filed a supplemental brief in reply to this point. Appellant's claim is based on certain deeds which were alleged to have been signed by the deceased in the year 1917. These deeds were not produced at the trial; it being appellant's theory that her father had destroyed them prior to his death. We believe it a sufficient answer to appellant's contention to state that, while

there was evidence to show that certain deeds had been signed by the deceased in 1917, the evidence of appellant as well as that of the deceased showed that deceased did not intend that said deeds should take effect immediately, but intended that they should be effective, if at all, only at the time of his death. Appellant testified:

"A. We were to take them, put them on record at his death.

"Q. And not before? A. No, we didn't have them."

Appellant further testified that the deeds were retained by the deceased and were last seen by her in his possession. This evidence justified the conclusion that the alleged deeds were never delivered so as to presently pass the title and that the signing and retention thereof merely showed the testamentary desires of the deceased at the time. Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; 9 Cal. Jur. p. 187. Under these circumstances, appellant was not entitled to a judgment upon the theory that the lost or destroyed deeds constituted valid conveyances divesting the deceased of title to the property described therein.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



CADWELL v. ANSCHUTZ. *

Civ. 9637.

District Court of Appeal, Second District, Division 2, California.

Jan. 4, 1935.

Rehearing Denied Jan. 25, 1935.

Hearing Granted by Supreme Court March 4, 1935.

1. Negligence ⇐136(2)

Negligence is a question of law only where facts are undisputed, and reasonable minds could draw but one conclusion.

2. Automobiles ⇐245(60, 90)

Where collision occurred when plaintiff motorist attempted to pass defendant motorist and both were negligent, whether defendant's negligence was proximate cause of plaintiff's injury and whether plaintiff's negligence contributed to injury *held* for jury (St. 1923, p. 517, as amended).

Appeal from Superior Court, Los Angeles County; E. O. Leake, Judge.

Action by Mabel M. Cadwell against Marvin D. Anschutz. From a judgment for plaintiff, defendant appeals.

Affirmed.

Walter S. Coen and Donald E. Ruppe, both of Los Angeles, for appellant.

Flint & MacKay, Wesley L. Nutten, Jr., and Donald W. Hamblin, all of Los Angeles, for respondent.

CRAIL, Justice.

In this case the appellant makes two contentions: First, that as a matter of law the defendant was not guilty of negligence; second, that as a matter of law the plaintiff was guilty of negligence which contributed to her injuries.

An accident occurred at a time when the parties were driving their respective automobiles north from San Juan Capistrano on a public highway. The plaintiff was overtaking and attempting to pass the defendant's car while they were going at a speed of 30 or 35 miles per hour. The plaintiff saw a car coming from the opposite direction and attempted to get back into her former place in the line of traffic. At the same time the defendant turned his wheel so that his car would come closer to the center of the highway. There was a collision between the plaintiff's front right wheel and the defendant's left rear wheel.

[1] It would serve no useful purpose to recite all the facts and circumstances in evidence, especially at this time when brevity in opinions is demanded as a cardinal virtue second only to clearness. Negligence becomes a question of law only where the facts are undisputed, and even then only where on those facts reasonable minds can draw but one conclusion.

[2] In some details the evidence is conflicting. The circumstances demanded reciprocal duties on the part of both drivers. Both were guilty of negligence, in that they failed to comply with certain provisions of the California Vehicle Act (St. 1923, p. 517, as amended). In the trial court a jury found that the defendant was guilty of negligence proximately causing the injuries, and that the plaintiff was not guilty of negligence which contributed to her injuries. We are not inclined to say under all the facts and circumstances in evidence that as a question

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 52 P.2d 916.

of law the defendant's negligence was not the proximate cause of the injury, and that as a matter of law the plaintiff was guilty of negligence which contributed thereto.

Judgment affirmed.

We concur: STEPHENS, P. J.; WILLIS, Justice pro tem.



3 Cal.App.2d 135

WICKSTROM v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9549.

District Court of Appeal, First District, Division 2, California.

Dec. 18, 1934.

Rehearing Denied Jan. 17, 1935.

1. Master and servant ⇐416

Where Industrial Commission received evidence as to injuries to claimant's nervous system but made no finding thereon, commission by failure to make specific finding *held* not to have exceeded its jurisdiction, since, having made finding stating affirmatively injuries sustained by claimant, it was not required to make also negative findings (St. 1917, p. 831, as amended).

2. Master and servant ⇐417(7)

Industrial Commission's findings were not subject to review except in so far as they may have been made without any evidence in support thereof (St. 1917, p. 831, as amended).

3. Master and servant ⇐417(7)

Percentage of claimant's disability is matter to be determined by Industrial Commission in exercise of its sound discretion, and its conclusion is not subject to review by court unless palpably contrary to undisputed evidence (St. 1917, p. 831, as amended).

4. Master and servant ⇐417(3¼)

Ruling of Industrial Commission refusing to allow compensation claimant to cross-examine adverse witnesses even if error was not excess of jurisdiction so as to authorize appellate court to review ruling on certiorari (St. 1917, p. 831, as amended).

5. Master and servant ⇐416

Industrial Commission's refusal to grant compensation claimant rehearing for purpose of refuting surprise testimony adduced by state compensation insurance fund *held* not error where claimant did not ask for continuance when testimony was offered and did not base motion for rehearing on ground of newly discovered evidence (St. 1917, p. 831, as amended).

Petition by Robert Wickstrom for certiorari against the Industrial Accident Commission of the state of California, William McIntosh, and State Compensation Insurance Fund, to review an order of the Industrial Commission.

Order affirmed.

Ingemar E. Hoberg, Jos. Anderson, and Devine & Devine, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner, while employed as a carpenter's helper, was working on a scaffold attached to a high building. The scaffolding gave way and the petitioner fell eight stories. By reason of the fall he suffered numerous injuries, but he made a substantial recovery. Within the time allowed by law and in a proper manner, he applied to the defendant commission for an adjustment of his claim for disability benefits under the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 831, as amended). The facts of employment, wages, age of employee, and injury arising out of and occurring in the course of his employment are not controverted. The only controversy presented by the record is the nature and extent of petitioner's disability due to said injuries. On the 13th of September, 1932, the respondent commission made an award in which it fixed the percentage of petitioner's disability at 90¼ per cent. and awarded him $23.77 per week for 240 weeks, and, in addition, the sum of $11.07 per week for the remainder of his natural life. The insurance carrier, state compensation insurance fund, petitioned for a rehearing and thereafter the respondent commission ordered annulled its previous award and ordered entered an award in which it found that petitioner's condition had not become permanent and fixed his compensation in the sum of $23.77 indefinitely. On the 13th of January, 1934, petitioner asked the respondent commission for a permanent disability rating. A hearing was had on January 29, 1934, and another one was held

on the 13th of March, 1934, and much evidence was introduced both on the subject of the physical injuries suffered by the petitioner and also on the subject of injuries to his nervous system. On the 26th day of April, 1934, the respondent commission filed amended findings and an award which, among other things, contained a finding as follows:

"2. Said employee was 40 years of age, and said injury caused permanent disability resulting in slight ulnar angulation of radius of minor arm; loss of forearm pronation; limitation of dorsal, palmar and radial flexions of wrist joint to 45/55, 55/70 and 20/30; grip of hand being 82/125; marked limited motion of spine, tips of fingers failing to reach floor on forward bending by 22 inches, 50% to 75% loss of backward bending; some pain and soreness in low back and sacral regions, in lumbar muscles and in operative scar over middle lumbar region; sciatic pain in both legs. The percentage of said permanent disability is 76, entitling the employee to $23.77 a week for 240 weeks, amounting to $5,704.80; and thereafter the sum of $5.85 a week for the remainder of his natural life. The Insurance Carrier has paid on account of disability indemnity the sum of $5,490.87, and is entitled to a credit herein in said amount. The foregoing weekly benefit is based upon wages of $7.00 a day for employment 5½ days a week." The petitioner filed a petition for a rehearing which was denied. Thereafter he commenced this proceeding for the purpose of having the last-mentioned award annulled.

[1, 2] He asserts that the respondent commission received evidence as to the injury to his nervous system, but made no finding thereon. Continuing, he asserts that by reason of such failure to make a specific finding the commission exceeded its jurisdiction. The point may not be sustained. When the case was being presented to the commission, it was the theory of the insurance carrier that by reason of the accident the petitioner suffered certain physical injuries and nothing more. On the other hand, it was the theory of the petitioner that he suffered the physical injuries and that his nervous system had been so affected that he had become afflicted with neurosis. After the hearing, the commission made findings stating affirmatively the injuries sustained by the petitioner. It was not called upon to make also negative findings. In making the affirmative findings, they carried the implied negative findings, and such implied findings lend full support to the order entered by the commission. Standard Varnish Works v. Industrial Acc. Commission, 197 Cal. 143, 146, 239 P. 1067. Furthermore the point is based on a misconception of the power of the courts to review the awards made by the commission. The position of the petitioner is to contend that if the respondent commission fails to make findings, in effect a bill of particulars both affirmative and negative, that then and in that event the commission acts in excess of its powers and that the courts have power to review such acts. That contention is too broad. In Southern Pacific Co. v. Industrial Acc. Commission, 177 Cal. 378, at page 381, 170 P. 822, 823, Mr. Justice Shaw, speaking for the court, stated as follows: "Section 84, of the Workmen's Compensation Act, which gives us the power we are now exercising over this award of the commission, authorizes us to annul an award only when the commission acted without or beyond its powers, or when the award was procured by fraud, or is unreasonable, *or when the findings of fact do not support it. The findings are not subject to review except in so far as they may have been made without any evidence whatever in support thereof.* The review of the findings, even in such cases, is not based on the theory that they are not supported by the evidence, and that we are weighing evidence to determine that proposition, but upon the theory that *the commission has no jurisdiction to make a finding where there is no evidence to support it.*" (Italics ours.) See, also, Newton v. Industrial Acc. Commission, 204 Cal. 185, 190, 191, 267 P. 542, 60 A. L. R. 1279; City of Los Angeles v. Industrial Acc. Commission, 123 Cal. App. 12, 14, 11 P.(2d) 434; County of Los Angeles v. Industrial Acc. Commission, 109 Cal. App. 724, 727, 293 P. 820. In the light of these authorities, we think it may not be said that the respondent commission exceeded its jurisdiction.

[3] In his brief the petitioner also asserts that the award was unreasonable. He cites no authority. Neither does he address his argument specifically to the point. The respondents cite Frankfort Gen. Ins. Co. v. Pillsbury, 173 Cal. 56, 159 P. 150. We think it states the rule against the contention of the petitioner. At page 59 of 173 Cal., 159 P. 150, 152, the court said: "The extent of disability occasioned by an injury is not capable of exact measurement. The percentage of such disability is a matter to be determined by the Commission in the exercise of its sound discretion, based upon a fair view of all of the circumstances. Its conclusion on this matter is the determination

of a question of fact, and is not subject to review by the courts unless palpably contrary to the undisputed evidence. We cannot say that the finding that Immel's injury caused a permanent disability of 20¼ per cent. is contrary to the evidence."

[4] It is further contended that the respondent commission refused to allow petitioner to cross-examine adverse witnesses. Assuming for the purposes of this decision that the ruling complained of was made, such ruling may have constituted error but it was not an excess of jurisdiction.

[5] The last point made is that the respondent commission refused to grant the petitioner a rehearing for the purpose of refuting surprise testimony adduced by respondent state compensation insurance fund. When the "surprise testimony" was offered, the petitioner was entitled to meet it at that time, and for that purpose to ask for a continuance. The record does not disclose that he did so. In applying for a rehearing, the petitioner was entitled to base his motion on the ground of newly discovered evidence. However, he made no sufficient showing in that behalf.

For the reasons stated, the order under attack is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



3 Cal.App.2d 392

CLOUGH v. STEEN.

Civ. 8907.

District Court of Appeal, Second District, Division 2, California.

Dec. 29, 1934.

1. Damages ⇐53

Mother injured in automobile accident in which her son was killed *held* not entitled to damages for injuries resulting from shock and grief growing out of knowledge of her son's death.

2. Appeal and error ⇐1178(6)

Action for injuries must be remanded for retrial on issue of damages, where award made in one entire sum included improper item of damage.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Margaret L. Clough against Carl B. Steen. Judgment for plaintiff, and defendant appeals.

Reversed and remanded for retrial on question of damages.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellant.

Wm. Christensen and Wm. H. Wilson, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Plaintiff, with her husband and minor child, was involved in an accident with defendant's automobile, in which she was injured and her son was killed. She recovered judgment for damages, from which defendant appeals. No question as to negligence or contributory negligence is raised, the sole question on appeal being one of damages.

By reason of the accident plaintiff received certain lacerations and contusions on her body. These she set out in her complaint, and then alleged that the knowledge of the tragic death of her son "immediately threw her into a state of profound shock" which caused mental and physical disorders for which she sought damages. The court found (paragraph IV) that plaintiff was physically injured by the accident, and (VI) that the knowledge of her son's death threw plaintiff into a state of profound shock, mental suffering, and sickness; that plaintiff's condition causes her mental and nervous suffering, and (VII) that, by reason of the injuries set out in paragraphs IV and VI, plaintiff has suffered and now suffers shaking, mental and nervous suffering, and a palsy and hysterical condition. Thereupon judgment was rendered for plaintiff in the sum of $20,000.

The father of said child had recovered damages under section 376 of the Code of Civil Procedure for the latter's death, and no question is here presented growing out of the right of action given by that section.

[1, 2] The trial court erroneously included in the judgment an amount which represented damages for the grief and shock and consequent damage suffered by plaintiff when she learned of the death of her child. For this injury she may not recover damages from defendant, although she is entitled to recover for her own mental and physical in-

juries proximately caused by the accident. The award was made in one entire sum, and, since it is not separable, the cause must be remanded for retrial on the issue of damages.

Respondent relies on Lindley v. Knowlton, 179 Cal. 298, 176 P. 440, where plaintiff suffered physical injury due to fright while repelling an attack by a chimpanzee on plaintiff and her children, and on Cohn v. Ansonia Realty Co., 162 App. Div. 791, 148 N. Y. S. 39, where plaintiff was frightened when she saw her children accidentally ascending in an unattended elevator, fainted, and was injured by falling into the elevator shaft. These and other cases sustain the rule that physical injury due to fright or shock is compensable. They are not authority, however, for an award of damages for injury due to learning of the death of another, even though that death has been due to negligence of the defendant. In Kalleg v. Fassio, 125 Cal. App. 96, 13 P.(2d) 763, the ruling of the trial court which excluded damages to plaintiff for subsequent grief and distress due to disfigurement of plaintiff's children was upheld on appeal. In Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 Ann. Cas. 578, plaintiff was denied recovery for his distress of mind on account of his wife's suffering. See, also, 8 R. C. L. 515, § 73, and 17 Cor. Jur. 835, § 155.

It is well settled that, in an action for wrongful death, the recovery is limited to the pecuniary loss, and the grief of the survivor may not form the basis of an award (Munro v. Dredging & Reclamation Co., 84 Cal. 515, 24 P. 303, 18 Am. St. Rep. 248); and no case nor rule of law has been brought to our attention which would support a recovery by plaintiff for the shock and grief, or injury consequent thereto, growing out of the knowledge of the death of her child. In the absence of such a right at common law or by statute, the plaintiff's recovery cannot be upheld. The detriment to plaintiff must naturally ensue from the act complained of, but here we find the injury to plaintiff ensuing from the sight of the dead child. The condition of the latter was the result of defendant's act, which impinged upon the child and not upon the plaintiff. We are not privileged to indulge our own feelings in this case which transcends in sadness perhaps every other case that has come before us.

Judgment reversed, and cause remanded for retrial on the question of damages.

I concur: CRAIL, J.

CHANDLER et al. v. BENAFEL et al.

Civ. 8910.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

Hearing Denied by Supreme Court Feb. 25, 1935.

1. Automobiles ⇐245(6)

Whether driver of truck which collided in intersection with automobile and injured pedestrian on sidewalk was negligent *held* for jury.

2. Trial ⇐194(16)

Where evidence showed that truck driver entered obstructed intersection at a speed in excess of lawful limit of 15 miles per hour, instruction as to speed limit *held* not error as taking question of negligence from jury, where jury were not instructed that speed in excess of lawful limit was negligence per se (St. 1931, p. 2120, § 113).

3. Trial ⇐105(4)

Where ordinance making it unlawful to drive into a sidewalk was admitted without objection in action for injuries to pedestrian standing on sidewalk as result of intersection collision between truck and automobile, instruction that violation of ordinance was negligence *held* not error of which defendants could complain.

4. Trial ⇐296(3)

In action for injuries to pedestrian as result of intersection collision between truck and automobile, instruction that it was as much negligence to fail to see that which could be observed with ordinary care as failure to look at all *held* not error, in view of other instructions and evidence.

5. Trial ⇐296(3)

In action for injuries to pedestrian as result of intersection collision between truck and automobile, instruction that, if the concurrent or successive negligence of two persons result in injury to third person, he may recover from either or both parties at fault, *held* not error, in view of evidence and other instructions.

6. Trial ⇐250

Court is not required to give an instruction merely because it may be applicable to the case from viewpoint of party offering it.

7. Automobiles ⇐246(49)

In action for injuries to pedestrian as result of intersection collision between truck and automobile, refusal of instructions predicated partly upon theory that negligence of automobile driver was sole proximate cause of accident *held* not error, where theory was unsupported by evidence.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

8. Appeal and error ⇐928(4)

Refusal to give instructions which in trial court's discretion might properly be withheld from the jury because unnecessary to a proper determination of the issues, does not require reversal.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by F. W. Chandler and another against N. J. Benafel and E. M. Borcherding, copartners doing business under the fictitious name of Benafel's Flower Shop, N. J. Benafel, E. M. Borcherding, William H. Kempton, and others. From a judgment for plaintiffs, the named defendants appeal.

Affirmed.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Paul Nourse and Forrest A. Betts, both of Los Angeles, for appellants.

J. H. De LaMonte, Ralph D. Brown, and Walter W. Little, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

Plaintiff Bessie Chandler was standing on the sidewalk at the southwest corner of Maple avenue and Adams street in Los Angeles when she was struck and injured by the floral truck driven by defendant Kempton and owned by defendants Benafel and Borcherding. The truck had collided with a coupé owned by defendant Machris and driven by defendant Christian with her consent, and had come up over the curb to where plaintiff was standing. The jury returned a verdict absolving the driver, Christian, and owner, Machris, of the coupé. At the same time they returned a verdict for plaintiff against the driver and owners of the truck. From judgment on the latter verdict, this appeal is taken.

[1] Appellants question the sufficiency of the evidence and declare that the physical facts show that defendant Kempton, the truck driver, was not negligent. The truck was going south on Maple avenue, and was well within the intersection when the coupé, going west, came in contact with the left rear thereof. Kempton testified that thereupon the truck was "tipped over on its right side and turned around and slid up against the curb, straightened up on its four wheels, landing on top of a fire plug." It made this movement between the point of collision and the fire plug, whirling all the time on its right side. The coupé came to rest within a few feet from where it touched the truck. The bumper on the coupé was shoved out to the left about 18 inches and the frame horns were bent down a little and 4 to 6 inches to the left. These and other circumstances establish the negligence of Kempton and differentiate this case from Waizman v. Black, 101 Cal. App. 610, 281 P. 1087, and Keyes v. Hawley, 100 Cal. App. 53, 279 P. 674, relied upon by appellants. The jury's determination that the accident was due to negligence of the truck driver and not the driver of the coupé appears just and reasonable in the light of the evidence.

[2] Appellants complain of certain instructions given. The court instructed the jury as to the speed limit of 15 miles per hour at an obstructed intersection (section 113, Cal. Vehicle Act [St. 1923, p. 553, as amended by St. 1931, p. 2120]), but did not tell them that it was negligence per se to exceed that speed. Since negligence as a matter of fact was shown by the evidence, the instruction cannot be said to have contravened the provisions of subdivision (d) of said section of the Vehicle Act, which merely has the effect of leaving it to the jury to determine the question of negligence. Potapoff v. Mattes, 130 Cal. App. 421, 19 P.(2d) 1016.

[3] The jury were told of a city ordinance making it unlawful to drive into a sidewalk and instructed that violation of an ordinance was negligence as a matter of law. Under the facts, this instruction was hardly applicable, but the ordinance was admitted in evidence without objection by appellants, and their contention in this respect does not appear timely.

[4, 5] The jury was also charged that it is as much negligence to fail to see that which can be observed with ordinary care as to not look at all. Further they were instructed: "If the concurrent or successive negligence of two persons combined, result in an injury to a third person, he may recover of either or both." Considering these instructions separately under the evidence and in the light of the court's entire charge, it does not appear that the jury could have been or was misled or confused.

[6] The exclusion of certain instructions offered by appellants is urged as reversible error. All parties submitted many instructions from which the court selected those which would give the jury a well-balanced statement of the essential legal principles which were to guide them in their delibera-

tions. It is not the rule that, merely because an instruction may be said to be applicable to the case from the viewpoint of the party offering it, the court by reason thereof is required to give it.

[7] The question, other than extent of damage, which the jury was called upon to determine, was whether either one or both of the drivers were negligent. Notwithstanding the assertion by Kempton that he entered the intersection at 15 miles per hour, the evidence would indicate that he must have entered it at a rate of speed that was clearly negligent and that such negligence was the proximate cause of the accident and of plaintiff's injuries. Appellants' instructions, which were in part predicated upon a theory that the negligence of the driver of the coupé was the sole proximate cause of the accident, were without such evidentiary support as to require their inclusion in the court's charge. See Linberg v. Stanto, 211 Cal. 771, 297 P. 9, 75 A. L. R. 555.

[8] We have nevertheless considered the authorities offered by appellants. The cases of Bickford v. Pac. Electric Ry. Co., 120 Cal. App. 542, 8 P.(2d) 186, and Ennulat v. Taylor, 127 Cal. App. 420, 15 P.(2d) 900, are cited in support of the contention to which we have above adverted. Since the first case was reversed and in the second the granting of a new trial was upheld because of erroneous instructions given, we do not construe them to require reversal of a case because certain instructions which might with propriety have been given are, in the discretion of the court, withheld from the jury because they were unnecessary to a proper determination of the issues.

In Raymond v. Hill, 168 Cal. 473, 143 P. 743, the proposed instruction was held to have been improperly omitted by reason of the probability that the jury may have been misled thereby. The court in Burge v. Albany Nurseries Inc., 176 Cal. 313, 168 P. 343, 346, merely remarks that, "inasmuch as the jury had to determine the fact upon which these theories depended, it was proper that they should have instructions as to the measure of damages upon both theories." The cases of Smith v. O'Donnell, 215 Cal. 714, 12 P.(2d) 933, and Ebrite v. Crawford, 215 Cal. 724, 12 P.(2d) 937, were reversed because of improper instructions given and not because of instructions omitted by the trial court.

The facts of this case are comparable to Bowles v. Stanley, 207 Cal. 362, 278 P. 441, in which the judgment for the innocent pedestrian was upheld, and we reach a similar conclusion as to the correctness of the acts of the trial court and jury.

Judgment affirmed.

We concur: CRAIL, J.; SCOTT, Justice pro tem.



3 Cal.App.2d 373

CHANDLER et al. v. BENAFEL et al.

Civ. 8974.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1934.

1. Appeal and error ⇐1064(1)

In action for injuries to pedestrian due to intersection collision of truck and automobile, modification of instruction by striking out statement that it was admitted that a collision had occurred *held* harmless, where fact was undisputed.

2. Trial ⇐296(3)

In action for injuries to pedestrian as result of intersection collision between truck and automobile, instruction that certain defendants could not be held liable unless negligence of automobile driver was proximate cause of pedestrian's injury *held* harmless, in view of other instructions, theory upon which whole case was tried and submitted, and discrimination shown by jury in deciding issues.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by F. W. Chandler and another against N. J. Benafel and others. From a judgment for defendants Bessie E. Machris and Frieda Christian, plaintiffs appeal.

Affirmed.

J. H. De LaMonte, Ralph D. Brown, and Walter W. Little, all of Los Angeles, for appellants.

Stewart, Shaw & Murphey and William L. Murphey, all of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is an appeal by plaintiffs from the judgment to which we have just adverted in 39 P.(2d) 890, which absolved the defend-

ants Machris and Christian. The facts are set out in the opinion in that case, and it is our conclusion that the verdict which exculpates the respondents here was proper under the evidence in the case.

[1, 2] Appellants herein complain of certain instructions omitted, but which appear to us to have been fully covered. The court deleted a paragraph from one instruction which told the jury it was admitted that a collision occurred. No one questioned the fact that a collision took place, and the deletion was immaterial. Another instruction was incorrect in telling the jury that to hold these respondents liable they must find the negligence of Christian was the proximate cause of injury to plaintiff. The jury, however, was further instructed: "If the concurrent or successive negligence of two persons combined result in an injury to a third person, he may recover of either or both." The whole theory of the case upon which it was submitted to the jury, and the discrimination with which they decided it, supports the contention of respondents that the jurors understood the law and knew just what they were doing in returning their verdicts in this case. Under such circumstances, their determination should not be disturbed.

Judgment affirmed.

We concur: CRAIL, J.; SCOTT, Justice pro tem.



3 Cal.App.2d 499

PEOPLE v. MACHEN.

Cr. 2645.

District Court of Appeal, Second District, Division 1, California.

Jan. 5, 1935.

1. Burglary ⇐41(10)

Evidence sustained conviction for attempted burglary.

Evidence disclosed that some person, without owner's permission, had made hole through window screen of certain apartment and pried open the hook which held screen, and that, at time of defendant's arrest, he had his hands raised up against screen of another window farther along wall of building, and other circumstances showed defendant's unauthorized presence on premises.

2. Criminal law ⇐258(4)

Where court, in prosecution for attempted apartment burglary tried without jury, found defendant guilty as charged at close of trial, and subsequently, as shown by minutes, found the crime to be attempted burglary of second degree, court was without power, on later date, to find crime to have been first degree attempted burglary and pronounce sentence accordingly (Pen. Code, §§ 1157, 1192).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Ernest E. Machen was convicted of attempted burglary, and he appeals from the judgment and from a purported order denying a new trial.

Appeal from the purported order dismissed. Judgment reversed, with direction.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

Upon trial before the court without a jury, the defendant was convicted of the crime of attempted burglary. He appeals from the judgment and "from an order denying a new trial." The record does not show that there was any motion for a new trial or any order denying such motion.

As grounds for his appeal from the judgment, appellant contends: First, that the evidence was insufficient "to justify the verdict"; and, second, that the court erred in pronouncing judgment on the defendant for attempted burglary in the first degree after the court had found the defendant guilty of attempted burglary of the second degree.

[1] Although the evidence tending to prove the attempted burglary by the defendant is in large part circumstantial, nevertheless the facts established by such evidence were legally sufficient to justify the decision of the court. The charge upon which the defendant was convicted was that he attempted to break into an apartment occupied by one Charles Hast in an apartment house. The evidence showed that some person without permission of the owner had made a small hole through

a window screen of the Hast apartment and had pried open the hook which held the screen. There is also testimony that at the time of defendant's arrest on the evening in question he had his hands raised up against the screen of another window farther along in the wall of the building; this being not a window of the Hast apartment. These and other circumstances showing defendant's unauthorized presence on the premises are sufficient to justify the conviction. The excuse offered by the defendant, if believed by the court, might have been a good defense. But the court evidently did not believe that testimony, and its decision on the facts cannot be further reviewed on this appeal.

[2] At the close of the trial on September 26, 1934, the defendant was adjudged guilty as charged, and September 28th was set as the time for pronouncing sentence. The minutes of the case on September 28th contain the following entry: "Defendant waives time for sentence and orally applies for probation. The court finds the crime to be attempted burglary of the second degree." The matter of passing on the application for probation and the pronouncing of judgment were postponed to October 10th, on which date the application for probation was denied, and the court found the crime to have been attempted burglary of the first degree. Sentence was pronounced accordingly, as for attempted burglary of the first degree. It is now contended by appellant that, when the court made its finding of September 28th, that the crime was attempted burglary of the second degree, and entered its order to that effect, this amounted to an acquittal of the crime of first degree attempted burglary, and that the court was without power thereafter to change that order. We are of the opinion that this contention on behalf of appellant should be sustained. The reporter's transcript (page 53) indicates that the court was then proceeding upon a wrong assumption concerning its prior order.

The defendant's attorney said: "I believe it was attempted burglary, first degree. I don't quite recall whether you set the degree first or second.

"The Court: I don't either. It was first, it was a dwelling house in the nighttime."

While this accounts for the error, the real question is one of power of the court at that time to change its decision. Section 1157 of the Penal Code reads as follows: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." We do not find any corresponding statutory rule with respect to trial by the court without a jury, except the provision in section 1192 of the Penal Code, which reads as follows: "Upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." This provision is mandatory. People v. Paraskevopolis, 42 Cal. App. 325, 328, 183 P. 585, 586, and cases there cited. Where the crime charged is divided into degrees, the question of degree of the particular crime is one of fact. In the above-cited case the court said: "We are of the opinion, however, after a careful consideration of section 1192, that it is essential in any event, in every case where the crime charged is divided into degrees, and a plea of guilty has been interposed to such charge by the accused, that the court, as a prerequisite to the pronouncement of judgment of sentence, should first determine the degree and that in the absence of such determination in such a case, any attempted sentence is illegal and invalid." See, also, In re Colford, 68 Cal. App. 308, 229 P. 63. Clearly, if this case had been tried by jury and the jury in rendering its verdict of conviction had found the crime was attempted burglary of the second degree, it could not be maintained that after entry of such verdict the court or jury could thereafter make a new and different finding upon that question. We think that by analogy the same rule should apply when the court in a trial without jury has found the defendant guilty and has regularly made its order establishing the degree of the crime.

The purported appeal from order denying motion for new trial is dismissed. The judgment is reversed, with the direction that the defendant be brought before the trial court again, to be sentenced for attempted burglary in the second degree.

We concur: HOUSER, J.; YORK, J.

HASKINS v. SOUTHERN PAC. CO.

Civ. 9351.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1934.

Rehearing Denied Jan. 18, 1935.

Hearing Denied by Supreme Court Feb. 14, 1935.

1. Master and servant ⇐278(7)

In brakeman's action for injuries sustained in stumbling over umbrella plant growing next to siding while engaged in switching operation in nighttime, evidence *held* sufficient to support finding that railroad was negligent in permitting umbrella plant to grow and remain on siding (Federal Employers' Liability Act § 1 [45 USCA § 51]).

2. Master and servant ⇐286(14)

In brakeman's action for injuries sustained in stumbling over umbrella plant growing next to siding in Nevada, that at time of accident siding was maintained according to general custom and usage of railroads in Nevada with respect to similar sidings did not, as matter of law, establish that railroad company was not negligent (Federal Employers' Liability Act § 1 [45 USCA § 51]).

3. Appeal and error ⇐1033(5)

In brakeman's action for injuries sustained in stumbling over umbrella plant growing next to siding, instruction that railroad was not bound to furnish better or different track and grounds adjacent thereto than such as were in general use *held* not ground for complaint by railroad (Federal Employers' Liability Act § 1 [45 USCA § 51]).

4. Master and servant ⇐112(1)

Test of whether railroad was negligent as respects injury to brakeman in adopting any particular method of maintaining its properties was whether reasonably prudent persons or corporations engaged in similar business and activity would have conducted their business under similar circumstances in same manner (Federal Employers' Liability Act § 1 [45 USCA § 51]).

5. Master and servant ⇐270(10)

In determining whether railroad was negligent as respects injury to brakeman in stumbling over umbrella plant growing next to siding, custom of others was admissible as some evidence of the standard to be applied but was not conclusive on jury in fixing such standard (Federal Employers' Liability Act § 1 [45 USCA § 51]).

6. Master and servant ⇐264(1)

In determining whether railroad was negligent as respects injury to brakeman sustained in stumbling over umbrella plant growing next to siding, brakeman suing for injury was not required to plead or prove custom or practice of others in relation to removing such plants from the right of way (Federal Employers' Liability Act § 1 [45 USCA § 51]).

7. Evidence ⇐359(3)
Trial ⇐56

In brakeman's action for injuries sustained in stumbling over umbrella plant growing next to siding in Nevada, refusal to admit photographs showing condition of sidings in San Francisco Bay region *held* not error, since evidence would have been merely cumulative and since similarity of weed growth in bay region and umbrella plant in Nevada was not shown (Federal Employers' Liability Act § 1 [45 USCA § 51]).

8. Master and servant ⇐288(2)

In brakeman's action for injuries sustained in stumbling over umbrella plant growing next to siding, whether brakeman assumed risk of injury from stumbling over natural growth of weeds *held* for jury (Federal Employers' Liability Act § 1 [45 USCA § 51]).

Evidence disclosed that prior to accident it had been practice of railway company to remove weeds from its right of way and that no weeds had been allowed to grow on sidings, that practice was discontinued and no notice was given to employees, that brakeman had no knowledge of change in practice and was not aware of weeds.

9. Trial ⇐241

In action under Federal Employers' Liability Act, instructions in language of act as to diminution of damages in event of contributory negligence of employee *held* proper (Federal Employers' Liability Act § 1 [45 USCA § 51]).

10. Negligence ⇐141(12)

In action under Federal Employers' Liability Act, instruction that where casual negligence was partly attributable to employee and partly attributable to employer, amount recoverable was proportionate amount as negligence attributable bears to entire negligence attributable to both employee and employer *held* proper (Federal Employers' Liability Act § 1 [45 USCA § 51]).

11. Appeal and error ⇐1033(5)

In action under Federal Employers' Liability Act, erroneous instruction that verdict in favor of employee should be reduced in proportion which employee's negligence bears to negligence of employer *held* not prejudicial to employer, since instruction was favorable to employer (Federal Employers' Liability Act § 1 [45 USCA § 51]).

12. Trial ⇐133(6)

Any misconduct in remarks in argument *held* not prejudicial where trial court promptly instructed jury to disregard remarks.

13. Appeal and error ⇐1015(5)

Trial court's conclusion on motion for new trial that misconduct in remarks in argument was not prejudicial would not be disturbed on appeal, unless plainly wrong.

On Petition for Rehearing.

14. Courts ⇐97(5)

Federal decisions are controlling in construction of Federal Employers' Liability Act in actions thereunder brought in state courts (Federal Employers' Liability Act § 1 [45 USCA § 51]).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Alexander J. Haskins against the Southern Pacific Company. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Elliott Johnson, of Oakland (D. W. Brobst, of Oakland, of counsel), for appellant.

Erwin P. Werner, of Los Angeles, and Clifton Hildebrand, of Oakland (Thomas F. McCue, of Los Angeles, of counsel), for respondent.

SPENCE, Justice.

Plaintiff, a brakeman in the employ of the defendant, Southern Pacific Company, suffered injuries in the course of his employment. He prosecuted this action under the Federal Employers' Liability Act (section 51, tit. 45 USCA). Upon a trial by jury, plaintiff had judgment for the sum of $25,000, and from said judgment defendant appeals.

The accident occurred at about 1 o'clock on the morning of August 10, 1932, at a siding called Numana in the state of Nevada. Plaintiff had been a railroad man for many years and had worked for the defendant company as a brakeman from 1926 until the date of the accident. He was injured while performing his duties during a switching operation at the time and place mentioned.

The siding at Numana was approximately a half mile in length. The freight train, consisting of some sixty-six cars, arrived there headed railroad east. The freight which was to be unloaded at Numana was located in the sixth car back from the engine. Six cars were uncoupled or cut from the main train, were pulled easterly along the main track, and were then backed westerly along the side track to the freight shed, which was located near the westerly end of the siding. The freight was unloaded, and the "cut" of cars was again pulled in an easterly direction along the side track. Plaintiff boarded one of these cars, and, with a lantern in hand, he watched the main train for "hot boxes" as the six cars were being drawn back along the side track to the head of the train. It was his intention to ride to a point near the head of the train, to get off, and to stand for the purpose of making a "rolling inspection" for defects in the cars as the train pulled out of Numana. When plaintiff reached a point near where the "cut" had been made, he got off the car on which he was riding, and, in doing so, his foot caught in a growth of umbrella plant which was growing between the main tracks and the side tracks. He stumbled, and, as he fell, his feet were thrown toward the moving cars. He was seriously injured, the main injuries consisting of the loss of his right leg below the knee and the crushing of his left foot.

A description should be given of the so-called umbrella plant which was permitted to grow around the siding and between the main track and side track involved. Its botanical name is eriogonum deflexum, commonly known as either umbrella plant or skeleton plant. Several pictures and specimens of the plant were introduced in evidence as well as the testimony of an expert witness. It is a hardy desert plant, the stem of which grows up from 5 to 7 inches from the ground and then branches, the branches growing in "whorls" or in a circle. These branches grow out from 5 to 8 inches and then branch again. The plant grows to an average height of 12 to 14 inches with a lateral spread of from 12 to 15 inches. The branches grow out in various forms from the main stems, which are usually clustered, and the branches of the plants become intertwined leaving a 5 or 6-inch space underneath. The roots of the plant go down from 7 to 9 inches. The stem and structure of the plant consist of fiber similar to bast, with a tensile strength or resistance of from 5 to 100 pounds. This tensile strength or resistance is greatest in August and September. In other words, this plant is quite different in structure and in strength from ordinary grass or the common variety of weeds which may be found in other localities.

[1] The main contention of appellant is that "there was no negligence." This con-

tention amounts to a claim that the evidence was insufficient to support the jury's implied finding of negligence. We find no merit in this contention. It is not disputed that this siding was a place where respondent and other employees were required to perform their duties in switching operations, nor is it disputed that said employees were required to get on and off moving trains in the nighttime as well as the daytime in performing such duties. Under these circumstances, we believe that there was sufficient evidence to support the implied finding that appellant was negligent in permitting plants of the type mentioned to grow and remain upon said siding. Our attention has not been called to any authority directly in point, but there are numerous cases in which liability for negligence has been imposed upon railroad companies for injuries to employees caused by obstructions, such as a metal hoop, large clinkers, old cross-ties, pieces of coal, rails, a pile of gravel, a wire, a deposit of sand, a limb of a tree, or a brake shoe, which were allowed to remain on rights of way in places where employees were required to work. Baltimore & O. R. Co. v. Flechtner (C. C. A.) 300 F. 318, certiorari denied 266 U. S. 613, 45 S. Ct. 95, 69 L. Ed. 468; Southern Railway Co. v. Puckett, 244 U. S. 571, 37 S. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69; Burks v. Atchison, T. & S. F. Ry. Co., 83 Kan. 144, 109 P. 1087: St. Louis Southwestern Ry. Co. of Texas v. Ford, 56 Tex. Civ. App. 521, 121 S. W. 709; Adskim v. Oregon-Washington R. & Nav. Co., 129 Or. 169, 276 P. 1094, and Id., 134 Or. 574, 294 P. 605; Doyle v. St. Louis Merchants' Bridge Terminal Ry. Co., 326 Mo. 425, 31 S.W.(2d) 1010; Thomas v. Southern Pacific Co., 116 Cal. App. 126, 2 P.(2d) 544; Green v. Atlantic Coast Line R. Co., 136 S. C. 337, 134 S. E. 385; El Paso & S. W. Ry. Co. v. Alexander (Tex. Civ. App.) 117 S. W. 927; Gillespie v. Grand Trunk R. Co. of Canada, 150 Mich. 303, 113 N. W. 1116; Holloway v. Missouri, K. & T. Ry. Co., 276 Mo. 490, 208 S. W. 27; Hicks v. Missouri Pac. R. Co., 226 Mo. 362, 40 S.W.(2d) 512. In some of the cases cited certain types of obstructions were concealed by grass or weeds, and, although mention is made of such grass or weeds, it was not the grass or weeds alone which caused the injuries. We see no reason, however, why plants of the type involved in the present case might not be said to constitute dangerous obstructions in themselves in places where employees are required to do the work described. Under the evidence presented here, we believe that the jury was entitled to so find. All that need be said is that reasonable minds might differ on this question, and therefore the finding of the jury may not be disturbed on appeal.

Wood v. Canadian Pacific Ry. Co., 30 Canada S. Ct. 110, and McCutcheon v. Chicago, M. & St. P. Ry. Co., 181 Iowa, 501, 164 N. W. 774, are cited by appellant. These authorities are not determinative of the issue before us for several reasons, but we believe it is only necessary to refer to one or two of the distinguishing features. In neither case was the court dealing with a plant growth similar to umbrella plant which, from its description, constitutes a far greater hazard than ordinary grass or weeds. Furthermore, the Wood Case was decided largely upon the fellow-servant defense which is not applicable under the Federal Employers' Liability Act (45 USCA § 51 et seq.), while the McCutcheon Case appears to have been disposed of under the doctrine of assumption of risk upon facts which were not similar to those before us.

We now come to appellant's main point which underlies both the foregoing contention and other contentions found in the briefs. It should first be stated that appellant produced several witnesses in an endeavor to show the general custom and usage of railroad companies operating in the state of Nevada with respect to the maintenance of similar sidings. Appellant claims that the undisputed evidence showed that the siding in question was maintained in the same manner as other similar sidings in the state of Nevada and that therefore appellant is not chargeable with negligence as it conformed with the standard of conduct established by general custom and usage. In other words, appellant takes the position that its standard of care was fixed by such general custom or usage rather than by the rules by which the standard of care is ordinarily measured. We cannot agree with the position taken by appellant in this regard.

[2] We will assume for the purpose of this discussion that the evidence of custom and usage was clear and undisputed. We do not mean to decide, however, that the record before us presents clear and undisputed evidence on this subject. Practically all of appellant's witnesses conceded in effect upon cross-examination that it was the custom of railroads generally or of their particular roads to remove plant growth from sidings whenever it appeared to constitute a hazard or a dangerous obstruction to men working on switching operations. Furthermore, there was abundant evidence to show that at all

times prior to the year in which the accident happened, the appellant company had made a practice of removing the growth of umbrella plant from its sidings, including the Numana siding. But assuming that the undisputed evidence showed that at the time of the accident the Numana siding was maintained according to the general custom and usage of railroads in Nevada with respect to similar sidings, we are still of the opinion that such evidence did not, as a matter of law, show that appellant was free from negligence.

There are many authorities from both the federal and state courts dealing with the effect of evidence of custom and usage upon the issue of negligence. It is generally held that evidence of custom and usage in a given business or industry is admissible upon the issue of negligence, and some of the authorities appear to go further and to hold that it is not only evidence of the standard of care required, but that it conclusively establishes, as a matter of law, the standard of care to be applied in determining the issue of negligence. We believe, however, that the authorities last mentioned and upon which appellant relies represent the minority view and that the weight of authority in both the federal and state courts establishes the contrary rule. We shall not attempt to cite or discuss the numerous cases arising in the state courts for the decisions of the federal courts are controlling here.

This subject is discussed in Roberts on Federal Liability of Carriers. In section 534 thereof, under the heading "Custom or Practice of Other Railroad Not Conclusive in Determining Exercise of Ordinary Care," we find the following: "The standard of duty under the Federal Act upon all common carriers is ordinary care, that is, the care that a person of ordinary prudence would use under the same circumstances. The custom or practice of other carriers may be admissible as evidence to determine whether ordinary care was exercised in a particular case; but evidence of that character is not conclusive, for *the ultimate and controlling test always is, not what has been the practice of others in like situations, but did the defendant in the case under investigation exercise such care as a reasonably prudent person would ordinarily have exercised in such a situation?* The law does not permit what ought to have been done to be determined in the particular case by the practice of others; for the degree of care exercised by them may not be due, reasonable or proper, and, therefore, not ordinary care within the meaning of the law. The law does not permit reason and common sense to lose their sway because, through ignorance, inattention or selfishness, an unreasonable practice prevails." (Italics ours.)

Several cases which have been decided by the United States Supreme Court and other federal courts fully sustain the text above quoted. In Midland Valley R. Co. v. Bell (C. C. A.) 242 F. 803, the court reviewed several of these decisions in passing upon the propriety of the rulings upon certain proposed instructions. At pages 807 and 808 of the opinion in 242 F. the court there said:

"We think these requests were properly denied. They confuse the controlling standard of ordinary care with what is only evidence of it. Unquestionably it was permissible, as was done in this case, to show what inspections were made by other railroads of their bridges, for that is some evidence of what could have been and ought to have been done by the defendant in this case; but evidence of that character is not indispensable, for the ultimate and controlling test always is, not what has been the practice of others in like situations, but did the defendant in this case exercise reasonable or ordinary care, that is, such care as a reasonably prudent person would ordinarily have exercised in such a situation. As was said by this court in Chicago, Milwaukee & St. Paul Ry. Co. v. Moore, 166 F. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962:

" 'The law is not so unreasonable as to afford no test where there has been no practice by others by which the conduct in question can be compared; nor does it permit common sense and reason to lose their sway because, through ignorance, inattention or selfishness, an unreasonable practice has prevailed.' Chicago Great Western Ry. v. McDonough, 161 F. 657, 665, 88 C. C. A. 517, and authorities there cited.

"See, also, Rickerd v. Chicago, St. P., M. & O. Ry., 141 F. 905, 73 C. C. A. 139.

"In Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 S. Ct. 932, 27 L. Ed. 605, the Supreme Court, speaking through Mr. Justice Harlan, said:

" 'If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be

due, or reasonable, or proper care, and therefore not ordinary care, within the meaning of the law.'

"And in Texas & Pacific Ry. Co. v. Behymer, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905, Mr. Justice Holmes states the rule as follows:

" 'Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.' Shandrew v. Chicago, St. P., Milwaukee & O. Ry. Co., 142 F. 320, 73 C. C. A. 430."

In addition to the cases referred to in the foregoing opinion, see James Baird Co. v. Boyd (C. C. A.) 41 F.(2d) 578; Baltimore & Ohio Railroad Co. v. Whitacre, 124 Md. 411, 92 A. 1060, affirmed in 242 U. S. 169, 37 S. Ct. 33, 61 L. Ed. 228; Parker v. Cushman (C. C. A.) 195 F. 715; and American Car & Foundry Co. v. Uss (C. C. A.) 211 F. 862.

For a further discussion of the general subject, see Wigmore on Evidence (2d Ed.) § 561. The author there says: "The chief difficulty here is of another sort. It arises from the necessity of distinguishing between the use of such facts evidentially and their use as involving a standard of conduct in substantive law. The distinction is in itself a simple one. (1) The conduct of others *evidences* the tendency of the thing in question; and such conduct—e. g., in using brakes on a hill, felt shoes in a powder factory, railings around a machine, or in not using them—is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and the maintenance was or was not negligence, in spite of the above evidence. (2) Meanwhile, the *substantive law* tells them what the *standard of conduct* for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law.

"This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard."

Appellant cites and relies upon Canadian Northern Ry. Co. v. Senske (C. C. A.) 201 F. 637, 640, but this case apparently expresses the minority view on the subject. In an earlier case decided by the United States Supreme Court, the existence of this minority view was recognized but was expressly repudiated as not based upon satisfactory reasoning. Wabash Railway Co. v. McDaniels, 107 U. S. 454, at pages 460 and 461, 2 S. Ct. 932, 27 L. Ed. 605. It is of interest to note that the case of Canadian Northern Ry. Co. v. Senske, supra, was decided by the Circuit Court of Appeals of the Eighth Circuit, and that the views expressed in the majority opinion in that case were contrary to those expressed in the previous decisions of the same court. Chicago, M. & St. P. Ry. Co. v. Moore (C. C. A.) 166 F. 663; Chicago Great Western Ry. Co. v. McDonough (C. C. A.) 161 F. 657; Parker v. Cushman (C. C. A.) 195 F. 715. The concurring opinion in that case is in accord with the views previously expressed by said court and the views hereinabove set forth. It is also of interest to note that the holding in that case was not followed in the later decisions of the same court. American Car & Foundry Co. v. Uss, supra; Midland Valley R. Co. v. Bell, supra.

[3-6] Perhaps the apparent conflict in the decisions and the language employed therein may be reconciled to some extent. This may be illustrated by appellant's argument in the present case, together with a consideration of two instructions given by the trial court. In the reply brief, appellant argues that "the law permits but one means of showing that the defendant failed to use ordinary care or was negligent, and that is by proving that it failed to maintain the siding in question in conformity with conditions as they existed on sidings located on other railroads under similar circumstances." In line with this proposition, appellant requested and the trial court gave an instruction stating that "a railroad

company is not bound to furnish a better or different track and grounds adjacent thereto than such as were in general use." In our opinion, appellant's argument is unsound and expresses what we have heretofore termed the minority view. It therefore follows that the above-quoted instruction was more favorable to appellant than it was entitled to have it. The trial court also instructed the jury as follows: "The test of whether or not any railroad company is guilty of negligence in adopting any particular method of maintaining its properties is whether *reasonably prudent persons* or corporations engaged in similar business and activity *would have conducted* their business under similar circumstances in the same manner." (Italics ours.) We believe this last-mentioned instruction to be a correct statement of the law and wholly in accord with the majority view as found in the authorities above cited with approval. The distinction is obvious between the tests set forth in the foregoing instructions. "The ultimate test always is, not what has been the practice of others in like situations, but did the defendant in the case under investigation exercise such care as a reasonably prudent person would ordinarily have exercised in such a situation?" Roberts on Federal Liability of Carriers, supra. The custom or practice of others is admissible as some evidence of the standard to be applied, but such evidence is not conclusive upon the jury in fixing that standard. It remains for the jury to determine whether the custom of others represents the practice of "reasonably prudent persons."

Keeping the above distinction in mind and analyzing the authorities relied upon in Canadian Northern Ry. Co. v. Senske, supra, it is apparent that many of said authorities do not support the decision. The court there held that an instruction defining the standard of care as "such as is used by railway companies in the general transaction of their business in that respect" should have been given. It further held that under the evidence the trial court should have instructed a verdict in favor of the defendant. It did so upon the theory that the evidence of custom was uncontradicted and that it was to be presumed that other railroads, their officers, and employees discharged their legal duties and acted as reasonably prudent persons in the conduct of their business. It points out that there was no evidence to controvert this presumption. But what evidence could have been given upon this subject other than the evidence of the conduct itself, which evidence was before the jury? No witness would have been permitted to state his opinion that such conduct was negligent or that the custom was not such as would have been followed by reasonably prudent persons. An attempt to introduce such testimony would have amounted to an attempt to invade the province of the jury and an objection thereto would have been promptly sustained. The effect of the decision is to make custom the absolute test of the standard of care and to take from the jury the determination of whether the conduct establishing the custom was the conduct of "reasonably prudent persons." Many of the cases cited in the opinion lend no support to this doctrine and are clearly distinguishable. The proper rule as established by the authorities above cited is indicated in the concurring opinion where it is said: "I do not agree to some parts of the foregoing opinion regarding the effect of custom upon the question of the care to be exercised by a particular employer. What is generally done in the like calling or occupation to prevent injuries is, of course, evidence of the proper precaution but it is not more. It seems to me that here it has been given an undue if not, practically, a controlling influence."

From what has been said, we conclude that the evidence of custom in the present case, even if such evidence be treated as clear and undisputed, was not conclusive upon the jury in establishing the standard of care applicable to appellant, and we further conclude that there was sufficient evidence to support the jury's implied finding of negligence on the part of appellant. Respondent was not required to plead or prove such custom and it therefore follows that appellant's contentions relating to the pleading and proof of custom may not be sustained.

[7] Closely related to the points above discussed is appellant's contention that the trial court committed prejudicial error in refusing to admit certain photographs in evidence. These photographs showed the condition of certain sidings in the San Francisco Bay region. We find no prejudicial error in such refusal. At best, this evidence was merely cumulative as there was abundant testimony in the record relating to the custom of other railroads with respect to the maintenance of sidings similar to the Numana siding, and, furthermore, it is not claimed that the weed growth in the bay area as shown on these photographs was similar to the umbrella plant which appellant permitted to grow and remain upon the siding at Numana.

[8] Appellant further contends that respondent "assumed the risk of the natural growth of weeds." We believe, however, that this was a question of fact for the jury in the present case rather than one of law. Mappin v. Atchison, Topeka, etc., Ry. Co., 198 Cal. 733, 247 P. 911, 49 A. L. R. 1330, certiorari denied 273 U. S. 729, 47 S. Ct. 239, 71 L. Ed. 862. There was some conflict, but there was abundant evidence to show that for several years prior to 1932 it had been the practice of appellant to maintain section crews for the purpose among others of removing weeds from the right of way and that prior to 1932 there had never been any weeds growing on the siding at Numana. The evidence further showed that the umbrella plant on the Numana siding in 1932 had been growing there for many months, but that no notice had been given by appellant to its employees regarding any change of policy with respect to clearing weeds from said siding. It also appears that the last trip that respondent had made through Numana as a freight brakeman prior to the accident was in October, 1931, and that during the interval he had made but one trip through Numana as a passenger brakeman on which last-mentioned trip he had no occasion to observe and did not observe the condition of the siding. If the jury believed this testimony rather than the testimony offered by appellant regarding its previous practice, such evidence was ample to sustain its implied finding that respondent did not assume the risk of the hazard created by changing such practice and permitting the umbrella plant to grow upon said siding without giving notice to its employees of such change. Appellant quotes and relies upon Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 S. Ct. 635, 640, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475. In that case the court states that "such dangers as are normally and necessarily incident to the occupation" are assumed by the employee "whether he is actually aware of them or not." Under the evidence above set forth, the danger here was neither normally nor necessarily incident to the occupation. The cited case further points out that there are other risks not falling within the class mentioned, but arising "out of the failure of the employer to exercise due care." As to these, it is said: "These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." The jury here was entitled to find under the evidence presented that the risk in question fell in the class just mentioned; that respondent was not aware thereof; and that neither the existence of the umbrella plant nor the risk occasioned thereby would be so obvious that an ordinarily prudent person engaging in similar switching operations during the middle of the night would have observed and appreciated them.

[9, 10] Appellant also contends that the trial court committed reversible error in giving certain instructions. The act provides that contributory negligence of the employee shall not bar a recovery, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The court instructed the jury in the language of the act. This was proper. Kippenbrock v. Wabash R. Co., 270 Mo. 479, 194 S. W. 50. It further instructed the jury on this subject in the following language: "Under this Federal Act [45 USCA § 51 et seq.] the rule of comparative negligence applies, and that means that where the causal negligence is partly attributable to the plaintiff and partly attributable to the defendant, the amount recoverable is the proportionate amount as the negligence attributable bears to the entire negligence attributable to both the plaintiff and the defendant." The language used in said instruction finds approval in Norfolk & Western Ry. v. Earnest, 229 U. S. 114, 33 S. Ct. 654, 57 L. Ed. 1096, Ann. Cas. 1914C, 172.

Before setting forth the instruction at which appellant directs its main attack, we may well pause to consider the application of the foregoing instructions. If a defendant is chargeable with the entire negligence causing the injury, then, of course, the employee is entitled to the amount which will fully compensate him for the damage sustained. Let us assume that said amount is $30,000. If the negligence causing the said injury is partly attributable to the defendant and partly attributable to the plaintiff, then the rules set forth in the above instructions apply and the recovery must be diminished. The same result is reached under either of the above-mentioned instructions. If the jury determines that the parties are equally negligent, or, in other words, if one-half of the negligence, is attributable to each, then the verdict should be $15,000. If the jury determines that the negligence is attributable one-third to plaintiff and two-thirds to defendant, then the verdict should be $20,000. Likewise, if the jury determines that the negli-

gence is attributable two-thirds to plaintiff and one-third to defendant, the verdict should be $10,000. In each case, the verdict is diminished in proportion to the amount which plaintiff's negligence bears to the combined negligence of both plaintiff and defendant, or, to put it another way, such verdict is computed by allowing plaintiff the proportionate amount which the negligence of defendant bears to the combined negligence of both plaintiff and defendant.

[11] Another instruction was given on this subject containing the following wording: "Then you should reduce the verdict, if you find in favor of the plaintiff, in the proportion which plaintiff's negligence bears to the negligence of the defendant Southern Pacific Company, or its employees, if you find the defendant was negligent." Appellant attacks the last-mentioned instruction, citing Norfolk & Western Ry. v. Earnest, supra, and claiming that the giving of said instruction constituted prejudicial error. Said instruction did not correctly state the law, but our inquiry may not end there. Was the giving of said instruction prejudicial to appellant? We have endeavored to analyze the effect of the giving of said instruction, and, in doing so, we have assumed that the jury found that respondent was guilty of contributory negligence and have further assumed that the jury attempted to apply said instruction rather than the rules embodied in the correct instructions which were also given. Applying the erroneous rule set forth in the last-mentioned instruction, we obtain some startling results. Said instruction directs a reduction of the verdict in certain proportions. If the negligence attributable to plaintiff is one-third and the negligence attributable to defendant is two-thirds, then the reduction under said instruction would be in the proportion of one to two or one-half. Plaintiff would therefore obtain a verdict of only $15,000 as against $20,000 which he would obtain under the correct rules above set forth. If the negligence attributable to plaintiff is one-half and the negligence attributable to defendant is one-half, then the reduction under said instruction would be in the proportion of one to one, which would give a result of a reduction of one. Such reduction would wipe out the entire recovery, whereas plaintiff would be entitled to recover $15,000 under the correct rules. Likewise, if the negligence attributable to plaintiff is greater than the negligence attributable to defendant, the reduction provided in the erroneous instruction would result in barring any recovery whatever rather than giving plaintiff the proportionate amount to which he is entitled. It is our conclusion that the error in the giving of said erroneous instruction could only have resulted in a verdict more favorable to appellant than a verdict reached by applying the correct rules. Therefore appellant may not complain.

We have discussed this question at some length because of the authorities cited by appellant. A similar instruction was criticized in Norfolk & Western Ry. v. Earnest, supra, but the court did not declare said instruction prejudicial. On the contrary, it said on page 122 of 229 U. S., 33 S. Ct. 654, 657, that "possibly it was not prejudicial to the defendant." However, in Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202, 177 S. W. 1127, a similar instruction was treated as prejudicial to the defendant. We have carefully examined said opinion and cannot escape the conclusion that the views of the court in that case were based on certain erroneous computations regarding the results which would be reached by applying the erroneous instruction.

[12, 13] The last heading in appellant's brief is "Misconduct of Counsel." It relates to a portion of the argument of respondent's counsel to the jury. The statement of respondent's counsel was immediately assigned as misconduct and the trial court promptly instructed the jury to disregard it. Respondent argues that there was no misconduct in these remarks, but assuming that there was, we believe that the effect thereof was cured by the trial court's admonition and that appellant suffered no prejudice. The trial court was of that opinion, as it denied appellant's motion for a new trial. The conclusion of the trial court on this question should not be disturbed unless it appears under all the circumstances to be plainly wrong. Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538; Aydlott v. Key System Transit Co., 104 Cal. App. 621, 286 P. 456. We find nothing to indicate that the court's conclusion was not entirely correct.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

On Petition for Rehearing.

NOURSE, Presiding Justice.

[14] The petition for rehearing presents but one point which requires comment. Appellant challenges, as an incorrect statement of the law, that portion of the opinion in which we stated that the decisions of the federal

courts were controlling. This proposition seems to be well settled. Hoogbruin v. Atchison, etc., Ry. Co., 213 Cal. 582, 2 P.(2d) 992; Hines v. Industrial Accident Commission, 184 Cal. 1, 192 P. 859, 14 A. L. R. 720; Smithson v. Atchison, etc., Ry. Co., 174 Cal. 148, 162 P. 111. We therefore made no reference in the opinion to the case of Webber v. Bank of Tracy, 66 Cal. App. 29, 225 P. 41, which appellant claims is the controlling authority upon this appeal. Appellant cites and relies upon Woods v. Chicago, B. & Q. R. Co., 306 Ill. 217, 137 N. E. 806, and Cincinnati, N. O. & T. P. Ry. v. Swann's Adm'x, 160 Ky. 458, 169 S. W. 886, L. R. A. 1915C, 27, but, in so far as those cases tend to support appellant's contention, they can no longer be accepted as authority. Chesapeake & Ohio Ry. Co. v. Stapleton, 279 U. S. 587, 49 S. Ct. 442, 73 L. Ed. 861.

The petition for rehearing is denied.

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2 Cal.2d 253

PETERSEN v. JURRAS et ux.

S. F. 15293.

Supreme Court of California.

Jan. 14, 1935.

Rehearing Denied Feb. 7, 1935.

1. Mortgages ⇐549

In mortgagor's action for accounting of rent received by mortgagee who purchased property at foreclosure sale, failure to find that mortgagee collected and retained rents without mortgagor's consent and permission *held* not error, since purchaser at foreclosure sale had statutory right to collect rents (Code Civ. Proc. § 707).

2. Mortgages ⇐549

In mortgagor's action for accounting of rent received by mortgagee who purchased property at foreclosure sale, refusal of mortgagor's proposed amendment to findings covering facts as to demand for and furnishing of accounting by mortgagee was not error, where such facts were fully incorporated elsewhere in findings.

3. Mortgages ⇐549

In mortgagor's action for accounting of rent received by mortgagee who purchased property at foreclosure sale, refusal to find that mortgagor was entitled to possession of premises until expiration of period of redemption *held* not error, where right to possession of premises was not an issue.

4. Mortgages ⇐549

In mortgagor's action for accounting of rents received by mortgagee who purchased property at foreclosure sale, refusal to find that mortgagor was entitled to rents collected by mortgagee *held* proper, since purchaser at foreclosure sale was entitled to rents during period of redemption (Code Civ. Proc. § 707).

5. Mortgages ⇐191

Mortgagor is entitled to remain in possession of property during period of redemption (Code Civ. Proc. § 707).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Wayne M. Petersen against John Jurras and wife. From the judgment, the plaintiff appeals.

Affirmed.

Joseph M. Trusty and Henry J. Kleefisch, both of San Francisco, for appellant.

Charles S. Wheeler, Charles S. Wheeler, Jr., and W. D. Shea, Jr., all of San Francisco, for respondents.

PRESTON, Justice.

This cause is before us on motion to dismiss the appeal of plaintiff or to affirm the judgment for defendants. We have no hesitancy in pursuing the latter course, as the record indicates clearly that the appeal is nonmeritorious, probably taken for the sole

purpose of delaying final judgment and thus extending the period for redemption of the property which is the subject-matter of the litigation.

Defendants are husband and wife; the word "defendant" will be hereinafter used to refer to defendant John Jurras. The property in question was acquired by plaintiff in 1932, subject to mortgage of defendant. In January, 1933, defendant brought an action to foreclose his mortgage, had judgment therein, and at the foreclosure sale, held February 3, 1933, bid in the property and received commissioner's certificate of sale thereof. During the one-year period of redemption he collected from said property rents in the sum of $1,235, and expended $179.67 for taxes. On February 2, 1934, one day prior to expiration of said statutory period, plaintiff served on defendant a demand for a written verified statement of the amount of rents collected by him. Defendant failed to comply with the demand, and on February 7, 1934, received a commissioner's deed to the property.

Section 707 of the Code of Civil Procedure provides: "The purchaser from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents * * * have been received by the * * * purchaser * * * from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption-money to be paid; and if the redemptioner * * * before the expiration of the time allowed for such redemption, demands in writing of such purchaser * * * a written and verified statement of the amounts of such rents * * * thus received, the period for redemption is extended five days after such sworn statement is given. * * * If such purchaser * * * shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner * * * may bring an action * * * to compel an accounting and disclosure of such rents * * * and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner. * * *"

Pursuant to the above provision, plaintiff, alleging facts substantially as above set forth, brought this action to quiet title and for an accounting of all rents received by defendant. Defendant appeared voluntarily and filed an answer admitting all allegations of the complaint and furnishing a written, verified account of rents received, which account was appended as an exhibit to said answer. Defendant also joined with plaintiff in requesting that the commissioner's deed be set aside, being premature, and that he be remanded to his position as purchaser at the foreclosure sale.

The cause proceeded to trial and evidence was received establishing the correctness of the account as submitted by defendant. The court thereafter made its findings and gave judgment in accordance with the admitted facts and the evidence. Among other things, the court found that defendant, on February 3, 1933, became the owner of the property by virtue of the certificate of sale in the foreclosure action, subject to the right of redemption as provided by law; that he had collected $1,235 in rents and expended $179.67 for taxes; that plaintiff was, prior to February 3, 1933, and ever since had been in actual possession and occupation of the property; and that the commissioner's deed, issued on February 7, 1934, should be annulled. The judgment provided that said commissioner's deed be vacated and that plaintiff might redeem said property within fifteen days after final determination of this action, provided, however, that if said property be not so redeemed, said commissioner shall, upon the expiration of said fifteen-day period, execute and deliver to defendant a good and sufficient commissioner's deed to said property; and, lastly, that plaintiff have costs.

From this judgment plaintiff appealed. The three points presented in the appellant's opening brief are scarcely worthy of mention. Appellant complains that the findings were prepared by counsel for defendants and that the court thereafter failed to approve his proposed amendments thereto, as follows:

[1] First, that the court failed to find, in substance, that after February 3, 1933, defendant, assuming to act under color of said certificate of sale, and without plaintiff's consent and permission, collected and retained said rents. This finding was unnecessary, as it was admitted on the trial that "no permission was requested and no permission was granted" to defendant to collect the rents. Furthermore, it would be immaterial whether or not permission was given by plaintiff, as defendant, in collecting the rents, was not exceeding the authority so to do conferred upon him by said section 707 of the Code of Civil Procedure.

[2] Appellant's second proposed amendment covered the facts as to the demand for and furnishing of an accounting by defendant. These facts were fully incorporated elsewhere in the findings.

[3, 4] Lastly, appellant complains of the court's refusal to adopt the following proposed conclusion of law: "That plaintiff * * * on February 3, 1933, was and ever since * * * has been and now is in the actual possession and entitled to possession of said real property and the fruits of said right of possession until the expiration of the period of redemption following the foreclosure and sale."

The trial court did not err in refusing this proposed amendment. Right to possession of the property was not an issue in the case. Plaintiff alleged and defendant admitted that he was in possession thereof. As to the proposed conclusion that plaintiff was entitled to the "fruits of said right of possession," presumably the rents collected by defendant, the ruling of the trial court was clearly correct.

[5] The purchaser at a foreclosure sale is entitled to rents during the period of redemption (section 707, supra), such rents to be a credit upon the redemption money to be paid. The mortgagor is entitled to remain in possession of the property. These respective rights of mortgagor and mortgagee are fully discussed and settled by the recent case of First National, etc., Bank v. Staley, 219 Cal. 225, 25 P.(2d) 982.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.



2 Cal.2d 141

PEOPLE v. DEYSHER.

Cr. 3708.

Supreme Court of California.

Dec. 27, 1934.

Rehearing Denied Jan. 25, 1935.

1. Officers ⇐121

To create supervisor's interest in public contracts, purchase from company in which supervisor is interested may be made after award of contract, if pursuant to agreement made before (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

2. Officers ⇐122

As regards supervisor's interest in public contract, making of agreement to deal with company in which supervisor is interested may be inferred by proof of conduct (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

3. Criminal law ⇐369(1)

Evidence showing independent crimes having no tendency to prove any material fact connected with particular crime charged is inadmissible.

4. Criminal law ⇐371(12), 372(1)

Evidence of other crimes of same general character connected as part of one plan and tending to same common end is admissible to show motive and design.

5. Officers ⇐122

In prosecution of supervisor for being interested in public contracts, evidence relating to work, not covered by indictment, *held* admissible to prove contract between defendant and corporation doing work, warranting inference of agreement as to rental of equipment from company in which supervisor was interested.

6. Criminal law ⇐1159(3)

Jury's finding on disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit.

It is only where, as a matter of law, there is no legal evidence supporting charge, that a reviewing court may disturb verdict, and, in criminal case, court must assume in favor of verdict, the existence of every fact which jury could have reasonably deduced from evidence.

7. Officers ⇐122

Evidence *held* to support conviction of supervisor for being interested in public contracts (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

Jury was not required to acquit because defendant denied making any express contract for rental of road equipment, but it was warranted by evidence as to his conduct towards corporation doing work, in inferring an implied contract for such rental, made before his ordering of the work.

8. Officers ⇐122

In prosecution of supervisor for being interested in public contracts, instruction for acquittal if contracts were entered into between board of supervisors and corporation contractor without previous "arrangement" between defendant and corporation *held* prop-

erly refused (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

Word "arrangement" is very wide, indefinite term, which has different signification from word "agreement," and its use made instruction vague, meaningless, and misleading as applied to facts.

[Ed. Note.—For other definitions of "Arrangement," see Words & Phrases.]

9. Officers ⇐122

In prosecution of supervisor for being interested in public contracts, instruction authorizing acquittal, but erroneously omitting element of previous agreement between defendant and corporation doing work, *held* properly refused (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

10. Criminal law ⇐1173(3)

In prosecution of supervisor for being interested in public contracts, refusal of instructions relating to contracts let by board of supervisors *held* not prejudicial where accused was acquitted on charges relating to such contracts (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

11. Indictment and Information ⇐171

As regards variance in criminal case, allegation otherwise not essential may become material and must be proved in all cases when descriptive of that which is necessary to the charge.

12. Officers ⇐122

In prosecution of supervisor for being interested in public contracts, variance as to location of work under one contract *held* fatal as to conviction on one count (Pen. Code, § 71; Pol. Code, §§ 920, 4322).

13. Criminal law ⇐726

In prosecution of supervisor for being interested in public contracts, closing argument of state's counsel resenting insinuation that local judge who did not try case had participated in interview of prosecution witness *held* justified.

While defense's cross-examination of such witness did not show such participation, questions asked could be reasonably construed as carrying such insinuation, and redirect examination conclusively negatived such participation.

In Bank.

Appeal from Superior Court, Marin County; Louis H. Ward, Judge.

William L. Deysher was convicted of being interested while Supervisor in certain contracts for the improvement of county roads, and he appeals.

Affirmed in part and reversed in part.

For prior opinion 25 P.(2d) 499.

Thomas P. Boyd, of San Rafael, Wallace Ware, of Santa Rosa, Edmund J. Thomas, Jr., of San Anselmo, and Joseph K. Hawkins, of San Rafael (Jesse H. Steinhart and John J. Goldberg, both of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., William F. Cleary and Seibert L. Sefton, Deputy Attys. Gen., Robert D. Duke, Sp. Atty. Gen., and Henry Greer, Dist. Atty., of San Rafael, for the People.

PER CURIAM.

This cause was taken over by this court after decision in the District Court of Appeal, First Appellate District, Division 1, solely because the appeal, so far as research has disclosed, presents for the first time a conviction under section 71 of the Penal Code, which section declares it to be a penal offense, punishable by fine or imprisonment in the state penitentiary, for a public officer to be "interested" in public contracts in a manner prohibited by law. Upon an examination of the entire record, and the authorities, we are satisfied with the appellate court's reasoning and conclusion that the appellant's conduct did violence to the provisions of the cited Code section. We therefore adopt as the decision of this court the opinion of the District Court of Appeal prepared by Mr. Justice Gray pro tem. It reads:

The grand jury of Marin county, by an indictment containing 21 counts, each pleading a separate contract, accused appellant of as many crimes of being interested, while supervisor, in contracts for the improvement of county roads. Upon arraignment, appellant pleaded "not guilty" to each count. Counts 11 and 14 were dismissed upon the prosecution's motion, during the trial. After a trial of ten days, the jury returned a verdict finding appellant guilty on counts 2, 5, and 15, based upon work ordered by him, and not guilty on three counts, based upon work ordered by other supervisors, and disagreed, as to the remaining counts, of which four were based upon contracts awarded by the board, after receipt of bids and nine upon work ordered by other supervisors. His motion for a new trial having been denied, he was sentenced to imprisonment in the state prison at San Quentin, concurrently, on each of the three counts. He appeals from the order denying a new trial and from the judgment of conviction, urging as grounds for reversal: (1) Erroneous admission of evidence; (2) insufficiency of the evidence to support

the verdict; (3) erroneous refusal of two requested instructions; (4) variance as to count 5; and (5) misconduct of the prosecutor in closing argument.

Section 71 of the Penal Code provides for the punishment of "every officer * * * prohibited by the laws of this state from * * * *being interested in contracts* * * * who violates any of the provisions of such laws." Section 920 of the Political Code declares that "* * * county * * * officers must not *be interested in any contract* made by them in their official capacity, or by any body or board of which they are members. * * *" Section 4322 of the last code states that "no member of the board [of supervisors] must *be interested, directly or indirectly* * * * *in any contract* made by the board, or other person, on behalf of the county, for * * * the * * * improvement of roads. * * *" (Italics ours.) The evidence, without conflict, proves that appellant, as supervisor, on four different occasions verbally ordered E. A. Forde, as president of Highway Builders Limited, a corporation, to improve three different roads within his district; that in doing such work the corporation subsequently rented road equipment from a copartnership, of which appellant was one of two members; that appellant approved claims for such work totaling $2,124.40; and that the corporation paid the copartnership, as rent for equipment, a total of $1,219.50. The only element of the offenses charged in counts 2, 5, and 15, as to which there is any question as to proof, is appellant's interest in the road contracts. Such interest, if any, must have arisen by the renting of the equipment subsequent to the letting of the road contracts.

[1, 2] Neither the briefs nor our own investigation has disclosed any case deciding what facts sufficiently establish such an interest in a public contract as will subject an officer to punishment under said section 71 or similar statute. But aid can be obtained from civil cases considering the sufficiency of evidence to prove such an interest of an officer in a public contract as to invalidate it. Outside of a general discussion of the public policy, underlying the statutory prohibition, the cases of Stockton P. & S. Co. v. Wheeler, 68 Cal. App. 592, 229 P. 1020; County of Shasta v. Moody, 90 Cal. App. 519, 265 P. 1032; Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 293 P. 145; Moody v. Shuffleton, 203 Cal. 100, 262 P. 1095, cited by respondent, are not presently helpful, because, in each case, the prohibited interest existed at the award of contract. The purchase, after award of contract and *without previous agreement so to do*, by the contractor of material used in the performance of the contract from a member of the board awarding the contract, or from a corporation of which such member is a stockholder or employee, does not create, in such member, an interest in the contract which will invalidate it. Escondido Lumber, etc., Co. v. Baldwin, 2 Cal. App. 606, 84 P. 284; cited with approval in Worrell v. Jurden, 36 Nev. 85, 132 P. 1158, and Kerr v. State ex rel., 65 Ind. App. 102, 116 N. E. 590; O'Neill v. Town of Auburn, 76 Wash. 207, 135 P. 1000, 50 L. R. A. (N. S.) 1140; People v. Southern Surety Co., 199 Mich. 30, 165 N. W. 769; Fredericks v. Borough of Wanaque, 95 N. J. Law, 165, 112 A. 309. However, if the purchase is made pursuant to an agreement, made before the award of contract, the latter is void. City of Northport v. Northport Townsite Co., 27 Wash. 543, 68 P. 204, 206. In the last case it is said: "However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void." "In determining whether or not a contract such as this is against public policy and illegal, the court is not concerned with the technical relationships of the parties, but will look behind the veil which enshrouds the matter to discern the vital facts." Tuscan v. Smith, 130 Me. 36, 153 A. 289, 293, 73 A. L. R. 1344. The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. Dunham, Carrigan & Hayden Co. v. Thermoid Rubber Co., 84 Cal. App. 669, 258 P. 663; Northern Assur. Co. v. Stout, 16 Cal. App. 548, 117 P. 617; Civ. Code, § 1621.

The conduct of appellant and the corporation in the rental of the equipment, together with attendant circumstances, is shown by the following undisputed facts: Appellant was a supervisor of Marin county for a term of four years commencing January, 1929. Prior thereto, and while such supervisor, he was an equal partner in a copartnership which was engaged in owning, operating, and renting road machinery, especially trucks, and conducting a garage. His stepson, at all times covered by the indictment, was general manager and bookkeeper of the copartnership's business, and particularly was in charge of rentals of equipment. In July, 1929, E. A. Forde incorporated the Highway Builders Limited, for the purpose of continuing his business of road construction and

exploiting an agency for the sale of road asphalt. He at all times was the president and sole owner of the corporation, transacted all its business, and received all its profits. At its inception, he transferred to the corporation a scarifier, small tools, and other undisclosed assets, valued at $1,767.49. He bought, for the corporation, from the copartnership, in 1929, a 17,000-gallon tank and pumping equipment for $600; in 1931 a truck, a crusher distributor, a roller, and a tank truck; and in 1932 another truck. The corporation never owned any other equipment. In November, 1929, he hired appellant's stepson as bookkeeper for the corporation, and the latter continued as bookkeeper at all times. Thereupon the office of the corporation was moved from Forde's home to the address of the copartnership, in a building owned by it.

Each supervisor solely ordered all road work within his road district, accepted its performance, and approved the claim therefor, and, upon such approval, the board of supervisors ordered its payment. Appellant verbally ordered Forde to do the work, specified in the counts upon which he was convicted, at an agreed price fixed at cost plus 15 per cent. In the performance of this work, equipment of the copartnership was used, with appellant's knowledge. Of the other remaining sixteen contracts, four were awarded by the board, appellant voting therefor, after receipt of competitive bids, and the remainder resulted from verbal orders of other supervisors. The county paid the corporation a total of $36,416.70 for these nineteen jobs, and the corporation paid the copartnership a total of $13,402.37 for rent of equipment used thereon. During 1930, 1931, and the first month of 1932, the corporation did about $85,000 worth of work for the county. Equipment of the copartnership was used in all of this work exclusively, except on four jobs where additional equipment of a kind not possessed by the copartnership was rented from other parties. The corporation also rented trucks from the copartnership for use in the performance of public contracts in four neighboring counties. Twelve or thirteen years before, appellant, while a town trustee, had been advised by a Deputy Attorney General that it was unlawful for a public official to be interested in a public contract, but that it was lawful to rent equipment to the contractor after the contract was let. Appellant saw the copartnership's equipment used by the corporation in performance of county contracts. The stepson rented the equipment to the corporation and fixed its rental price. Appellant ordered the work, described in count 15, after the corporation had rented equipment from the copartnership which it had used in performance of the contracts specified in the next six counts; the work, described in count 5 after such rental for use in the performance of contracts, specified in the last sixteen counts; and the work described in count 2 after such rental for use in doing the work specified in counts 3 to 21, both inclusive.

[3-5] Appellant assigns as error the admission, over his objection, of evidence relating to work wrongly described in count 14, which had previously been dismissed for variance, and to work not covered by the indictment, but done during the times specified therein. The first job was ordered by appellant at a cost to the county of $2,550 and the corporation paid to the copartnership as rental for its equipment used thereon the sum of $1,306.26. The second job consisted of the oil surfacing of a continuous portion of the San Quentin-Greenbrae-Kentfield road within appellant's district. To evade section 2640 of the Political Code, as amended by St. 1931, p. 178, requiring bids for work in excess of $2,000, appellant gave to the corporation, at a unit cost in excess of the prevailing price, five contracts for this work, each for less than $2,000, but all totaling $7,810.93. Evidence showing the commission of independent crimes which has no tendency to prove any material fact connected with the particular crime charged is inadmissible. 8 Cal. Jur. 58. Evidence of other crimes which are of the same general character, are connected as part of one plan or scheme, and tend to the same common end, is admissible to show motive and design leading up to the particular crime charged, and thus directly tending to show that the crime in question was part of such common scheme. 8 Cal. Jur. 69. The prosecution was attempting to prove such conduct between appellant and the corporation as would warrant the inference that an agreement as to the rental of equipment was made before the work was ordered. Obviously, the questioned evidence as to their conduct relative to other work during the same time was material on that issue. The court of its own volition correctly, at the time of its admission, admonished the jury as to the limited consideration which could be given such evidence.

[6, 7] "The findings of a jury upon disputable questions of fact, if supported by direct evidence or inferences, or both, must be given full faith and credit. It is only where, as a matter of law, there is no legal evidence supporting the charge that a reviewing court may

disturb a verdict. The rule, upon an appeal in a criminal case, is that the court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence and then determine whether or not the guilt of the defendant is deducible therefrom. The question for the court to pass upon is whether there were facts before the jury to justify the inference of guilt. People v. Tom Woo, 181 Cal. 315, 184 P. 389." People v. Hennessey, 201 Cal. 568, 571, 258 P. 49, 50. From the sale by the copartnership to the corporation of practically all of the latter's road equipment and the common use of the same office and bookkeeper, the jury might have reasonably deduced a close business connection between them. From the almost exclusive use of partnership equipment by the corporation in the performance of its contracts and the payment of rentals in a large amount therefor, the jury might well have inferred that the corporation was a favored and valuable customer of the copartnership, whose profits would be increased by reciprocity. The jury might also have believed that appellant was attempting to evade the statutory prohibition, of which he had previously been advised, when he did not himself rent the equipment, but allowed the common bookkeeper, who was his manager and agent, to do so, with his knowledge. The jury also could have reasonably inferred from previous rentals of equipment on other county contracts that appellant had reason to believe, before he ordered the corporation to do any work, that it would, in continuance of its previous practice, rent copartnership equipment in doing such work. The jury was not required to acquit appellant because he denied making an express contract of rental, but it was warranted by the evidence as to his conduct towards the corporation, in inferring an implied contract for such rental, made before his ordering of the work.

[8, 9] The court correctly refused to give two of appellant's proposed instructions, which advised the jury to acquit if they believed the evidence established specified facts. The pertinent part of the first instructed an acquittal if the jury believed the contracts referred to in the indictment were entered into between the board of supervisors and the corporation contractor "without any previous *arrangement* between the defendant and the said corporation contractor contemplating the rental or use by said corporation contractor of trucks and equipment from the firm of which the defendant was a member." (Italics ours.) As above pointed out, if an agreement, either express or implied, had been made by appellant and the corporation for the rental of the equipment before the former ordered the roadwork, he was interested in such work. The word "arrangement" is a very wide and indefinite term, which has a different signification from the word "agreement" and does not necessarily mean an "agreement." 5 Cor. Jur. 373. Its use, therefore, made the instruction vague, meaningless, and misleading, as applied to the facts. The second, so far as here material, advised a verdict of not guilty if the jury believed that, in the public contracts, "the defendant was not interested except to the extent that he might have been indirectly interested by reason of said corporation contractor having subsequently hired or used trucks or equipment in the performance of any work or improvement specified in said contracts from the firm of which defendant was a member." If such rental resulted from an agreement previous to the public contract, it would create a prohibited interest. The instruction, by the omission of the element of previous agreement, erroneously stated that such rental could never create an interest. The court, in its own instructions, correctly and fully defined "interest" and when prohibited.

[10] At this point, we add to the discussion of the District Court of Appeal the following: These instructions purport to relate to the contracts let by the board of supervisors. Appellant was acquitted on the charges relating to these contracts. He was convicted for those offenses only in the commission of which he was charged with having personally let the contracts for public work as road commissioner. He personally approved the resulting and subsequently presented claims against the county. It therefore appears that the jury gave appellant the benefit of every possible doubt, and convicted him of only those offenses wherein his interest was manifest, and wherein his knowledge of, and intentions as to, that interest were as fully apparent. Therefore, aside from the discussion by the District Court of Appeal on the refusal of the trial court to give the two instructions, we are of the view that no prejudicial error was committed by such refusal.

[11, 12] The fifth count of the indictment alleged that during December, 1931, the copartnership rented to the corporation its trucks and equipment, which were used by the corporation upon work which was being performed by the corporation on the Nicasio road in road district No. 5, and for which the copartnership was paid by the corporation the sum of $112. The only identification of the public contract involved is this designation of

its location. The evidence proved the time of use and amount of rental of the equipment as alleged, but the location of the work as at White's Hill in road district No. 2. The variance occurs not in surplusage as to venue but in the description of the public contract. An allegation otherwise not essential may become material, and must be proved in all cases when descriptive of that which is necessary to the charge. People v. Handley, 100 Cal. 370, 34 P. 853; People v. Strassman, 112 Cal. 683, 45 P. 3; People v. Lapique, 10 Cal. App. 669, 103 P. 164. Since an acquittal on this count would not have barred a further prosecution on the contract disclosed by the evidence, the variance is fatal. People v. Arras, 89 Cal. 223, 26 P. 766.

[13] Counsel for the people in his closing argument forcefully resented what he designated as an insinuation that the local judge, who did not try the case, had participated in the interview of a prosecution witness. While the defense's cross-examination of this witness did not show such participation, the questions asked can be reasonably construed as carrying such insinuation. The redirect examination conclusively negatived such participation. The argument was justified, even if the defense immediately disavowed any such insinuation and as strenuously resented the same.

The judgment and order denying a new trial are, and each is, affirmed as to counts 2 and 15. The judgment is reversed, for variance, as to count 5.

2 Cal.2d 209

EWELL v. STATE BAR OF CALIFORNIA.

S. F. 15166.

Supreme Court of California.

Dec. 29, 1934.

As Modified on Denial of Rehearing Jan. 28, 1935.

1. Attorney and client ⇐57

Court reviewing State Bar governors' action in recommending suspension of attorney, relying in good faith on assurance by chairman of local administrative committee that disciplinary proceeding would be postponed or case reopened, should see that he was not misled to his prejudice thereby, whether application to reopen case was made in strict compliance with statute or not (St. 1927, p. 38, as amended).

2. Attorney and client ⇐53(2)

Evidence in disciplinary proceeding against attorney *held* insufficient to sustain charge that he solicited employment from jail prisoner awaiting trial on robbery charges (St. 1927, p. 38, as amended).

3. Attorney and client ⇐58

Attorney's unauthorized prosecution of appeal from order granting probation to one from whom attorney was charged with soliciting employment to defend him in robbery prosecution *held* not to justify suspension of attorney for one year.

4. Attorney and client ⇐58

Suspension of attorney for three months *held* adequate punishment for his failure to communicate with attorney, representing one accused of robbery at preliminary examination, and obtain definite information as to whether latter attorney would continue to represent accused before assuming to advise latter (St. 1927, p. 38, as amended).

WASTE, C. J., and SHENK, J., dissenting.

In Bank.

Proceeding by Raine Ewell to review the action of the board of governors of the State Bar of California in recommending petitioner's suspension as an attorney at law for one year.

Petitioner ordered suspended for three months.

Raine Ewell, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

SEAWELL, Justice.

This is a proceeding instituted for the purpose of reviewing the action of the board of governors of the State Bar of California in recommending the suspension of petitioner as an attorney at law of this state for the period of one year.

On May 25, 1933, local administrative committee No. 2 for the city and county of San Francisco, pursuant to the provisions of the State Bar Act (St. 1927, p. 38, as amended) regulating the practice of law and providing penalties for the violation of said act, issued an order directed to Raine Ewell, to appear on June 13, 1933, before local administrative body No. 5 and show cause why he should not be disciplined for professional misconduct alleged to have consisted in the violation of rule

2, which in terms provides that "a member of The State Bar shall not solicit professional employment by advertisement or otherwise." The specific acts as alleged in the notice to show cause, briefly stated, were that prior to May 1, 1933, Eugene H. O'Donnell, a practicing attorney of the city and county of San Francisco, had been retained by Meta Corville to defend one Herschell Rutherford, who was imprisoned in county jail No. 1, upon a commitment by a magistrate to answer to the charge of robbery. It is charged in said notice that after said Rutherford had been held to answer and before trial petitioner Raine Ewell while a visitor at said jail and without any request from said Rutherford, or any one in his behalf, to visit or communicate with said Rutherford, requested and caused said Rutherford to be brought from his cell into his presence and he thereupon stated to said Rutherford that he specialized in the practice of criminal law and he could help him gain his liberty; that he was certain to go to San Quentin if he allowed his present attorney to defend him, since he was a civil lawyer and not experienced in criminal procedure. It was further alleged that Rutherford refused to employ him and that petitioner called upon Meta Corville on the same evening and repeated to her the same statement as to Mr. O'Donnell's inexperience in criminal law which he had made to Rutherford. Petitioner was given five days to answer after service of said notice. Within said period he filed a verified answer to said notice in which he denied that he had any acquaintance whatever with Mr. O'Donnell and denied that he requested to see said Rutherford in regard to his or any matter whatsoever; denied that he told Rutherford that he specialized in criminal law or that he could help him obtain his liberty; or that he was certain to go to San Quentin if he retained his present attorney; denied that he had been advised or knew that Mr. O'Donnell was representing Rutherford or that he said any of the things set forth in the notice as to the lack of experience on the part of O'Donnell in handling criminal cases; denied that he solicited employment or that Rutherford had refused to employ him.

As a further defense the accused averred that on or about April 24, 1933, he was given a card by another inmate of county jail No. 1, on which was written the name Herschell Rutherford, and the person who gave him the card containing Rutherford's name said that Rutherford requested the accused to call him out as he wished to talk with Ewell; that in response to said card and request he called Rutherford out; that Rutherford said to him he wanted to talk about his case and upon being asked by Rutherford if he was a criminal lawyer he replied that "that was all he did." Rutherford then told him he had been in jail since April 13th and had not been able to have any communication with a lawyer; that he was supposed to have an attorney hired to defend him, but that his attorney had never called on him since he had been held to answer, and he did not know whether he was going to represent him or not; that he was charged with robbery committed with the aid of two others with the use of a gun that belonged to him; that he had lived or boarded at the home of Meta Corville and her mother for four years; that he drove his Packard car to the place of robbery and remained in it while his companions actually committed the robbery; that he explained to Rutherford that robbery by the use of a deadly weapon was punishable from five years to life in the state penitentiary, and probation, in cases where a deadly weapon was used, was not available to the accused; that Rutherford asked him to go to the home of Miss Meta Corville, giving him her street number, and to request her to call and see him; that Miss Corville resided in the district through which petitioner passed on his way home; that he called upon Miss Corville as he was going to his home and she said to him that Mr. O'Donnell was her attorney and was taking care of Rutherford's case; that he said to her: "Well, he asked me to please tell you to come tomorrow and see him." That accused made no reference to Mr. O'Donnell, or comment upon his legal experience whatever and did not ask to be employed on the case. Proceedings were had and, as shown by the local administrative committee entry, the matter was entirely heard and submitted on June 13, 1933. On February 6, 1934, approximately eight months after said matter was heard and submitted, the committee filed its findings of fact, conclusion, and recommendation that the accused be disbarred.

At the close of the hearing on June 13, 1933, the accused, insisting that the testimony of Rutherford in particular in accusatory matters was false and was influenced by his desperate effort to obtain probation, which was subsequently granted, requested permission to reopen the case for further hearing. Several similar requests were made during said eight months' period to reopen the case. On December 18, 1933, the accused was notified by respondent that no adequate showing had

been made to reopen the case and his request was denied.

There is no suggestion as to the particular in which the showing was inadequate. It appears from the verified statement of the accused filed in opposition to the report of the committee, that on June 15, 1933, the second day after the order of submission was made by said committee, he applied in writing to said committee to set aside said order of submission and reopen the case; that he explained in detail to the chairman of said committee the existence of evidence which would rebut the alleged false testimony given by Rutherford, and a certain named witness discovered by the accused since the cause was submitted; and that additional testimony material to his defense had come to his notice which he asked to introduce, including the testimony of Mock Jock, a Chinese, who had been transferred from the San Francisco jail to the Santa Clara county jail to serve a term on a misdemeanor charge. Mock Jock was unquestionably a material witness for the accused to the point that Rutherford actually wrote his own name on a card and caused it to be delivered by Mock Jock to the accused requesting him to call upon Rutherford. The accused avers that he was informed by the chairman of the committee that he would be given an opportunity to offer other evidence, and said chairman requested him to let the matter stand over for a time as he had pressing matters which demanded his personal attention; that at all times before he was notified on December 18th by mail that his request had been denied he was made to believe that there was no objection to the sufficiency of his request and that it would be granted.

[1] The respondent makes no denial of the above averments with respect to reopening the case for the introduction of further evidence. The attorney for the State Bar apparently admits the truth of the above averments and seeks to avoid their effect by the claim that the committee was justified in denying the request because of an "obvious insufficient showing." He further argues that any statements made by the chairman of the committee "are not binding upon the committee as a whole."

We are not in agreement with the above statement as a general proposition. If it should appear as a fact that an accused in a disciplinary proceeding was told by the chairman of the committee that he would be granted a postponement of his case, or an order would be made reopening his case and he, in good faith relying upon such assurance, should suffer any prejudice or detriment by reason of said assurance being withdrawn or denied, it would be the plain duty of a reviewing court to see to it that he was not misled to his prejudice thereby, whether the application had been made in strict compliance with the statute or not.

The Rules of Procedure of the State Bar provide that in investigations, hearings, and in all other matters before the board or a committee the proceedings shall be informal, but thorough, with the object of ascertaining the truth. (Rule 28.) The accused complains that the long delay following the submission of the case contrary to rule No. 30, which makes it the duty of the committee to proceed to a prompt hearing, to make findings and to report promptly to the board, was not occasioned by any fault of his and the case could have been reopened and closed within the time which elapsed between June 13th and December 18th, on which last-mentioned day the order denying leave to produce other evidence was denied. The accused complains that his case was prejudiced by this delay of six months. The accused filed his opposition to the committee's report on February 16, 1934, within the ten-day period allowed by law.

The findings of fact as made by said committee were approved and adopted by the board of bar governors, and it concluded therefrom that the accused had been guilty of a violation of rule 2 of the Rules of Professional Conduct. The recommendation of the committee as to disbarment was rejected and instead the board recommended suspension for a term of one year. If the board were satisfied with the committee's findings of fact, which were adopted by it, it would seem that the extreme penalty provided by the Bar Act and as recommended by the committee, which was disbarment, should not have been modified. The findings of the committee contain an unusually caustic arraignment of the accused both as a member of society and as a lawyer. As a conclusion from its findings, to which we will hereafter refer, the committee expressly stated that it gave no credence to the several witnesses produced by the accused and who were or had been his clients and none of those who were not his clients, as the latter class, according to the findings, were induced by prejudice instilled by the accused to testify against Rutherford. No credence whatever was given to the testimony of the accused. No questions were asked him but one, at the close of his extended statement with respect to his contact with Rutherford, which is not of sufficient

importance to require a restatement. As a conclusion from its findings the committee thus closes its recommendation: "The committee also feels that an attorney as well acquainted and as influential with the criminal element as respondent has shown himself to be and who has been and is capable and willing to use such acquaintance and influence to his own advantage in obtaining perjured testimony and in intimidating witnesses adverse to him, is not only a discredit to the profession but a menace to society in general."

The accused appeared before said board on February 16, 1934, and vigorously attacked said findings and recommendation of the committee and board in his written opposition to the above report of the committee and made an application to present additional evidence and for a hearing de novo. On the following day both applications were denied. The accused insists that the committee was unalterably prejudiced against him from the first and should not have sat in judgment in the matter. His claim is that he is engaged exclusively in defense of persons charged with crime; that during his sixteen years of practice he has necessarily antagonized the officers engaged in the prosecution of persons charged with crime and the public defenders and that long and deep-seated animosities existing on the part of such persons have caused them to harass him to the extent that seven to eight charges calculated to cripple him and finally drive him from the practice of the law have been lodged against him without success; that during his entire course as an attorney he has never tried a personal injury case and has had but ten divorce cases and has never by improper methods solicited business or engaged in ambulance chasing. He boldly challenges his enemies to prove the contrary, or to prove him guilty of a single dishonest act. His practice is confined to the less desirable branch of the practice and is commonly known as police court practice. He asserts that 80 per cent. of his work is devoted to charity for which he receives no remuneration. The accused makes specific reference to members of the committee and cites incidents upon which he relies as evidence sufficient to disqualify said members from sitting in judgment upon his case. The accused, however, made no objections to any committeeman on the grounds of prejudice when the matter was called for hearing, and we are not disposed to pursue the question any further in view of our determination of the matter.

[2] The sole charge lodged against the accused was that he solicited employment from one Rutherford, a prisoner awaiting trial on charges of robbery. This charge grew out of the activity of Mock Jock, a Chinese client of the accused, detained, it appears, for the violation of some federal statute. Several other inmates, among a large number of persons awaiting examination or trial, were or had been the clients of the accused. The Chinese in question had in his possession an old political card bearing the likeness of the accused and which he had circulated when a candidate for the office of judge of the municipal court at a past election. At the time this proceeding was heard said Chinese had been transferred as a federal prisoner to the Santa Clara county jail and he did not testify at the hearing. But it is admitted that said Chinese presented this card to Rutherford on April 24th and told him that the accused was a successful lawyer. It was the custom for persons charged with crime who wished to see a lawyer to write their names on a card which was delivered to the lawyer whom they wished to consult. Rutherford admittedly wrote his name on the card bearing the accused's name and picture and returned it to the Chinese. It was delivered to the accused who had no acquaintance with Rutherford and on the following day the accused, apparently in compliance with the rule of the jail, had Rutherford brought out for consultation. Rutherford had been held over on April 13th on a charge of robbery. His codefendants had admitted the commission of the crime. The attorney who had represented Rutherford at the preliminary examination, and who had no legal duty to do so, had not visited him. Ten days had passed and Rutherford had become worried as to his fate.

It is very convincing from the testimony of Rutherford himself that he told both the accused and several of his prison mates that he did not know whether Mr. O'Donnell had been retained to defend him or not. His half admissions of the fact and evasive answers on the question make it very certain that he did not know that any arrangements had been made for his defense, and that he was uneasy and was anxious to confer with the accused. The admitted fact that he wrote his name on a card handed to him by the Chinese, who was unable to write, which he knew was to be delivered to the accused, is quite conclusive proof of that fact. He admits that he told the accused that he didn't

know for sure whether Mr. O'Donnell was retained. There is ample proof in the case from several sources that he requested an interview with the accused, and his act in doing so forms the basis for this proceeding. He admitted that he fully explained his case to the accused which is wholly inconsistent with any doubtful denial by him that he requested an interview with the accused looking to his defense. It further appears from his testimony that he gave to the accused Miss Corville's address. When asked if he did not request the accused to go to see her and ask her to come and see him, Rutherford answered: "I told him he would have to go out and see her if he was to be retained." The accused called on Miss Corville the same evening and informed her that he had come to talk to her about Mr. Rutherford. Her testimony is that she informed him she already had an attorney and the accused said: "O'Donnell is a civil attorney; he is not a criminal lawyer and you have the wrong attorney. If he handles his case in the way he is going to he will send this boy to San Quentin for fourteen years." He said he had forty cases and had been successful in most of them, and that O'Donnell was hardly ever seen in the criminal courts. The accused said that he knew the ins and outs of the criminal practice. Miss Corville admits that he did not ask her for employment or say anything to her about a fee. The accused asked her if she would go and visit Rutherford and she said she would and added that she would also see Mr. O'Donnell. The accused said, "All right, you do that." He then left. Both Miss Corville and Mr. O'Donnell visited Rutherford on the following day after the accused had visited Miss Corville. The accused called on Rutherford after the visit of O'Donnell, as he was expected to do, and Rutherford told him he had decided to keep Mr. O'Donnell.

It is upon Rutherford's testimony that the charge of solicitation of employment rests. As above related, he was being held on a charge of robbery committed by force of arms. It developed in the case that he was hoping for probation on a plea of guilty. The accused understood that Rutherford was contemplating entering a plea of guilty with the expectation of being released on probation. That such negotiations were pending, of which the accused was not fully informed, is very clear from the record and from the fact that a few days after he testified against the accused he was permitted to enter a plea of guilty of second degree robbery and was granted probation. The accused understood that Rutherford was to plead guilty to the charge as made and he told him if he entered such a plea he would be sentenced to the penitentiary inasmuch as the law provides (section 1203, Pen. Code) that probation shall not be granted to persons who in the perpetration of robbery use a deadly weapon in accomplishing the crime. Such is the law as to first-degree robbery. The accused contends that was what he had reference to when he told Miss Corville and Rutherford that if his attorney handled Rutherford's case "in the way he is going to he will send this boy to San Quentin for fourteen years." Rutherford testified that the accused had solicited employment from him by boasting of his skill as a criminal lawyer and minimizing the experience of O'Donnell as a criminal lawyer. He admits that the accused did not ask him for a fee or directly seek employment, but used methods which had the tendency to persuade him that he would be better protected by employing him. As before stated, Rutherford's admission that he wrote his name on a card which he doubtless knew was to be sent to the accused and which constituted the customary jail method of requesting a conference with the lawyer to whom the card was to be presented is conclusive against him. His explanation to the effect that he did sign the card, but did not intend that it would be delivered to the accused is exceedingly weak. Besides, another inmate testified to a similar incident in which Rutherford's name appeared upon a card to be delivered to the accused. The five witnesses herein referred to, not including the accused, testified to the desire expressed by Rutherford to interest the accused in his defense. The logic of the situation as detailed by the evidence gives force to the claim that the accused was first solicited by Rutherford. A short time after it became certainly known that Mr. O'Donnell was to represent Rutherford thenceforward, charges were filed against Ewell. Naturally it became known to the inmates of the jail that Rutherford, who was then an applicant for probation, had appeared as one of the complainants against Ewell in the solicitation charge. Ewell showed the complaint to the prison mates of Rutherford who were familiar with the transactions between Rutherford and himself. The prisoners who had been companions of Rutherford and who had been a part of said transaction became incensed at Rutherford at what they asserted were false charges and accused him of being influenced to perjure himself in the hope of receiving immunity.

Some remarks on the part of one or two of said prison mates as testified to by Rutherford were to the effect that Rutherford, because of his part in preparing false charges against the accused, should be or would be thrown off the tier (elevated cell floor) or should receive personal chastisement. No violence or uprising of any kind resulted from the conduct of Rutherford by reason of joining forces with Ewell's prosecution. There is no sufficient evidence in the record which would justify a finding that Ewell, the accused, attempted to incite Rutherford's prison mates against him or that he did more than a person so accused would have done to collect evidence in his defense. He interviewed the only persons who were witnesses to the transaction, informed them of the charges Rutherford had placed against him and gave them a copy of the charges in writing. Naturally he would go to the only persons who had knowledge of the transaction for evidence. The matter was wholly a prison affair. There is nothing in the record to sustain the finding that he was well acquainted with or unusually influential with the criminal element. The only evidence from which such an inference could be drawn is that he was acquainted with his two clients and through them he became known to the other two who had been represented by other lawyers. That he influenced any witnesses to testify in his behalf cannot be said with any greater degree of certainty or plausibility than it may be said that Rutherford, who had admitted a participation in a serious crime, and whose testimony is not more convincing than that of his prison mates, was influenced to give prejudiced or perjured evidence against the accused in the hope that he might receive probation, which act really came to pass.

[3] After Rutherford had been permitted to plead guilty to second-degree robbery and was granted probation against the recommendation of the probation officer, the accused undertook to appeal from the order. His objection to granting probation was that Rutherford had committed first-degree robbery by the use of arms and was by express provision of law denied the right of probation. The attempted appeal from the order granting probation, not being supported by the district attorney or attorney general, was dismissed inasmuch as the only person who may represent the people in the conduct of criminal proceedings or in matters arising out of public prosecutions is the district attorney or the attorney general. The committee found that the accused did not act in good faith in taking said appeal and that he was actuated solely by a malicious purpose in harassing said Rutherford in violation of rule No. 13.

There can be no doubt that the accused did feel resentment against Rutherford, who had become informer and witness against him under the circumstances which he and the witnesses to the transaction claimed to have been truly set forth by them. He sought to prevent Rutherford, whom he claimed had testified falsely against him, from enjoying probation, which testimony he claimed was induced by the hope of gaining probation. His contention was that a second degree plea could not be accepted where the evidence showed deadly weapons were used in the commission of the crime. He presented his contention in open court, but it was unsuccessful. We are satisfied that he had no standing to urge the appeal. There appears to be little doubt as to the sincerity with which he urged his appeal. There is also no doubt that his contention that he had a right to prosecute the appeal was unsound. His pique may have affected his judgment. But it cannot be said that his misguided effort under the circumstances should be punished with suspension for one year.

[4] We are of the view, however, that the accused should not have relied merely upon the word of Rutherford as to whether an attorney had been provided for him in view of the fact that an attorney had represented him at the preliminary. Although it does not so appear from the record in express language, it should have occurred to the accused that it was likely that arrangements for retaining Mr. O'Donnell to represent Rutherford at subsequent proceedings had not been concluded and that it was because of pending negotiation with Miss Corville that Mr. O'Donnell had not made definite announcement as to whether he would continue as his attorney. In other words, the accused should, under the circumstances, have communicated with Mr. O'Donnell and obtained definite information on the subject before he assumed to advise Rutherford. His act no doubt constituted an infraction of the rules providing for the improvement of the practice of the law.

Upon a full examination of the record we are satisfied that a suspension for a period of three months is adequate punishment for the infraction complained against.

It is therefore ordered that said Raine Ewell be suspended from the practice of the law in all the courts of this state for a period of three months dating from the day this decision shall become final.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.

WASTE, Chief Justice (dissenting).

I dissent. In view of the record in this case, and particularly in view of the findings of the State Bar, I am of the opinion that the recommendation of the board of governors that the petitioner be suspended from the practice of the law for a period of one year should be approved.

I concur: SHENK, J.



3 Cal.App.2d 521

PEOPLE v. ANDERSON.

Cr. 1410.

District Court of Appeal, Third District, California.

Jan. 8, 1935.

1. Criminal law ⇐112(1)

Where persons ordering taxi directed driver to cross river separating two counties, and there robbed driver and took the spoils back across the river, prosecution for robbery could be instituted in either county (Pen. Code, §§ 777, 781, 786).

2. Criminal law ⇐564(7)

In determining whether spoils of robbery had been brought into county so as to warrant prosecution there, facts that very shortly after the robbery accused was found in county with only $4.35 in coins exactly corresponding with those taken from person robbed could be considered (Pen. Code, § 786).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

George Anderson was convicted of robbery in the first degree, and he appeals.

Affirmed.

George I. Lewis, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant and his wife were convicted of robbery in the first degree upon an information filed in the superior court of the county of Sacramento, charging him with robbing one Henry Redmond, a taxi driver, of the sum of $4.35 on the 23d day of July, 1933. The defendant George Anderson prosecutes this appeal from the judgment of conviction and from the order denying his motion for a new trial.

The only ground urged for reversal is that the actual taking of the $4.35 from Henry Redmond was accomplished in the county of Yolo. It is urged that under section 777 of the Penal Code the superior court of Sacramento county had no jurisdiction. That section does provide for the trial of offenses in the county where committed, but it also contains a clause reading as follows: "Except as herein otherwise provided, the jurisdiction of every public offense is in the county wherein it is committed." Following this section are two sections of the Penal Code which we think applicable here. Section 781 of the Penal Code in part reads as follows: "When * * * the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county."

Section 786 of the Penal Code permits prosecution to be had in any county into which property taken by burglary, robbery, larceny, or embezzlement has been brought.

The transcript shows that on or about 2 a. m. of July 23, 1933, Henry Redmond, the taxi driver, received a telephone call to go to North B street on the outskirts of the city of Sacramento, in the county of Sacramento. Arriving there, he found the defendant and his wife awaiting him, who requested to be taken to certain resorts in Yolo county. Upon arriving at one of the places designated, the defendant stated that he wanted to go to Pagni's place. It appears that Redmond did not know the way, so he followed the defendant's directions. Coming to a house, the taxi driver got out to look at the same. The defendant thereupon drew a pistol and commanded the taxi driver to give him his money. The taxi driver complied with this demand, and turned over to the defendant $4.35, the money being in the form of two silver dollars, four 50-cent pieces in silver, and 25 cents silver coin and a 10-cent silver piece. The defendant and his wife immediately took possession of the taxi, left the driver to shift for himself, and drove back to the city of Sacramento with the money. Shortly thereafter, at a resort in the city of Sacramento, the appel-

lant was arrested, and upon his person was found the sum of $4.35 in coins exactly corresponding with those taken from the taxi driver, which we have herein described.

[1] The trial was had before the court sitting without a jury. We think this evidence was amply sufficient to justify the court in coming to the conclusion that the appellant and his wife procured the taxi in the city of Sacramento, and directed the driver to proceed across the Sacramento river over into Yolo county, for the express purpose of robbing the taxi driver of whatever money might be in his possession, that the appellant and his wife immediately returned to Sacramento county, and that the appellant brought with him the money which he had obtained from the taxi driver. The procuring of the taxi under such circumstances as disclosed by the testimony we think justified the court in concluding that it was simply a part of the scheme requisite or employed for the consummation of the offense of robbery. In so far as the possession of the money was concerned, the appellant testified that his father-in-law had loaned him the sum of $10 in $5 bills, being a loan of $5 on each of the two previous days. The appellant's father-in-law testified to the same effect. The court heard this testimony, saw the witnesses, and of course had an opportunity of judging as to the credibility of the appellant and his father-in-law, and, as appears from the record, the court concluded that such testimony was unworthy of belief. Where the means employed for the consummation of a criminal offense has a situs or location in one county, and the completed offense takes place in another, as we have seen, both counties may entertain jurisdiction. A frequent illustration of the application of this rule is found in such cases as People v. Grubb, 24 Cal. App. 604, 141 P. 1051, where the inducement and persuasion to induce a female to enter a house of ill repute is in one county, and the female, in pursuance thereof, journeys to another county in consummation of the scheme. In the case just mentioned the persuasion took place in the county of Los Angeles, and the consummation of the offense in the county of San Francisco.

A like illustration of the rule may be found in the case of People v. Steffner, 67 Cal. App. 1, 227 P. 690, where the offense of obtaining money by false pretenses was begun in one county and consummated in another. The counties of Lassen and San Francisco were held to be counties in which a prosecution in that case would lie. See, also, the case of People v. De Martini, 25 Cal. App. 9, 142 P. 898, where two counties were involved, the offense being inducing a female to enter a a house of ill repute.

[2] It is further urged that the finding of $4.35 on the person of the appellant, corresponding exactly with the money taken from the taxi driver, is immaterial, and cannot be considered for the purpose of showing that the proceeds of the robbery were brought into the county of Sacramento; it being argued that the possession of the money only shows a coincidence. While it is true that the possession of stolen property is not alone sufficient to sustain a conviction, it is a circumstance to be taken into consideration. Likewise the rule seems to be that mere possession of money is ordinarily, in and of itself, no indication that the possessor was the taker of the money charged to be taken, because in general all money is alike, etc. However, there may be particular circumstances connected with the money found in the possession of the one alleged to have taken it, which give it probative value. This is shown by the following language which we quote from section 154, volume 1, Wigmore on Evidence: "Where the denominations of the money found, and the money taken, correspond in a fairly close way, the fact of the finding of that specific money would have probative value and be relevant, because the money found is fairly marked as identical with the money taken."

Here, we find two silver dollars, the four 50-cent pieces, the one 25-cent piece, and the one 10-cent piece found on the person of the appellant within a very short time after the commission of the robbery. The commission of the robbery took place about 2 a. m., and the arrest of the appellant was made shortly after 3 a. m. of the same morning, which gives, under the rule we have quoted from Wigmore's, probative value and justified the trial court in concluding that it was the same money, and therefore gave the superior court in Sacramento county jurisdiction. The fact that the appellant committed the robbery as alleged in the information and as found by the trial court is unquestioned; that is, so far as this appeal is concerned, the commission of the offense is admitted only with the technical objection that the superior court of Sacramento county did not have jurisdiction.

We conclude from what we have set forth that there is no merit in this appeal, technical or otherwise.

The order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

3 Cal.App.2d 559

MASCOT PICTURES CORPORATION v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al.

Civ. 10189.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1935.

1. Appeal and error ⇐458(1)

"Supersedeas" is an auxiliary process designed to supersede enforcement of trial court's judgment brought up for review, and its application is limited to the judgment from which an appeal is taken.

[Ed. Note.—For other definitions of "Supersedeas," see Words & Phrases.]

2. Courts ⇐190(5)

Writ of supersedeas or injunction would not issue from appellate court to stay proceedings on municipal court judgment from which there was no right of appeal to appellate court, since writs were unnecessary to complete exercise of appellate jurisdiction in writ of review proceeding in the superior court refusing to restrain enforcement of judgment (Const. art. 6, § 4b).

Petition by the Mascot Pictures Corporation for writ of injunction in supersedeas against the Municipal Court of the City of Los Angeles and others.

Writs denied.

Gordon W. Levoy, of Hollywood, for petitioner.

PER CURIAM.

The above-entitled proceeding was a proceeding in the superior court of Los Angeles county, wherein the petitioner demanded a writ of review of an order made by the municipal court after judgment of that court in an action wherein the petitioner, Mascot Pictures Corporation was defendant. The judgment of the municipal court was a money judgment in the sum of $924.10. By order of date August 17, 1934, the municipal court vacated a previous order which had been made granting a new trial of the action. Defendant in that action (petitioner here) appealed to the superior court from said order of August 17, which order was by that court affirmed.

By an independent proceeding the petitioner then applied to the superior court for a writ of review of said order of date August 17, 1934. From the petition now presented to this court, it appears that the superior court issued a temporary restraining order against the enforcement of the municipal court judgment, but the superior court thereafter sustained a demurrer of respondents to the petition for writ of review and denied a motion of petitioner to continue in effect the aforesaid restraining order "pending its intended appeal from the aforesaid judgment and order."

If a judgment denying the application for the writ of review or a judgment affirming the order of the municipal court has been entered, that fact does not appear by the present petition to this court. It only appears inferentially, if at all, by the statement that "proceedings on appeal are now pending" to this court. Upon the proceedings set forth in the present petition to this court, and to which we have referred only in general terms, the petitioner asks for an order upon the municipal court to show cause why execution and enforcement of the judgment of that court should not be stayed pending appeal "from the judgment and order" in the writ of review proceeding in the superior court, and for a temporary stay until further order, pending hearing upon the order to show cause. In other words, the petitioner on appeal from the judgment or order made by the superior court in the proceeding for writ of review asks for a writ of supersedeas or injunction to stay proceedings on the municipal court judgment.

[1, 2] The writ of supersedeas would not be an appropriate remedy. That writ in its application is limited to the judgment from which an appeal is taken. It is an auxiliary process designed to supersede the enforcement of the judgment of the trial court brought up for review. But there is not, in the judgment of the superior court from which petitioner has appealed (assuming that he has such appeal pending), anything to which an execution or other means of enforcement could apply. In reality, petitioner is asking this court to issue a writ of injunction to prevent and stay proceedings upon a judgment of the municipal court from which there is no right of appeal to this court. This court is without power to issue original writs except as it may have power to issue certain specified writs (of which injunction is not one), and "all other writs necessary or proper to the complete exercise of their appellate jurisdiction." Const. Cal. art. 6, § 4b. We are of the opinion that the issuance of the

writ of injunction applied for in relation to the municipal court action is neither necessary nor proper to the complete exercise of the appellate jurisdiction of this court in the writ of review proceeding.

In arriving at the conclusion above stated, we have taken into consideration the decision rendered in Martin v. Rosen (Cal. App.) 38 P.(2d) 855, relied upon by petitioner as authority supporting the application here made by him. It may be that, upon the facts stated in that case, the court was justified in its holding that the writ of injunction there granted might properly be considered as a writ necessary and proper to the complete exercise of its appellate jurisdiction; but as to that question we refrain from expressing any opinion. In the case before us the facts are so far different that we decline to accept the decision in Martin v. Rosen as sufficient authority upon which to rest the issuance of the writ of injunction in this proceeding.

The application presented by the petitioner for writ of supersedeas or for writ of injunction is denied.

SPENCER v. BEADLE S. S. CO., LIMITED, et al. *

Civ. 9190.

District Court of Appeal, First District, Division 1, California.

Dec. 28, 1934.

Rehearing Denied Jan. 26, 1935.

Hearing Granted by Supreme Court Feb. 25, 1935.

1. Seamen ⇐29(4)

Under Jones Act, contributory negligence is not a defense but may be considered only in mitigation of damages to injured seaman (Jones Act § 33 [46 USCA § 688]).

2. Courts ⇐97(5)

State courts must adopt construction placed by federal courts on Federal Employers' Liability Act and Jones Act (Federal Employers' Liability Act § 1 et seq. [45 USCA § 51 et seq.]; Jones Act § 33 [46 USCA § 688]).

3. Seamen ⇐29(4)

Under Jones Act, assumption of risk by injured seaman is a defense in a limited manner when action is brought in state courts (Jones Act § 33 [46 USCA § 688]).

4. Seamen ⇐29(5)

Under evidence that seaman knew that there were no safeguards around open hold of vessel into which he fell, and knew that lumber on which he was working close to hold was not secure, and that he disobeyed orders, refusal to instruct on assumption of risk in action under Jones Act *held* reversible error (Jones Act § 33 [46 USCA § 688]).

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Alfred Spencer against the Beadle Steamship Company, Limited, and George S. Beadle. A nonsuit was granted as to the defendant steamship company. From a judgment in favor of plaintiff against defendant George S. Beadle, he appeals.

Reversed.

Sawyer & Cluff, Webster Street, and Daniel W. Evans, all of San Francisco, for appellant.

A. Don Duncan, of San Francisco, for respondent.

JOHNSTON, Justice pro tem.

Plaintiff, a seaman employed on the Fort Bragg, a coastwise vessel, was injured aboard the ship while unloading part of a deckload of timber at Vallejo, Cal. He brought this action for damages against both defendants under the terms of the Jones Act § 33 (46 USCA § 688). At the trial, a nonsuit was granted as to the defendant Beadle Steamship Company, Limited (a corporation), from which no appeal was taken, and it is consequently eliminated from the case. The jury returned a verdict against the defendant George S. Beadle for $10,000, which the trial court reduced to $7,000 on motion for a new trial, and said defendant has appealed from the judgment.

[1] The amended complaint alleged that respondent suffered numerous injuries of a serious nature through the negligence of appellant in failing to provide respondent with a reasonably safe place to work. The particulars in which appellant failed in this duty are alleged to be in piling sling loads of lumber on the deck next to the open hold of the vessel without piling, or properly securing the lumber, and failing to provide safeguards around the open hold; that as a result of this negligence certain lumber gave way under respondent as he was attempting to fasten a loading sling under a sling load of this lumber, precipitating him into the hold, causing

*For subsequent opinion see 48 P.2d 678.

the injuries complained of. The answer denied negligence, and set up as affirmative defenses, assumption of the risk by respondent and what is stated to be contributory negligence. It may be doubted that the plea of contributory negligence is sufficient, but no question is made on that point, and in any event, under the Jones Act, contributory negligence is not a defense, but may be considered only in mitigation of damages.

At the outset it may be well to state that we feel that the evidence was sufficient to go to the jury on the question of appellant's negligence, and is sufficient to sustain the verdict on that point.

As heretofore noted, appellant pleaded as an affirmative defense assumption of the risk, and requested the court to give instructions on that question. This, the court, however, refused to do, apparently on the theory that such defense was not open to appellant in a case of this character. For this error, we feel that the judgment must be reversed for the reasons hereinafter set forth.

The Jones Act, by reference, incorporates the Federal Employers' Liability Act (45 USCA §§ 51–59). The Federal Liability Act eliminates the doctrine of assumption of the risk as a defense in cases where the employer has violated a statute enacted for the safety of employees; otherwise it remains. 45 USCA § 54; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1.

The common-law doctrine, however, is limited, and risks of the employment due to the employer's negligence are not assumed unless the employee becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. Seaboard Air Line Ry. v. Horton, supra; Southern Railway Co. v. Hermans (C. C. A.) 44 F.(2d) 366.

[2] The Horton Case, it is true, was a railroad case under the Federal Liability Act, but that act is a part of the Jones Act, as we have already seen. The Hermans Case was, however, a case brought under the Jones Act, and the issue there was whether the employer had provided the employee with a reasonably safe place to work. It may be noted that in construing these statutes, the Federal Liability Act and the Jones Act, the state courts are required to adopt the construction placed on them by the federal courts. Pryor v. Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120.

[3] We are therefore satisfied that the doctrine of assumption of the risk is applicable in a limited manner to cases of injuries to seamen, when the action is brought under the Jones Act in the state courts, and it remains only to be seen if there was any evidence in the case to justify instructing the jury on that issue.

[4] The ship's hold was open, which fact was admittedly known to respondent; the lumber on which he was working was so close to the open hold that if he fell he would almost certainly fall down into it, and he also knew that no safety lines or other safeguards were present to prevent him falling into the hold should he slip from his place of work. There was evidence also that he knew that the lumber he was working on was landed in sling loads and not piled, and was not as secure as piled lumber. There was also some evidence, although contradicted, that respondent disobeyed specific orders in doing his work in the manner he was pursuing at the time of his injury. Respondent was an experienced seaman, who had made other voyages on the Fort Bragg and other lumber vessels. Under such circumstances, appellant was entitled to have the jury instructed on the theory of assumption of the risk, and the court's refusal to do so was reversible error. Pryor v. Williams, supra; Southern Railway Co. v. Hermans, supra; Holy Cross Gold Min. Co. et al. v. O'Sullivan, 27 Colo. 237, 60 P. 570.

Respondent cites the following cases from California, claiming that assumption of the risk does not apply. They are Anderson v. Matson Nav. Co., 125 Cal. App. 447, 13 P.(2d) 1041, Lejeune v. General Petroleum Corp., 128 Cal. App. 404, 18 P.(2d) 429, and McGeorge v. Chas. Nelson Co., 107 Cal. App. 148, 290 P. 75. In the first two cases the injury resulted from the negligence of a fellow servant, which defense is excluded under the Federal Liability Act. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430.

In the McGeorge Case the injured man was an assistant engineer who had been ordered to adjust a bolt, using a cold chisel, while a fellow employee struck the end with a heavy hammer. After several strokes, the hammer missed the bolt and struck the plaintiff in the head and face. Clearly this was negligence of a fellow servant, and also there was the failure of the employer to furnish proper appliances, since there was evidence that there was on the vessel, which was at sea, no wrench of the proper size to turn the bolt. The court recognizes that under proper circumstances the doctrine of assumption of the risk applies to seamen but not under the par-

ticular facts. Furthermore, the instructions given were too broad. We are of the opinion that that case is clearly distinguishable under the facts.

Many other errors are claimed by the appellant, but as they are not apt to occur on another trial, it is not necessary to refer to them. In passing, we may say that instruction No. IX is erroneous in using the words "built up," as one of the issues was whether respondent had slipped on lumber that had not been piled, or lumber that had been piled as respondent claimed it should have been, and the quoted words are general enough to include both types.

For the reasons given, the judgment must be and is reversed.

We concur: TYLER, P. J.; CASHIN, J.



3 Cal.App.2d 574

McKEON v. SANTA BARBARA POLO CLUB.

Civ. 8947.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1935.

Use and occupation ⊂⇒9

In action by assignee of land to recover reasonable value of polo club's use and occupancy of land, evidence *held* to support finding that polo club used land at invitation of assignor without any obligation to pay for such use.

Appeal from Superior Conrt, Santa Barbara County; S. E. Crow, Judge.

Action by Robert S. McKeon against the Santa Barbara Polo Club. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for appellant.

Heaney, Price & Postel and Kenneth W. Watters, Jr., all of Santa Barbara, for respondent.

SCOTT, Justice pro tem.

Plaintiff's assignors, one Boeseke and wife, owned certain real property which was used as a polo field by defendant for five years. This action was brought to recover the reasonable value of the use and occupancy of the property. The trial court found that "the entry upon and the possession of said premises by said defendant * * * was by and under the license of the plaintiff's assignors and by and with their knowledge, consent, acquiescence, permission and invitation without any obligation, agreement, condition or provision for any payment by the defendant to the plaintiff and/or plaintiff's assignors of any sum whatsoever for such entry and/or use and/or occupation." From judgment for defendant this appeal is taken.

There was no evidence of a written lease or other contract for payment of rent, nor is it contended that any representative or agent of defendant orally promised to pay for the use of said land. Appellant contends that an implied agreement to pay arose from the fact of such use by respondent, and that in the absence of affirmative proof of an agreement that the land was to be used without cost to respondent, the latter is liable for its reasonable value.

The circumstances admitted in evidence, however, are such that the lower court could properly make the finding above quoted, and the findings are sufficient to support the judgment. Boeseke was a polo enthusiast and a director of respondent corporation. Costly stables were erected upon his land at respondent's expense for use by local and visiting teams. The conduct of all parties indicated definitely that they understood the land was to be used by respondent without cost, in the interest of good sportsmanship, unless at some time it were to be purchased outright. Boeseke consented to respondent "going into occupation of this property when they first went on it," and said that neither then nor later was there any agreement as to rent. He made no demand for payment of rent during the period of time that the land was so used by respondent, although he supervised the building of the stables and participated actively in the affairs of the club.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

⊂⇒For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3 Cal.App.2d 659

GORDEN et ux. v. GOLDBERG et al.

Civ. 9042.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1935.

1. Negligence ⇐121(2)

Doctrine of res ipsa loquitur applies only in absence of explanation of cause of accident resulting from thing under exclusive control of party charged with negligence.

2. Negligence ⇐121(2)

Explanation of cause of accident so as to render doctrine of res ipsa loquitur inapplicable may be supplied by evidence of either party.

3. Negligence ⇐121(3)

Where parties suing for injury inflicted by falling glass globe or shade in poultry market showed that globe or shade was dislodged by chicken, doctrine of res ipsa loquitur did not apply, and nonsuit was proper where there was no proof of defendants' negligence.

4. Appeal and error ⇐1008(1)

Whether poultry merchants were negligent in respect to the custody, escape, or flight of a chicken, which dislodged glass globe or shade so that it fell on a customer, *held* for trial judge.

Appeal from Superior Court, Los Angeles County; Donald B. Geary, Judge.

Action by Max Gorden and wife against Isaac Goldberg and Bernard Weiss and another. From a judgment of nonsuit as to one cause of action and from a judgment for defendants on second cause of action, plaintiffs appeal.

Affirmed.

Henry Haves, of Los Angeles (Michael M. Moser, of Los Angeles, of counsel), for appellants.

W. I. Gilbert, of Los Angeles, for respondents.

WILLIS, Justice pro tem.

Respondents were merchants conducting a poultry market in Los Angeles. While appellant Frieda Gorden, as a customer, was in respondents' place of business purchasing a chicken, standing near an "egg house" having a roof some 8 by 8 feet in dimension and 8 feet above the floor, and on which a glass light globe or shade was, and for a long time had been placed, a live chicken, escaping from one of the coops in the store, flew upon the roof or top of the egg house, lighting on the globe, dislodging or pushing it from its position and causing it to fall, striking Mrs. Gorden on her nose and causing the injuries complained of. In appellants' first cause of action set forth in their complaint, relief was sought on the basis of allegations of negligence of respondents in placing and leaving situate on the edge of a shelf in the store the light globe so that it would slip or fall, with knowledge of its dangerous position. In the second cause of action the basis of relief was the alleged negligence of respondents in allowing a chicken to remain outside a coop, knowing it was the habit of chickens to fly and jump when alarmed, and that as a result of such negligence the chicken flew against the light globe on the roof or top of the egg house, causing it to fall and injure Mrs. Gorden.

At the close of plaintiffs' case, nonsuit was granted as to the first cause of action and denied as to the second cause. Appeal is taken from the judgment entered on the order granting nonsuit and from the judgment entered on the findings and conclusions as to the second cause after trial thereof on the merits. Appellants make two contentions: (1) That the doctrine of res ipsa loquitur was applicable to the first cause, and made a prima facie case for appellants sufficient to overcome the motion for nonsuit; (2) that the findings as to the second cause are not supported by the evidence, and that the judgment entered thereon is contrary to the evidence.

[1-3] The inference of negligence created by the doctrine of res ipsa loquitur can arise only in the absence of explanation of the cause of the accident, resulting from the thing which is under the exclusive control of the party charged with negligence. This explanation may be supplied by the evidence of either party, and, when the cause is established, the doctrine is not then applicable. Manuel v. Pacific Gas & Elec. Co., 134 Cal. App. 512, 25 P.(2d) 509. Herein appellants' evidence, adduced prior to motion for nonsuit, fully explained the cause of the globe falling, namely, its dislodgement by the flight of the escaped chicken. There was therefore no basis of claiming the aid of the inference created by the doctrine, and the burden of proof of negligence in respect to the placement and maintenance of the globe on the roof or top of the egg house rested upon appellants, and the question whether it had been sustained was to be determined under the ordinary rules.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

So viewed, it clearly appears from the record that appellants produced no evidence of negligence on the part of respondents sufficient to support the charge of negligence set forth in the first cause of action, and the motion for nonsuit was properly granted.

[4] As to the other contention of appellants, we note upon examination of the record a conflict of evidence in respect to the cause or manner of the escape of the chicken which in its flight caused the globe to fall on Mrs. Gorden's nose. Under the established rule, we cannot disturb the trial court's finding that respondents were not negligent in respect to the custody, escape, or flight of the chicken.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



CRAWFORD v. ROSE.

Civ. 9272.

District Court of Appeal, Second District, Division 1, California.

Jan. 9, 1935.

New trial ⇐99

Denial of motion for new trial on ground of newly discovered witnesses *held* not abuse of discretion, where identity of witnesses was known before trial, but witnesses could not be located, no motion for continuance was made, and evidence of such witnesses would be merely cumulative.

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 39 P.(2d) 217.

Harry D. Parker and Horace W. Danforth, both of Los Angeles, for appellant.

Charles W. Gorham, of Wilmington, and Marion P. Betty, of Los Angeles, for respondent.

PER CURIAM.

The petition for rehearing of this appeal is denied. Complaint is made that this court's opinion filed in our decision of the case did not discuss appellant's assignment of error of the trial court in denying the motion for a new trial, with reference to the proposed testimony of newly discovered witnesses. We think that the testimony in question is in substance only cumulative to that of other witnesses who testified at the trial. Appellant at that time knew of the existence and identity of these additional witnesses, but had not been able to locate them. It may well be that a continuance, if a motion therefor had been made, would have been granted. But no such motion was made. We think that the court was not guilty of any abuse of discretion in denying the motion for a new trial.



3 Cal.App.2d 665

STATE COMPENSATION INS. FUND et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 10030.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1935.

Master and servant ⇐364

Injuries to applicant for relief who was given county work order as part of aid, to be paid from funds furnished in part by a federal relief agency, which injuries were sustained while applicant was wrecking a school building as assigned by foreman hired by school district *held* not compensable since applicant was not an "employee" of school district.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Petition by State Compensation Insurance Fund and Huntington Beach Elementary School District to review an award of the Industrial Accident Commission of the state of California, Orange County, in favor of Zinie Phillips opposed by R. C. Branion.

Award annulled.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

SCOTT, Justice pro tem.

Respondent Phillips in May of 1933 applied to respondent county's welfare department for work which was "relief work only and for charitable purposes." After an investigation into his financial status, the county gave Phillips a relief work order and assigned him to work wrecking an elementary school building under a foreman employed by petitioner school district. While so working, he received an injury for which award was made. Payment for such labor was by the county from funds furnished at least in part by a federal agency for relief work projects. Petitioner school district did not select the men, fix their hours or pay or number of days work.

Under the facts, respondent Phillips was not an employee under the Workmen's Compensation Act (St. 1917, p. 831, as amended). McBurney v. Industrial Accident Commission, 220 Cal. 124, 30 P.(2d) 414; County of Los Angeles v. Industrial Accident Commission (Cal. App.) 38 P.(2d) 828. He was not an employee of the school district, and under the cited cases the award is illegal.

Award annulled.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 756

STATE COMPENSATION INSURANCE FUND and Huntington Beach Elementary School District, Petitioners, v. INDUSTRIAL ACCIDENT COMMISSION of the State of California, County of Orange (a political subdivision of the state of California), R. C. Branion, Emergency Relief Administrator of the state of California, and Darrahl Franklin Stock (a minor), by his guardian ad litem Joe Swartz, Respondents.

Civ. 10031.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1935.

F. Britton McConnell, of Los Angeles, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondent commission.

SCOTT, Justice pro tem.

Respondent Stock was given a relief work order by respondent county and, while working thereunder, was injured. The essential facts are the same as in the case of State Compensation Insurance Fund v. Industrial Accident Commission et al. (Cal. App.) 40 P.(2d) 277, this day decided, and the same rule should apply as to the award.

Award annulled.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 568

PEOPLE v. WEST.

Cr. 2630.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1935.

1. Counties ⇐102

Unquestioned facts that deputy county treasurer, taking worthless checks for county funds loaned to maker and keeping them as cash items, was public officer and fraudulently altered, falsified, and concealed account of money in his charge in violation of statute, established corpus delicti in maker's trial for violating such statute (Pen. Code, § 424, subd. 4).

2. Criminal law ⇐59(4)

One knowing that his worthless check to county treasurer for county funds, loaned to him by deputy treasurer, was being held in treasurer's office as cash item and substituting new checks from time to time to enable fraud to continue, *held* principal in violation of statute creating crime of fraudulent alteration, falsification, and concealment of account of money in public officer's charge (Pen. Code, § 424, subd. 4, and §§ 31, 971).

3. Criminal law ⇐406(3)

Defendant's voluntary testimony before grand jury after being advised of his rights *held* admissible at trial to show statements by him concerning case.

4. Criminal law ⇐519(4)

Defendant's voluntary statement concerning case to deputy district attorney *held* admissible at trial after laying sufficient foundation.

Appeal from Superior Court, Los Angeles County; J. Marion Wright, Judge.

L. Monte West was convicted of violating the act providing for the punishment of persons fraudulently altering, falsifying, concealing, destroying, or obliterating accounts of county officers, and he appeals.

Affirmed.

Stanley Visel, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Appellant was convicted of a violation of section 424, subd. 4, of the Penal Code, and was found to have suffered two prior felony convictions. A codefendant, Woodruff, deputy county treasurer, had loaned county funds to West, taking the latter's check therefor. The amount of the loan gradually increased until it totaled $815. For this loan Woodruff held West's check on a bank where the latter had closed his account; a new check being substituted from time to time, being kept in a drawer in the treasurer's office as a cash item. Woodruff disclosed the facts and pleaded guilty. West was tried by the court, and from judgment of conviction and order denying motion for new trial he appeals.

[1] It is urged that the corpus delicti was not established. It was not questioned that Woodruff was a public officer and that he had fraudulently altered, falsified, and concealed the account of money in his charge. This constituted the corpus delicti under the section cited. People v. Bonilla, 124 Cal. App. 212, 12 P.(2d) 64.

[2] It appears, contrary to appellant's second contention, that West was a principal under Penal Code, §§ 31 and 971. He knew his worthless check to the county treasurer was being held as a cash item, and substituted a new check from time to time to enable the fraud to continue. People v. Ah Gee, 37 Cal. App. 1, 174 P. 371.

[3, 4] Appellant testified before the grand jury, and his testimony was read in evidence at the trial. It was voluntarily given after he was advised of his rights by the grand jury, and was properly admitted at the trial to show statements made by him concerning the case. People v. O'Bryan, 165 Cal. 55, 130 P. 1042. A statement by appellant to the deputy district attorney was likewise properly admitted; a sufficient foundation having been laid and there being no suggestion that it was not voluntary.

The final argument, that the evidence is not sufficient to support the judgment of conviction, is without merit. From appellant's own lips fell evidence which removed any question of his guilt, and amply corroborated the testimony of his codefendant.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 666

GARDINER v. BURKET.

Civ. 9088.

District Court of Appeal, Second District, Division 2, California.

Jan. 17, 1935.

1. Contracts ⇐346(10)

In action on oral contract for removal of dwelling, there can be no fatal variance resulting from designation of lot by wrong number, where such designation is unnecessary in statement of claim or cause of action and is therefore mere surplusage.

2. Pleading ⇐398

To be fatal, variance must be as to material statement and must also have misled defendant.

3. Appeal and error ⇐1039(13)

Where, in action against executrix on oral contract for removal of dwelling from lot, finding showed that total recovery was exactly sum found as value of house, any variance between claim filed in probate court for reasonable value of building and complaint seeking larger amount would be immaterial.

4. Evidence ⇐441(1)

Where written contract is made between parties, evidence of contemporaneous oral collateral contract is admissible as long as col-

lateral contract does not conflict with terms of written contract and covers matters distinct from express subject-matter of written instrument, not embodied therein.

5. Evidence ⇐441(7)

In action on oral contract for removal of dwelling from lot, entered into contemporaneously with written lease of lot as part of community lease, which lease was silent as to removal of house, evidence of contemporaneous oral contract was admissible as against contention that written lease superseded all negotiations between parties.

6. Appeal and error ⇐1052(5)

Where recovery in action on oral contract for removal of dwelling from lot was based solely on value of house, evidence as to rental value, though improper, was not prejudicial.

7. Contracts ⇐103

In action on oral contract for removal of dwelling from lot, evidence that plaintiff unlawfully removed the building because permit was not obtained from city *held* properly rejected, where contract could have been performed in legal manner, since failure to procure permit did not render contract void.

8. Contracts ⇐103

Where contract can be performed in legal manner as well as in illegal manner, it will not be declared void because it was in fact performed in illegal manner.

Appeal from Superior Court, Los Angeles County; Joseph L. Call, Judge.

Action by Elizabeth Gardiner against Virginia Burket, executrix of the estate of Flavius Otto Burket, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Kyle Z. Grainger and Harry M. Irwin, both of Los Angeles, for appellant.

Freston & Files, by James A. McLaughlin, all of Los Angeles, for respondent.

CRAIL, Justice.

This is an appeal from a judgment against the defendant (appellant) on an oral contract, under the terms of which the plaintiff was to remove or demolish a dwelling from her lot in the oil field near Venice and by which defendant's decedent was to pay the reasonable value of the house. It is alleged in the complaint that the contract was entered into contemporaneously with a written lease, whereby the plaintiff leased her lot to the said decedent as a part of a community lease.

[1, 2] The first and principle contention of the appellant is that there was a fatal variance between the claim which was filed against the decedent's estate and the complaint, in this respect that the claim which was presented against decedent's estate described the lot upon which the dwelling was located as lot 2, block F, Ocean Strand tract, whereas the complaint described it as lot 1. It seems that the plaintiff owned lot 1, but did not own lot 2, although said neighboring lot was also included in the community oil lease. It also is clear that the dwelling in dispute was removed from lot 1, and that the dwelling on lot 2 was not removed. The facts make it clear that the defendant was not misled by this variance. There can be no fatal variance where the variance results from a designation of a lot by number and where such designation is unnecessary in the statement of the claim or cause of action and is therefore mere surplusage. To be fatal, the variance must be as to a material statement and must also have misled the defendant. This is a good case to keep in mind that technicalities were made to serve justice, not justice to serve technicalities.

[3] Appellant's second contention is that there was a fatal variance because the respondent's claim as filed in the probate court demands payment solely for the reasonable value of the building specified therein, whereas the complaint alleges that deceased promised "that he would reimburse and pay plaintiff all damages, costs and loss caused to plaintiff by the removal of the said residence building thereon and the reasonable value of the said residence building" and seeks judgment thereon. However, the findings of fact show that the total recovery was exactly the sum found as the value of the house. Therefore, if there is a variance, it had no effect upon the sum awarded in the judgment.

[4, 5] Appellant's next contention is that the court erred in admitting evidence of the contemporaneous oral contract for the reason that the written lease superseded all of the negotiations between the parties and that it was error to receive evidence to vary or add to the terms of said written lease. Evidence of a contemporaneous oral collateral contract is admissible as long as the collateral contract does not conflict with the terms of the written contract, and covers a

matter distinct from, even though closely related to, the express subject-matter of the written instrument, and is not embodied therein. 10 Cal. Jur. 927; Greathouse v. Daleno, 57 Cal. App. 187, 206 P. 1019; Buckner v. A. Leon & Co., 204 Cal. 225, 267 P. 693; Linney v. Challacombe, 118 Cal. App. 95, 4 P.(2d) 789. In the instant case, the written lease was absolutely silent as to plaintiff's house, the removal of the same, or the compensation therefor. The adjoining lessors of the community lease who were to receive the same royalties under the written lease did not demolish and remove valuable residences as did the plaintiff, nor were they under any duty to do so under the said lease, and it is obvious from a review of the record that the oral contract was separate and distinct from the written one.

Appellant also contends that there was no evidence that the decedent made the alleged agreement, that the evidence does not warrant or support the findings, and that appellant's motion for a nonsuit for lack of evidence should have been granted. We disagree with the appellant on these contentions.

[6] Appellant contends that the court made erroneous rulings upon objections to testimony relating to value and particularly to the following: "Q. Do you know what the rental value of that property was in September, 1930, with the house situated on it? A. $125 per month, on a year's lease." This question and other questions were not proper on the direct examination, but, as said before, the recovery was based solely on the value of the house, and the defendant was not prejudiced by the questions and answers of which he complains.

[7, 8] Appellant's final contention is that evidence that respondent unlawfully removed said building was improperly rejected, and his contention is based on the theory that the contract was void and illegal for the reason that a permit to remove the house had not been obtained from the city of Los Angeles. The plaintiff made a contract with the Schuck Construction Company as contractors to remove the house. It is not claimed that such a permit could not have been obtained, and it is apparent that the contract could have been performed in a legal manner. Certainly there is no intention disclosed in the terms of the contract itself to perform it without obtaining a permit. "Where a contract can be performed in a legal manner as well as in an illegal manner, it will not be declared void because it was in fact performed in an illegal manner." 6 Cal. Jur. 100.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



3 Cal.App.2d 525

BAILEY v. MARKET ST. RY. CO. (two cases).

Civ. 9175.

District Court of Appeal, First District, Division 2, California.

Jan. 9, 1935.

Hearing Denied by Supreme Court March 7, 1935.

1. Street railroads ⇐117(24)

Whether motorist and wife on street railroad track near park entrance were contributorily negligent in relying upon custom of street cars to slow down to four miles an hour when passing park entrance *held* for jury (St. 1929, pp. 510, 541, §§ 23, 129; St. 1931, p. 2124, § 122).

2. Appeal and error ⇐1050(1)

In action by motorists struck by street car near park entrance, where there was testimony concerning custom of street cars to slow down to about four miles an hour when passing park entrance, any error in admission of street railroad company's rule directing cars to be so slowed down, *held* harmless.

3. Appeal and error ⇐1056(1)

In action by motorists struck by street car near park entrance, where, besides oral testimony concerning custom of street cars to slow down to about four miles an hour when passing park entrance, street railroad company's written rule was also admitted in evidence, rejection of evidence concerning street railroad company's interpretation of rule and of instructions on the subject *held* not error since they concerned collateral matters.

4. Appeal and error ⇐1050(1)

In action by motorists against street railroad company, where several witnesses testified that street car approached at 35 miles per hour, permitting one witness to testify that street car was going exceedingly fast *held* harmless.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Trial ⇐244(1, 2), 260(1)

Where instructions given fully covered every issue made by the pleadings, refusal of further instructions, some of which were covered by instructions given, and some of which singled out certain issues or isolated portions of the evidence, *held* not error.

6. Appeal and error ⇐762

Additional points may not be made in appellant's closing brief.

7. Appeal and error ⇐1050(1)

Erroneous admission of evidence is harmless, where there is an abundance of other evidence on the subject which was properly admitted.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Separate actions by Richard Bailey, administrator of the estate of Minnie Bailey, deceased, and by Richard Bailey against the Market Street Railway Company, which were consolidated. From judgments for plaintiffs, the defendant appeals.

Affirmed.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellant.

George K. Ford and Fletcher A. Cutler, both of San Francisco, for respondents.

STURTEVANT, Justice.

Richard Bailey and Minnie Bailey, his wife, were injured when their automobile in which they were riding was struck by a car operated by the Market Street Railway Company. They commenced appropriate actions to recover damages. The defendant answered in both actions and thereafter for the purposes of the trial the actions were consolidated. A trial was had before the court sitting with a jury. The jury returned a verdict in favor of each plaintiff, and from the judgments entered thereon the defendant has appealed.

Shortly after the actions were commenced the deposition of each plaintiff was taken. Thereafter a trial was had and each plaintiff was called as a witness. A second trial was had. During the second trial Mr. Bailey was called as a witness but Mrs. Bailey was not called. However, the deposition of Mrs. Bailey was read in evidence and parts of the testimony of both Mr. Bailey and Mrs. Bailey given at the former trial were also read in evidence. The record discloses numerous conflicts, and varying statements. We will not attempt to enumerate them but will endeavor to call attention to such passages as seem to be necessary to a consideration of the points presented by the defendant.

The accident happened at the intersection of Third avenue and Lincoln way in San Francisco at about 10 o'clock in the morning of Thanksgiving Day. The day was clear and conditions as to visibility were good. Mr. and Mrs. Bailey resided on Fourth avenue a short distance from Lincoln way. They had resided there for some time and both were familiar with that neighborhood. Both knew that street cars were operated in both directions on Lincoln way. About opposite Third avenue there is a driveway (hereinafter called Park entrance) entering Golden Gate Park, and that entrance is the most accessible way to the children's playground. It was an admitted fact that at the time of the accident and for some time prior thereto it was the practice of the defendant when approaching Park entrance to cause its cars to make a check stop; that is, the car on approaching Park entrance would "slow up to along around four miles an hour." That practice was known to the plaintiffs. A short time before the accident the plaintiffs drove from Fifth avenue into Lincoln way and turned easterly, traveling along the southerly line of Lincoln way approximately midway between the curb and the inbound railway track. They were riding in a Studebaker coupé. Mr. Bailey was driving and Mrs. Bailey was sitting at his right. Shortly after entering Lincoln way Mr. Bailey slowed down from ten miles to five miles per hour. At that speed he continued according to the testimony of himself and of his wife until the time of the accident. As they drove forward a street car traveling east was ahead of them. That car stopped and then advanced, but the plaintiffs did not pass it. It continued on its course ahead of them. When they aproached Third avenue that street car was nearly up to Second avenue. Lincoln way is about 80 feet wide. Third avenue runs into it at right angles from the south. It is 40 feet from curb to curb. A sidewalk extends along the southerly line of Lincoln way. On the northerly line there is no sidewalk, but the street extends up to the line of Golden Gate Park. Nearly opposite Third avenue a passageway, Park entrance, for pedestrians and vehicles leads into Golden Gate Park making an acute angle with Lincoln way. In other words, the union

of Park entrance and Lincoln way resembles the letter "Y." It may readily be seen that the center of the intersection of Third avenue and Lincoln way does not necessarily coincide with the center of the intersection of Park entrance and Lincoln way. As to what may be the variation in that regard counsel have not called to our attention any part of the record that speaks on the subject. Having reached Third avenue, Mr. Bailey drove beyond the westerly curb three or four feet. As he did so he looked to the rear and saw no traffic approaching from the west. He testified that he gave a signal and thereupon commenced to turn to the left to go into Park entrance. Continuing to advance, according to his testimony, he drove with his left wheel "over," "in," or "on" the center and the rest of his car was to the east. According to the testimony of Mrs. Bailey, he passed beyond the center, and then turned. We do not find that either witness was asked what center. Before making the turn both Mr. Bailey and Mrs. Bailey looked to the east and at that time the inbound car was near Second avenue. They saw no other car. However, slightly beyond Second avenue there is a turn in Lincoln way and from a point on the southern line of Lincoln way near the corner of Third avenue one cannot see but a short distance beyond Second avenue. The record discloses that no other object or vehicle in any way interfered with visibility in Lincoln way. Having started to make the turn both Mr. Bailey and Mrs. Bailey again looked to the east and at that time they saw a car approaching from the east which for a time had been blanketed by the inbound car. Mr. Bailey testified that when he first saw the car coming toward them his automobile was between the rails of the eastbound car and the rails of the westbound car. At that time the westbound car was about at Second avenue, a block away. That is the front of the car. At that time he was already upon the rails of its track. When he saw it he did not speed up. He continued the same speed down to the time of the collision. He did not put on his brakes, try to stop, nor try to back up. From the point where he made his observation he did not know whether the car was coming fast or slow. The only evidence he had of the speed of the on-coming car was the force with which it struck his automobile. After he first saw it he looked ahead at the traffic in Park entrance. He then turned his head to the street car and at that time it was 50 feet away from him. He stepped on the gas but it was too late and the collision occurred. That happened when, according to the testimony of Mr. Bailey, the left-hand side of his automobile was in the center of Third avenue if the lines thereof be extended. The rest of his automobile was to the east. At that particular time there was nothing on the surface of the street to indicate where the center was. It was his contention that between the time his automobile was over one rail of the outbound track the westbound street car traveled a block and collided with the rear wheel of his automobile. He did not sound his horn to the street car, but he did sound it to some pedestrians that were crossing to the park. At the time he sounded it he did not know that the street car was approaching. When he first saw the outbound car his automobile had advanced to a point where, if he had stopped, the on-coming car would have hit the front part of his car. He relied upon the fact the westbound car would slow up and therefore did not step on the gas. Mrs. Bailey testified that she first saw the westbound car when it appeared from behind the car that was going east. At that time the latter car was about at Second avenue. She noticed that the motorman had his head turned and was not looking to the front. She kept looking at him and he did not turn his head. His face was turned to his left. She kept looking at him but was not a bit scared because she thought he would stop, slow up. She did not know the speed he was traveling otherwise she stated she would have shouted. She stated that when she first saw the westbound car the plaintiffs were then on the tracks of the eastbound car; that the front wheels of their automobile were just about on the first rail of the outbound track. She was very positive in asserting that when she saw the westerly bound car emerge from behind the inbound car it was a block away—more than 240 feet. Mrs. Bailey and some other witnesses testified that the outbound car approached at a speed of from thirty to thirty-five miles per hour and did not slow down.

[1] The defendant contends that Mr. Bailey was guilty of contributory negligence because he violated three different sections of the statute. Sections 23, 122, and 129, chap. 266, p. 517, Stats. 1923 (section 23, as amended by St. 1929, p. 510; section 122, as amended by St. 1931, p. 2124; section 129, as amended by St. 1929, p. 541). It is sufficient to state that the record does not disclose that he violated any one of them. Pointing to the testimony given by Mrs. Bailey to the effect that when she first saw the westbound car, 240 feet away, the motorman was looking to his left and paying no attention to what was

ahead of him, it is again asserted that the plaintiffs were guilty of contributory negligence. However, we think it is perfectly clear the plaintiffs were not bound to presume the motorman would continue his inattention to duty, or that he would not come to a check stop. Again, the defendant cites the evidence and contends that under the story as stated above the plaintiffs were guilty of contributory negligence as a matter of law. In this connection the defendant asserts that the plaintiffs exercised no care whatever. The statement is too broad. Bearing in mind the admitted fact that it had theretofore been the practice for the defendant to make check stops at Third avenue, that both plaintiffs were familiar with the practice, and bearing in mind their numerous statements regarding the speed of their own car, the condition of the day, and the numerous times they looked in all directions, we think it is clear that reasonable minds might draw different conclusions upon the question of their negligence, if any, and that the question presented was one of fact for the jury.

[2, 3] Over the objection and exception of the defendant, the plaintiffs introduced in evidence the defendant's written rule or bulletin directing that the cars be slowed down to four miles per hour when passing the Park entrance at Third avenue. The defendant cites and relies on Smellie v. Southern Pacific Co., 128 Cal. App. 567, 578–783, 18 P.(2d) 97, 19 P.(2d) 982. Conceding, solely for the purposes of this opinion, that the trial court erred, we think it is entirely clear that the error was not prejudicial. That written rule proclaimed nothing whatever except to state in writing the practice of slowing down at the Park entrance. As stated above, that practice was an admitted fact. Moreover, it was testified to by the witnesses and both Mr. and Mrs. Bailey testified to their knowledge of the practice. In this condition of the record it is impossible to see how a writing of the fact could constitute prejudicial error when there was much oral testimony on the same subject. Regarding the defendant's interpretation of the bulletin, the latter attempted to introduce evidence but the trial court ruled it out. Thereafter the defendant requested instructions on the subject be given to the jury, but those instructions were refused. We see no error in these rulings. The matters were entirely collateral to the issue on trial.

[4] As stated above, several witnesses testified that the westbound car approached at thirty-five miles per hour. Over the objection and exception of the defendant one witness testified that the car was going "exceedingly fast." In view of the other testimony that was admitted, the testimony objected to was harmless. Bennett v. Central California Traction Co., 115 Cal. App. 1, 8, 1 P.(2d) 47.

[5] Both parties tendered many requests for instructions. The trial court gave a large number and in doing so covered fully and completely every issue made by the pleadings. At this time the defendant complains because the trial court refused seven of its requests. Many of those requests were on subjects that were covered by the instructions given. Some of the requests singled out certain issues or isolated portions of the evidence thereby intimating that special consideration should be given thereto. We have carefully examined each refusal and find no error.

[6-7] In its closing brief the defendant added additional points. That practice is contrary to the statutes and the rules. 2 Cal. Jur. 726 et seq. However, in view of the importance of the litigation we have examined each additional point. Several of them are addressed to rulings on evidence. In some of those rulings it may be conceded that there was technical error; but as to each fact erroneously admitted there was an abundance of other evidence on the same subject which was properly admitted and therefore the defendant suffered no prejudice.

Other errors are assigned. All are different methods of presenting the alleged errors which we have discussed. Further discussion is not necessary.

The judgments appealed from are affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

3 Cal.App.2d 550

MINEHAN et al. v. SILVERIA et al.

Civ. 9637.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1935.

Appeal and error ⇐660(2)

Motion to correct record on suggestion of diminution would be denied where claim that transcription of testimony in prior trial was improperly included in transcript on appeal was in conflict with record and judge's certificate to transcript.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by T. P. Minehan and others, copartners doing business under the firm name and style of T. P. Minehan & Sons, against I. V. Silveria and others. On suggestion of diminution and notice to correct record.

Motion denied.

See, also, 131 Cal. App. 317, 21 P.(2d) 617.

Carl R. Schulz, of San Francisco, for plaintiffs.

John J. Jones, of San Jose, for defendants.

TYLER, Presiding Justice.

Suggestion of diminution and notice to correct record. Appellant in support of his application claims that the transcription of testimony in a prior trial is improperly contained in the transcript on appeal herein. The record and the certificate of the judge to the transcript show otherwise.

The motion is denied.

We concur: KNIGHT, J.; CASHIN, J.



3 Cal.App.2d 546

MILLS v. LOS ANGELES JUNK CO.

Civ. 8598.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1935.

1. Appeal and error ⇐110

Order denying motion for new trial is not appealable (Code Civ. Proc. § 963, subd. 2).

2. Appeal and error ⇐699(4)

Alleged error in failing to give requested instruction on subject of res ipsa loquitur in personal injury action would not be considered where record failed to disclose that such instruction was requested.

3. Appeal and error ⇐82(1)

Order striking from files jurors' affidavits with respect to request for instruction is special order made after final judgment, and is appealable (Code Civ. Proc. § 963, subd. 2).

4. Trial ⇐255(11)

Trial court of its own motion *held* not required to instruct on doctrine of res ipsa loquitur, even if doctrine was applicable.

5. Appeal and error ⇐758(3), 761

Alleged error in giving instruction would not be considered where appellant in brief printed none of other instructions given on same subject and printed none of evidence pertinent to criticisms, and cited no authorities to sustain general assertions, except as to two of seven instructions (Rules of Courts of Appeal, rule 8, § 3).

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Jack Mills against the Los Angeles Junk Company, a corporation. From a judgment for defendant, and from an order denying his motion for a new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

J. J. Hughes and S. S. Tipton, both of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondent.

ROTH, Justice pro tem.

Appellant alleged that he was injured in respondent's place of business by reason of the negligence of respondent in so operating one of its presses that a bale of paper was blown therefrom, violently striking appellant, and throwing him to the ground. The case was tried before a jury. The jury found for defendant. From the judgment entered on the verdict of the jury and from an order denying a motion for a new trial, plaintiff prosecutes this appeal.

[1] An appeal, of course, will not lie from an order denying a motion for a new trial. Code Civ. Proc. § 963, subd. 2. We will, therefore, consider only the appeal from the judgment.

It is unnecessary to detail the facts which gave rise to the accident, as the pivotal question upon which this appeal turns is not dependent upon or related to a recitation of these facts.

[2] The primary question raised by appellant is that the court should have given an instruction which he claims he requested on the subject of res ipsa loquitur. Respondent's answer to this contention is twofold: First, that it was not requested; and, second, that it would have been error for the trial court to give such an instruction if it had been requested. Respondent's first answer is conclusive.

The record on appeal nowhere indicates a request for the proposed instruction. Indeed, the only place in the record on appeal in which the asserted context of the proposed instruction appears is in an affidavit of one of the trial jurors, which, on motion of respondent, was stricken from the files, together with the affidavits made by some of the other trial jurors.

[3] The order striking these affidavits from the files is a "special order made after final judgment" (Code Civ. Proc. § 963, subd. 2), and is an appealable order (Gay v. Torrance, 145 Cal. 144, 78 P. 540).

There is no appeal or purported appeal from the order striking the affidavits. There is nothing else in the record which even suggests that the proposed instruction was requested, and, as has already been pointed out, the affidavit of the trial juror which has been referred to, conceding for the purpose of this appeal that it suggests anything of importance, is not in the record which we can consider.

Since the record on appeal shows no request for an instruction on the subject of res ipsa loquitur, the only remaining question is whether or not the court of its own motion should have given an instruction on the subject of res ipsa loquitur, conceding for the purposes of this appeal that the facts would warrant the giving of such an instruction.

[4] There is no ambiguity in the law on this subject, it being thoroughly settled that the court, under such circumstances, is not bound to give one.

"The rule is well established that the failure of a trial court to give an instruction may not be reviewed on appeal, unless the record specifies the instruction and shows that it was requested and refused. * * *" McFate v. Zuckerman, 130 Cal. App. 172, 19 P.(2d) 532, 534.

[5] Appellant claims further that the trial court erred in giving certain instructions numbered 1, 11, 12, 18, 19, 20, and 24. Appellant in his brief prints none of the other instructions given on the same subject and prints none of the evidence pertinent to such criticisms. Further, with reference to the instructions so criticized, appellant cites no authorities to sustain his general assertions, except as to two of these instructions. Such a presentation does not comply with section 3 of rule VIII of the rules adopted by the judicial council of this state for this court, and it has been repeatedly held that appellate courts will decline to give consideration to instructions thus generally criticized. Swartz v. Feddershon, 92 Cal. App. 285, 291, 268 P. 430; Scott v. Times-Mirror Co., 181 Cal. 345, 371, 184 P. 672, 12 A. L. R. 1007; Born v. Castle, 175 Cal. 680, 685, 167 P. 138; Vance v. Gilbert, 178 Cal. 574, 580, 174 P. 42; Gavin v. Gavin, 92 Cal. 292, 28 P. 567; Phoenix, etc., Co. v. Texas Holding Co., 81 Cal. App. 61, 76, 252 P. 1082.

Failure of appellant to print or even by reference to the transcript to designate any of the evidence is of more than formal importance, in view of the fact that instructions Nos. 1, 11, 12, and 19 are severally criticized in general language as follows: "No evidence was offered thereon"; "is not supported by the testimony"; "is not supported by the pleadings or evidence"; "there is not evidence in the record tending to prove that reasonable care. * * *" With reference to instruction No. 18, appellant says: "We do not think this instruction states the law," which is substantially all that appellant says with reference to said instruction. Some authority is cited in substantiation of the criticism directed to instructions Nos. 20 and 24, but we are satisfied that there is not in these two instructions, nor in any of the others criticized, any error of a prejudicial nature.

Judgment is affirmed. The appeal from the order is dismissed.

We concur: CONREY, P. J.; YORK, J.

MARTIN v. ANGEL CITY BASEBALL ASS'N et al.

Civ. 9066.

District Court of Appeal, Second District, Division 2, California.
Jan. 15, 1935.

Hearing Denied by Supreme Court March 14, 1935.

1. **Appeal and error** ⇐1002
Appellate court is bound by jury's findings on conflicting evidence, and only questions of law are within its jurisdiction.

2. **Theaters and shows** ⇐6
Negligence of baseball association for failure to exercise ordinary care in keeping stairway in reasonably safe condition, and contributory negligence of woman who tripped her foot on beam end at top of stairway and fell down stairway when departing from grandstand at end of baseball game, *held* for jury on conflicting evidence.

3. **Theaters and shows** ⇐6
On issue whether negligence of baseball association in maintenance of stairway was proximate cause of injuries to woman who tripped her foot on beam end at top of stairway and fell down stairway when departing from grandstand at end of baseball game, evidence that stairway with its projecting beam ends was not built according to good practice *held* relevant.

4. **Evidence** ⇐150
Experimental evidence is admissible if it substantially tends to establish fact it is offered to prove.

5. **Trial** ⇐55
Trial court has discretion to limit extent to which experimental evidence may be received, and court must refuse its admission when it is doubtful whether evidence is likely to tend more to confusion than to certainty.

6. **Evidence** ⇐150
In action against baseball association by woman who tripped her foot on beam end at top of stairway and fell down stairway when departing from grandstand at end of baseball game, excluding evidence of results of experiments made by an individual in approaching and descending stairway in manner described by woman *held* not error.

7. **Damages** ⇐177
On issue of special damage comprising expenses and loss of earnings of wife injured by negligence of third party, testimony of husband as to expenses paid for wife's care and treatment *held* relevant.

8. **Damages** ⇐38
Loss of earning capacity is an element of general damage recoverable by one injured by negligence of another.

9. **Appeal and error** ⇐1005(1)
Decision of trial court on question of weight and sufficiency of evidence on consideration of motion for new trial is of much weight when sufficiency of evidence is a point raised in appellate court.

Appeal from Superior Court, Los Angeles County; Joseph F. Chambers, Judge.

Action by Carrie Martin against the Angel City Baseball Association and others. From a judgment in favor of plaintiff and from an order denying its motion for judgment notwithstanding the verdict, named defendant appeals.

Affirmed.

George H. Moore, of Los Angeles, for appellant.

Kenneth K. Scott, of Los Angeles, and Samuel L. Rummel, of Hollywood, for respondent.

WILLIS, Justice pro tem.

Appellant brings this appeal from a judgment for damages for injuries to respondent resulting from alleged negligence of appellant and from an order denying a judgment in favor of appellant notwithstanding the verdict of the jury.

As an invitee, respondent attended a baseball game at Wrigley Field, maintained and operated by appellant as a place of public entertainment, and in departing from the grandstand erected and maintained thereon by appellant she fell down a stairway, suffering serious injuries. From photographs and testimony, it appears that the stairway, when the accident happened, was one of eleven, each about eight feet wide and containing about fifteen steps. At the top of their stairway, on each side on the aisle level, there was the top or end of a supporting beam, two and one-half inches wide, rising three and a quarter inches above the floor of the aisle, set back one-half inch from the line of the aisle wall into the stairway head, and located two and seven-eighths inches from the stair wall. Respondent alleged that such construction constituted an unsafe condition, and that, while she was in the act of turning to the left from the aisle to descend the stairway, she caught or tripped her foot against this projecting beam end, causing her to fall down the length of the stairway.

The case was tried before a jury, and at the close of plaintiff's evidence motion for nonsuit was made, but ruling thereon re-

served, and the record fails to disclose any subsequent order thereon. At the close of trial defendant moved for a directed verdict in its favor. This was denied; and, after verdict was entered in plaintiff's favor, defendant moved for entry of judgment in its favor notwithstanding the verdict. This motion was also denied.

[1, 2] These rulings are assigned as error on the ground that no negligence of defendant was shown and that contributory negligence of plaintiff was established by the evidence. We have examined the record in the light of the briefs, and find therein presented a real and substantial conflict on the question of negligence of defendant in respect to the maintenance of the stairhead with the above described projecting beam ends, and on the question in respect to the manner in which the accident happened, and to respondent's conduct at the time of the accident. These conflicts were resolved by the jury in respondent's favor, and, under the familiar rule, this court is bound thereby; questions of law only being within the jurisdiction of our appellate courts. Nor may this rule be avoided herein on appellant's claim that respondent's version of the accident was so inherently improbable as to be unworthy of belief. Her testimony as to how the accident happened is quite reasonable, and, if true and accepted, clearly established the fact that she caught or tripped her foot on the beam end as she turned to descend the stairway, causing her to fall, without fault on her part; there being no evidence that she knew the projection was where it was or that she acted otherwise than as a person of ordinary care and prudence would act under similar circumstances. The evidence affecting appellant's duty to exercise ordinary care in keeping its stairways and aisles in a reasonably safe condition was such that neither the trial court nor this court on appeal could say as a matter of law that appellant had performed its duty in that respect. It is clear to us that the case was such that the trial court was required to submit the same to the jury.

[3] Over appellant's objection the court admitted the testimony of two witnesses to the effect that the construction of the stairway with the projecting beam ends at the head of the stairs was wrong, of poor design, and not built according to good practice. This is assigned as error. Those witnesses were not asked, nor did they express, their opinions as to the character or condition of the structure as it might affect the safety of those using it, but only what in their knowledge was its condition in relation to the standard or approved practice of such stairhead structures. Such evidence was proper and relevant to an enlightened consideration of the question whether appellant was negligent in the maintenance of such stairhead, and, if so, whether such negligence was the proximate cause of respondent's injuries. Long v. John Breuner Co., 36 Cal. App. 630, 172 P. 1132.

[4-6] During the trial, appellant's offer of evidence of experiments made by a witness in approaching and descending the stairway in the manner described by respondent was refused by the court, and of this appellant complains. While it is the general rule that experimental evidence is admissible if it substantially tends to establish the fact it is offered to prove, it is nevertheless discretionary with the trial court to limit the extent to which such evidence may be received; and it is the duty of the court to refuse its admission when it is doubtful whether it is likely to tend more to confusion than to justice or certainty. People v. Woon Tuck Wo, 120 Cal. 294, 52 P. 833; People v. Ely, 203 Cal. 628, 265 P. 818. The results of experiments made by an individual chosen for the purpose to demonstrate bodily movements in walking or in approaching and descending a stairway are so likely in the nature of things to be what the mind of the individual suggests that it is extremely doubtful whether such personal experiments are safe as proof. Clearly there was no abuse of discretion in denying admission of such proof under the circumstances of this case.

[7] Appellant contends that the court erroneously permitted respondent's husband to give testimony as to expenses paid for his wife's care and treatment. There was no error in the court's rulings, as the evidence admitted was relevant upon the issue of special damage, comprising expenses and loss of earnings of respondent, as alleged in the complaint. It was for the jury to decide that issue upon the evidence and under the instructions of the court respecting special damages.

[8] Of these instructions appellant complains of three given at plaintiff's request, relating to the measure of damage, being numbered 11, 12, and 13. The contention is that the effect of these instructions, in view of the husband's testimony, was to allow the jury to award double or excessive damages. Instruction No. 11 is a correct and proper expression in amplified form of the element of mental suffering which is recognized as part of the basis of general damages. Instruction No. 12 correctly states that loss of earning ca-

pacity is an element of general damage. Instruction No. 13 clearly is not objectionable on the ground stated by appellant, namely, that it permits double damages. It distinctly segregates the elements of general and special damages, and is predicated on issues joined by the pleadings and evidence presented in support thereof.

[9] A motion for new trial was made in the court below and denied. We find no error therein. The trial court heard the testimony, saw the witnesses on the stand, and is presumed to have weighed the evidence on the consideration of the motion for new trial. The decision of that court on the question of weight and sufficiency of the evidence is the second decision thereon, and is of much weight when sufficiency of evidence is a point raised in the appellate court. We think the case was fairly tried without error in admission of proof or instruction to the jury, and that the verdict and judgment are supported by the evidence.

The order denying the motion for a judgment notwithstanding the verdict and the judgment are and each of them is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 635

STRANGE v. CORYELL.

Civ. 9620.

District Court of Appeal, First District, Division 2, California.

Jan. 16, 1935.

1. Holidays ⇐5

Service of legal process may generally be made on legal holiday, in absence of express statute declaring it a dies non for purpose of serving process.

2. Sunday ⇐30(3)

Service of summons and complaint on Sunday *held* valid.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Ralph R. Strange against Mabel L. Coryell. From an adverse judgment, defendant appeals.

Affirmed.

Robert R. Moody, of San Francisco, for appellant.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover a judgment proving a written instrument the trial court entered a default judgment against the defendant from which she has appealed under the alternative method.

[1, 2] The action was commenced in the superior court of the city and county of San Francisco on January 25, 1933. On the same day a summons was issued and it was served on the defendant's husband, Joseph B. Coryell, at Atherton in the county of San Mateo on February 5, 1933. Thereafter on Sunday, the 19th day of March, 1933, the summons was served on Mabel L. Coryell, the defendant, in the county of San Mateo. On April 19, 1933, the trial court made an order that the default of the defendant be entered and it was entered on that day by the clerk. On the 11th day of May, 1933, the trial court entered the judgment appealed from. It recites that the action had been dismissed as to the defendant's husband. It also recites that the default of the defendant had been duly entered. No motion to vacate the default and allow the defendant to answer was ever made. However, on April 17, 1933, the defendant served and filed a written notice that, appearing specially for that purpose, she would, on April 24, 1933, move the court for an order quashing the purported service of summons and for an order that the court had no jurisdiction over her person. She stated that her motion would be made on the ground that the copy of summons and complaint were handed to her on Sunday, the 19th day of March, 1933, and that no other service had ever been made. Together with said notice the defendant served a copy of her affidavit supporting said notice and motion. The motion came on for hearing and on May 6, 1933, it was denied. Reciting the foregoing facts the defendant claims the trial court erred in denying her motion and that the service of said summons and complaint was a void act and did not confer jurisdiction of her person. She cites and relies on Whit-

ney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 584. It is not in point. It was an action brought to recover damages for *not serving a writ of attachment*. All that is said about service on a holiday is dictum. In 29 C. J., at page 765, the author states: "As a general rule the service of legal process may be made on a legal holiday in the absence of express statute making the day in question a dies non for the purpose of serving process." That same rule was declared in Reclamation District v. Hamilton, 112 Cal. 603, 610-612, 44 P. 1074. That case was cited and followed in Heisen v. Smith, 138 Cal. 216, 71 P. 180, 94 Am. St. Rep. 39; Young v. Patterson, 9 Cal. App. 469, 472, 99 P. 552; People v. Heacock, 10 Cal. App. 450, 102 P. 543. We find nothing in Vidal v. Backs, 218 Cal. 99, 21 P.(2d) 952, 86 A. L. R. 1134, at variance with Reclamation District v. Hamilton, supra. On the other hand, there are other authorities that, in effect, declare the same rule. People v. Town of Loyalton, 147 Cal. 774, 82 P. 620, and People v. Helm, 152 Cal. 532, 93 P. 99. As we have no statute prohibiting the service of process on dies non juridicus, the trial court did not err in denying the motion made by the defendant.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



3 Cal.App.2d 670

SLYE v. BROCK et al.

Civ. 5134.

District Court of Appeal, Third District, California.

Jan. 17, 1935.

1. Mines and minerals ⇐54(2)

Under contract providing that mining properties and stocks should be sold upon demand and payment of specified sum, that if such sum should be made from such sale, certain persons should receive one-fifth of payments made, and that one-half of principal sum should be paid within one year from date and balance within two years, payment to be made forthwith if earlier sale should be made, demand for sale could be made at any time within four years from date, in absence of proof that such period was unreasonable, and where no demand had been made, nothing was due persons who were to receive part of payments made (Civ. Code § 1657; Code Civ. Proc. § 337).

2. Sales ⇐81(2), 82(2)

Where contract for sale of property fails to limit time within which it may be performed, a reasonable time is allowed therefor (Civ. Code, § 1657).

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

Action by Joseph Slye against M. J. Brock and others for declaratory relief under Code Civ. Proc. § 1060. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. E. Wright and Robert W. Tharp, both of Nevada City, for appellants.

Vernon Stoll, of Grass Valley, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment which was rendered against them in a suit for declaratory relief under the provisions of section 1060 of the Code of Civil Procedure.

This proceeding determines the rights of the respective parties to this suit respecting the property which is involved in a written agreement for the sale thereof. The property consists of shares in the Grass Valley Boundary Mines Company, a corporation, and claims against that company, together with specified mining claims and other real property. Some of the shares of the mining corporation were deposited in escrow. The real property includes lot 5, block 21, of the city of Grass Valley, according to the official plat thereof, and two other mining claims known as "Gamblers" and "Church Hill" quartz claims in that vicinity. The written agreement for the sale of this property was executed by the respective parties on July 30, 1932. The only portion of that agreement which is involved in this proceeding reads as follows: "Now, upon demand of Joseph Slye, Trustee, or his nominee conveyance of said real property and all of the certificates representing shares of stock above enumerated and including any other shares now owned and held by said parties, or in anywise or at all the property of said persons or in which they now have any interest whatsoever, together with all of the properties hereinabove mentioned as being

the property of said persons, shall be sold and delivered to said Slye, Trustee, upon the payment therefor of the sum of forty-five thousand dollars; it is understood that if said sum shall be made from a sale of the Grass Valley Boundary Mines Company property that said parties shall receive one-fifth of each and every payment made upon account of said purchase of said Grass Valley Boundary Mines Company property, and that at least one-half of said principal sum shall be paid within one year from the date hereof and the remaining one-half within two years, upon the delivery of good and merchantable titles,—it being understood that transfer of claims may be made upon filings already had, save and except surveying and platting hereinabove provided to be immediately done by M. J. Brock. If, however, said property shall be disposed of and paid for at any earlier date then the balance of moneys then due and payable to said parties shall be forthwith paid."

A controversy arose between the parties to the agreement respecting the construction of the preceding paragraph thereof. The defendants claim that the purchase of the property is to be completed within two years from the date of the contract and that one-half of the purchase price of the property, which is fixed at $45,000, is to be paid within one year of the date of the agreement, or the contract becomes void. On the contrary, the plaintiff claims there is no specific limitation of time within which the property may be purchased, except that it must be conveyed "upon demand of Joseph Slye," with the proviso that if the Grass Valley Boundary Mines property is sold for $45,000, one-half of that sum must be paid within one year and the balance within two years of the date of the contract.

The trial court adopted findings to the effect that the Grass Valley Boundary Mines had not been sold; that no demand for the conveyance of the property or any portion thereof was made; that this demand may be made at any time within four years from the date of the agreement; and that no money is due upon the purchase price of the property. Judgment was rendered accordingly. From that judgment the defendants have appealed.

[1] We are of the opinion the trial court correctly construed the paragraph above quoted. The contract fails to limit the time within which the property shall be sold and conveyed. It specifically provides that the property shall be sold and conveyed "upon demand." It reads in that regard, "Upon demand of Joseph Slye, * * * said real property and all of the certificates representing shares of stock * * * shall be sold and delivered * * * upon the payment therefor of the sum of forty-five thousand dollars;" following the semicolon which appears after the statement of the sum for which the property is to be sold, there is a proviso or condition which is limited solely to the sale of the Grass Valley Boundary Mines property and does not affect the other property mentioned in the contract. This proviso reads in part, "If said sum shall be made from the sale of the Grass Valley Boundary Mines Company property * * * said parties shall receive one-fifth of each and every payment made" upon that particular specified property. It is further provided that in the event of the sale of that Grass Valley Boundary Mines property, "at least one-half of said principal sum shall be paid within one year from the date hereof and the remaining one-half within two years." And finally it is specifically covenanted that "If * * * said property shall be disposed of and paid for at any earlier date then the balance of moneys then due and payable to said parties shall be forthwith paid."

The language with relation to the limitation of time may be reasonably construed to mean that if the Grass Valley Boundary Mines property is sold for $45,000 within one year of the date of the instrument, which is July 30, 1932, then one-half of the purchase price of that particular property must be paid to the owners thereof within one year, and the balance shall be paid within two years therefrom. This is an acceleration clause requiring payment of the purchase money only in the event of a sale of that particular property. It follows that in the event that property is not sold within two years from the date of the contract, then it must be sold and conveyed upon demand within a reasonable time thereafter. Apparently the proviso which follows the semicolon referred to relates only to the limitation of time within which such money as may be collected on the sale of the Grass Valley Boundary Mines property shall be paid to the owners thereof.

It seems apparent from the language of the written agreement for sale of the property that the parties contemplated that Slye might be able to sell the Grass Valley Boundary Mines property to some purchaser thereof for the sum of $45,000, which was the full stipulated purchase price of all of the properties involved in the contract. In that event Slye would be entitled to a conveyance of all the other properties involved without further con-

sideration. If that was the intention of the parties, it would account for the conditional clause in dispute to the effect that if Slye found a purchaser of the Grass Valley Boundary Mines property for the full sum of $45,000, he was required to pay to the vendors one-half of that sum within one year of the date of the instrument, and the balance within two years therefrom. But he did not sell that property, and he received no money on account of sales of any of the property. It follows that since no absolute limitation of time within which the option to purchase the property is fixed by the contract, Slye was entitled to a reasonable time within which to demand a conveyance thereof upon tendering to the owners the entire purchase price.

[2] The authorities are in accord to the effect that when a contract for the sale of property fails to limit the time within which it may be performed, a reasonable time is allowed therefor. Section 1657, Civ. Code; Williams v. Bergin, 116 Cal. 56, 47 P. 877; 6 Cal. Jur., p. 218, § 143; 6 R. C. L., p. 646, § 60. Section 1657 of the Civil Code provides in that regard: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." The question as to what constitutes a reasonable time for the performance of acts depends on the circumstances of each particular case.

Since the time within which the property in question was authorized by the contract to be sold is not limited, and the written instrument specifically provides that it must be "sold and delivered" upon demand, in the absence of a showing of an abandonment or inability to fulfill the agreement, it may be terminated only upon demand.

It has been held that in the absence of a stipulated time within which a contract must be fulfilled, where a demand therefor is necessary, that such demand may be made within the time limited by statute for the maintenance of an action for breach of the contract or for the termination thereof. Meherin v. San Francisco Produce Exchange, 117 Cal. 215, 48 P. 1074, 1075; Caner v. Owners Realty Co., 33 Cal. App. 479, 165 P. 727; Tisdale v. Bryant, 38 Cal. App. 750, 177 P. 510. In the Meherin Case, supra, it is said in that regard: "What is to be considered a reasonable time for this purpose [of demand] does not appear to be settled by a precise rule. It must depend on circumstances. If no cause for delay be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action."

The statutory limitation for commencing an action "founded upon an instrument in writing" is four years from the date thereof. Section 337, Code Civ. Proc. In the present proceeding the court found that the demand for conveyance of the property could be made within four years of the date of the contract. Owing to the nature of the mining property which is involved in this suit, that might be deemed to be an unreasonable length of time for the exercise of the option to purchase the property. But the record contains no evidence to support the appellants' contention that four years is an unreasonable time within which to make a demand for conveyance. In the absence of evidence to the contrary, we are of the opinion that the court properly found that the demand could be lawfully made within four years of the date of the instrument.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 595

LENNON et ux. v. WOODBURY et al.

Civ. 1505.

District Court of Appeal, Fourth District, California.

Jan. 15, 1935.

Hearing Denied by Supreme Court March 14, 1935.

1. Negligence ⇐1, 11

"Negligence" is carelessness and tends to be negative in character, whereas "willful misconduct" is something of more positive nature involving intentional doing of wrongful act with intent to harm another with utter disregard of consequences.

[Ed. Note.—For other definitions of "Negligence" and "Willful Misconduct," see Words & Phrases.]

2. Automobiles ⇐181(1)

"Willful misconduct," within automobile guest statute, is intentionally doing something in operation of automobile which should not be done, or intentionally failing to do something which should be done under circumstances disclosing knowledge express or implied that injury to guest will be probable result (St. 1931, p. 1693, § 141¾).

3. Automobiles ⇐244(20)

In action by guest for injury sustained when automobile skidded into ditch, evidence *held* insufficient to sustain finding that driver was guilty of willful misconduct based upon driving at excessive speed upon wet pavement in disregard of request by guest to slow down and fact that tires were smooth (St. 1931, p. 693, § 141¾).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by William L. Lennon and Carol Lennon, husband and wife, against C. F. Woodbury and another. Judgment for plaintiffs, and defendants appeal.

Reversed.

See, also, (Cal. App.) 36 P.(2d) 415.

West & West, of Santa Ana, for appellants.

Euler & Subith, of Los Angeles, and Charles D. Swanner, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

Mrs. Lennon, one of the plaintiffs, was injured on January 29, 1933, while riding as a guest in an automobile owned by the defendant Woodbury and driven by the defendant Beck. On that day the four parties hereto, with three other persons, had gone on a pleasure excursion from their home in Anaheim to a place known as Big Pines Playground, in the San Bernardino mountains. The party had gone in two cars and on the return trip Beck drove Woodbury's car in which were also Mrs. Lennon, a Mrs. Bamford, and Beck's small son, who sat in Mrs. Bamford's lap. They started for home about 3 o'clock in the afternoon and a snow which was then falling changed to rain about the time they reached the Cajon Pass highway and from that time until the accident happened it was either raining or drizzling. As they passed through San Bernardino, Beck, by mistake, took a road leading to Redlands. He discovered his mistake after going about half a mile and turned around and started back toward San Bernardino. Very shortly after he turned around the car suddenly skidded without warning and went off the road into a ditch, causing the injuries complained of. This action followed, and the defendants have appealed from a judgment in favor of the plaintiffs, after the verdict of a jury.

The main question presented is whether the evidence is sufficient to sustain an implied finding of wilful misconduct on the part of the driver of the car within the meaning of section 141¾ of the California Vehicle Act, as added by St. 1929, p. 1580, as amended in 1931 (page 1693). The meaning of the term "willful misconduct" as used in that section has been well settled. Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279, 282; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.(2d) 988, 989; Olson v. Gay, 135 Cal. App. 726, 27 P.(2d) 922. In Turner v. Standard Oil Company, supra, it is said:

[1-2] "Negligence is carelessness, whether greater or less in degree, and tends to be negative in character while willful misconduct is something of a more positive nature involving the intentional doing of a wrongful act, with the intent to harm another, with an utter disregard of the consequences, or with knowledge that an injury to a guest will be a probable result. All of these situations include actual or implied knowledge that injury is probable. 'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

It is respondents' contention that "willful misconduct," as thus defined, appears here and that the implied finding is supported by evidence which tends to show that the appellant Beck was driving at a rate of speed which was excessive under the circumstances, in that his rear tires were worn smooth and the highway was wet and slippery, and that the injured respondent had asked him to drive slower on account of the rain.

[3] Mrs. Lennon testified that as they were coming down the highway between Cajon Pass and San Bernardino, Beck at one time drove 55 miles an hour while passing two other cars; that she asked him not to drive so fast; that she did not notice whether or not he slowed down; that while they were on the Redlands road she did not look at the speedometer, but it seemed to her they were going about as fast as they had before; that while they were on that road she asked him to be careful and he told her not to be so nervous; that she did not notice then whether he slowed down or not; that about five minutes before the accident occurred he was driving about 45 or 50 miles an hour and did not slow down when she asked him to be careful; that about five minutes later he turned

around and the car skidded into the ditch when they had come back about 10 feet; and that before they started from Anaheim that morning she heard the appellant Woodbury say that he wouldn't drive his car very fast because the rear tires were worn smooth. Several witnesses testified that this last statement was made while all of the party were together in a room, although none of the witnesses knew whether or not the appellant Beck heard the statement.

Mrs. Bamford testified that Mrs. Lennon asked Beck two or three times during the return trip not to drive so fast and that she did not remember whether or not he slowed down; that at one time while he was passing two cars she noticed that he was going 55 miles an hour, and that thereafter "it wasn't that fast"; that the roads "were slick all over from the rain; we didn't slide around, but it was raining and they were slick"; that the road at the point where the accident occurred "was wet, the same as the rest of the road"; and that just before the accident occurred the car was under control and there was nothing to indicate to her that it was going to skid "only the slick road."

The appellant Beck testified that at the point where the accident occurred the highway was made of concrete and was about 30 feet wide; that after turning around he had proceeded about 30 rods when the car suddenly skidded off the road; that when the car skidded he was traveling between 30 and 40 miles an hour; that there was a drizzling rain and the highway was wet; that he did not feel there was any danger at the time but felt perfectly safe; that when Mrs. Lennon had previously asked him to slow down he was in the line of traffic and going the same as the other cars; and that he believed his car was under control and being driven in a safe manner. He also testified as follows:

"Q. Mr. Beck, with your experience in driving automobiles over a period of sixteen years, and over two hundred thousand miles, have you not had an experience of your car skidding on a wet street going less than twenty-five miles an hour? A. I believe I have, yes.

"Q. And because of the experience you have had you would not consider it dangerous to drive fast on wet streets? A. It all depends on what kind of a make-up or composition of the street; if it was a muddy road I would say three miles an hour is too fast."

If wilful misconduct appears from this evidence, it must be inferred from the fact that the appellant Beck was traveling too fast in view of the wet pavement and his smooth tires and when he had been previously asked to slow down. While there is some evidence that he had previously been traveling at from 45 to 50 miles an hour, and at one time 55 miles an hour while passing two other cars, there is neither direct nor other evidence justifying an inference that he was traveling at more than from 30 to 40 miles an hour at the time the accident occurred. Beck testified to this effect and that he had proceeded approximately 30 rods after turning around when the car skidded, while the injured appellant testified that he went only about 10 feet after turning around before this occurred. The previous requests to slow down had been made at times when he was going at a higher rate of speed. While the other two witnesses could not remember whether or not he slowed down at the times he was asked to do so, the only evidence in the record is to the effect that at the time the accident occurred he was going considerably slower than when the requests were made. He was on a wide concrete pavement, and it is a well-known fact that such pavements are not as slippery in wet weather as are certain other types of pavement. While the injured appellant testified that the car skidded once or twice before they reached San Bernardino on their return trip, there is no evidence that it had shown any signs of skidding while on a concrete pavement and the evidence shows without contradiction that he had theretofore traveled with safety at a higher rate of speed for a considerable number of miles in the same rain. There were no other cars on the highway near this point. The driver testified that he believed the car was under control and that he was driving in a safe manner, and Mrs. Bamford testified that immediately before the accident the car was under control and that there was nothing in the manner in which it was being operated to indicate that it was going to skid, except the fact that the road was slick.

While this evidence with the reasonable inferences therefrom would support a finding of negligence, we think it is not sufficient under the established rule to sustain a finding of wilful misconduct. Any excessive speed which here appears is plainly attributable to a lack of care and not to a disregard of the probable consequences. While the driver of this car knew or should have known that an accident with the consequent injury to one of

his guests was possible under the circumstances, we see in the evidence nothing to indicate that he knew or should have known that such an injury was probable. He had his own son in the car and the other passengers were his intimate friends. They were returning from a pleasure trip and were apparently anxious to get home. We may say here, as we said of the driver in the case of Howard v. Howard, supra: "It clearly appears that, although he proved to be mistaken, he thought he could safely drive as he did even though the pavement was wet; that while he intended to drive rather rapidly he neither intended the result that happened nor was indifferent to the same; and that he was far from being in such a frame of mind that he did not care whether or not he injured any one. While this driver may have been negligent in a greater or less degree, in our opinion, no willful misconduct within the meaning of this statute is disclosed by this evidence."

In our opinion the appellants have not met the burden of proof imposed upon them by the statute, and we think this case comes squarely within the class in which the Legislature intended to deny a right of recovery to an injured guest.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



3 Cal.App.2d 551

In re HUGHES' ESTATE.

TESLUCK v. WELLS FARGO BANK & UNION TRUST CO.

Civ. 9629.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1935.

1. Courts ⇐475(2, 3)

Probate court has exclusive jurisdiction to adjust brokers' conflicting claims for commission on sale of realty belonging to decedent's estate; such commission being expense in care, management, and settlement of estate.

2. Executors and administrators ⇐236

Probate court erred in ordering equal division of commission on sale of realty, belonging to decedent's estate, between two brokers, without hearing to determine which of them was entitled to commission.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Margaret Hughes, also known as Margaret M. Hughes, deceased. From an order, denying the motion of Pamphil Tesluck to be made a party to a proceeding to fix the amount of a real estate broker's commission and set aside an order for payment thereof, and an order dismissing his complaint in an action against the Wells Fargo Bank & Union Trust Company, as executor of the estate, to recover the commission, petitioner appeals.

Order denying motion reversed, with instructions.

Thomas Pierce Rogers and William E. Kidd, both of San Francisco, for appellant.

William M. Malone, of San Francisco, for respondent Bank & Union Trust Co.

Nathan Merenbach, of San Francisco, for respondent Gromeeko.

TYLER, Presiding Justice.

There are two appeals arising out of the facts of this case. The first is one from an order denying petitioner the right to be made a party to a proceeding fixing the amount of a real estate broker's commission and to set aside an order for the payment of the same. The second is from an order made in the superior court, sitting in law and equity, dismissing the complaint of appellant brought to recover the commission. The appeals have been consolidated.

The facts show that the executor of the estate of Margaret M. Hughes, deceased, was desirous of selling certain real property belonging to the estate, and it accordingly listed the same with several real estate agents to secure a purchaser for said property, agreeing at the same time to pay the agent, who actually procured and consummated a sale, a reasonable sum for procuring such buyer, the amount to be fixed and allowed by the court. A purchaser was procured, and upon proceedings to confirm the sale the court made an order allowing the sum of $175 as a commission. Appellant Tesluck, a broker,

claimed the entire commission. One Gromeeko, another broker, orally objected to the designation of appellant as the proper person to receive the commission, on the ground that he himself rendered services in procuring the purchaser to whom the sale was confirmed. Appellant objected to any portion of the sum being paid to Gromeeko and asked for a hearing to determine to whom the commission should be paid. Without taking any evidence, oral or documentary, upon the subject, the court inquired of respondent's counsel if Gromeeko had rendered services in the matter, and was informed that he had. Thereupon the court postponed the hearing for one week, at the expiration of which time an order was made dividing the commission equally between the two brokers. Appellant, being dissatisfied with the order of the probate court, brought an equitable action against the executor, demanding from it the entire commission. Gromeeko was subsequently substituted as defendant in lieu of the executor. Thereafter he demurred to the complaint on the ground that the court had no jurisdiction over the subject-matter of litigation, urging that the proper court to decide the question of a broker's fee is the probate court, and also that plaintiff's remedy is under section 473 of the Code of Civil Procedure to set aside the order of payment of said commission, or by appeal. While this action was still pending in the superior court, appellant made a motion in the probate court to set aside the previous order for the payment of the commission. This motion was denied. The demurrer to the equitable action in the superior court was sustained, and the action ordered dismissed.

[1, 2] The question involved in the two appeals is whether the probate or the superior court, sitting in law and equity, has jurisdiction to determine a dispute between rival real estate brokers seeking commission allowed upon return of sale of real property of decedent's estate. It is conceded by appellant that the probate court has power to fix and allow the amount of the commission and also to divide commissions where an increased bid is made, but it is claimed that no authority exists in it to determine adverse claims as to who rendered the service. There is no merit in the contention. The question is not one of first impression in this state. It is well established that the probate court has exclusive jurisdiction to adjust conflicting claims of two brokers. Eastwood v. Stewart, 64 Cal. App. 614, 222 P. 369; Estate of Ince, 98 Cal. App. 763, 277 P. 886; Wilson v. Fleming, 106 Cal. App. 542, 289 P. 658. A demand of a real estate agent, employed to sell real property belonging to an estate, is a claim which comes under the head of expense in the care, management, and settlement of the estate, and of such claims the court, sitting in probate, has complete and exclusive jurisdiction. Appellant makes the further contention that, even assuming the probate court had jurisdiction to make the order in question, it erred in not giving the respective parties a hearing to determine which of the claimants, if not both, had a right to the commission. We see no answer to this claim. The rights of the parties could not be adjudicated without a proper hearing.

The order denying petitioner's motion to be made a party and to set aside the order for payments of commissions must therefore be reversed, with instructions to the court to take evidence upon the subject and determine the question.

We concur: KNIGHT, J.; CASHIN, J.



3 Cal.App.2d 755

Pamphil TESLUCK, Plaintiff and Appellant, v. John GROMEEKO, Substituted for and in Place of Wells Fargo Bank & Union Trust Company (a Corporation), as Executor of the Last Will and Testament of Margaret Hughes, also Known as Margaret M. Hughes, Deceased, Defendant and Respondent.

Civ. 9636.

District Court of Appeal, First District, Division 1, California.

Jan. 14, 1935.

Appeal from Superior Court, City and County of San Francisco; Franklin D. Griffin, Judge.

Thomas Pierce Rogers and William E. Kidd, both of San Francisco, for appellant.

William M. Malone, of San Francisco, for respondent Wells Fargo Bank & Union Trust Co.

Nathan Merenbach, of San Francisco, for respondent Gromeeko.

TYLER, Presiding Justice.

Appeal from an order dismissing an action for declaratory relief. The judgment is affirmed upon the authority of Estate of Hughes, etc., Deceased (Tesluck v. Wells Fargo Bank & Union Trust Company, Executor, etc.) (Cal. App.) 40 P.(2d) 295, this day decided.

We concur: KNIGHT, J.; CASHIN, J.



3 Cal.App.2d 645

ARGUE v. WILSON et al.

Civ. 9120.

District Court of Appeal, Second District, Division 2, California.

Jan. 16, 1935.

1. Appeal and error ⇐1024(4)

Trial court's finding of failure of consideration on motion to set aside satisfaction of judgment would not be interfered with where affidavits were conflicting.

2. Judgment ⇐898(1)

Satisfaction of judgment *held* properly set aside, where draft of judgment debtor's insurer was dishonored because of insurer's insolvency during course of collection and it was not suggested that draft was received on any basis except as valid instrument equivalent to cash on presentation and judgment creditors did not agree to substitute insurer as judgment debtor.

3. Judgment ⇐898(4)

Order setting aside satisfaction of judgment was properly made in immediate action wherein judgment was entered.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by George Argue against Hazel Wilson and others, wherein defendants filed a cross-complaint. Judgment for defendants on the cross-complaint, and from an order setting aside a satisfaction of the judgment, cross-defendant appeals.

Affirmed.

David R. Faries and J. Clifford Argue, both of Los Angeles, for appellant.

G. M. Cuthbertson, of Los Angeles, for respondents.

SCOTT, Justice pro tem.

In an action instituted by plaintiff, a cross-complaint was filed against him on which judgment was recovered in the trial court. His insurance carrier gave cross-complainants a draft for the amount of the judgment, payable upon presentation to the insurance company's office in New Orleans, La., but two days later and while the draft in due business course was in transit for presentation and before it was presented for payment a receiver took over the company's assets and payment was refused and the draft dishonored. A satisfaction of the judgment which had been delivered upon delivery of the draft and filed was thereafter on motion in the case set aside by the trial court. From this latter order cross-defendant appeals, contending that a failure of consideration was not shown, that a satisfaction of judgment cannot be vacated for failure of consideration, that there was a novation, and that a suit in equity was required to effect respondent's purpose.

[1] On conflicting affidavits the trial court found there was a failure of consideration. This court will not interfere with the determination of that question. Zuver v. General Development Co., 136 Cal. App. 411, 28 P.(2d) 939.

[2, 3] It is not suggested in the affidavit filed in opposition to the motion to vacate satisfaction of judgment or elsewhere that the draft was tendered or received on any basis except that it was a valid instrument equivalent to cash upon presentation. Nor does it appear that respondents intended or agreed to substitute the faltering insurance company as judgment debtor in lieu of appellant. The authorities cited afford no support to appellant's contentions under circumstances such as appear in this case. The order setting aside the satisfaction of judgment was properly made in the immediate action in which the judgment was entered. Clark v. Johnston, 49 Cal. App. 315, at page 318, 193 P. 864. See, also, 51 A. L. R. 244, note.

Order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 647

COLBURN BIOLOGICAL INSTITUTE et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 10153.

District Court of Appeal, Second District, Division 2, California.

Jan. 16, 1935.

Mandamus ⇐16(1)

Mandamus directing court to permit filing of answer to supplemental and first amended cross-complaint will be denied where such cross-complaint was filed at conclusion of trial to conform with proof, since allegations of cross-complaint were deemed denied, and granting of mandamus would serve no purpose.

Proceeding by the Colburn Biological Institute and others for a writ of mandate to be directed to Superior Court of Los Angeles County, Charles D. Ballard, Judge, ordering respondents to permit filing of an answer in a certain case. On respondents' demurrer to petitioners' petition.

Demurrer sustained, alternative writ discharged, and peremptory writ denied.

Elliott & Aberle and H. F. Poyet, all of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and D. De Coster, both of Los Angeles, for respondents.

SCOTT, Justice pro tem.

Petitioners Oberdorfer and Farwell, as individuals, and also designating themselves as trustees of the corporation and claiming to act for it, seek a writ of mandate directed to respondent court ordering it to permit them to file their answer to the supplemental and first amended cross-complaint in case No. 337-301 on file in respondent court, entitled "The Colburn Biological Institute, a non-profit California corporation, C. Cecelie Oberdorfer and Dr. Alice M. Farwell, plaintiff, v. Fannie Shaffer, Margaret N. P. Wall, Henry B. Wall, and Nora H. Bates, defendants." The said supplemental and first amended cross-complaint had been filed at the conclusion of the trial, upon order of the court to conform with the proof, and its allegations were deemed denied without pleading. McKelvy v. Martin, 118 Cal. App. 691, 5 P.(2d) 652.

Assuming, without deciding, that mandate would be proper where, as in this case, the Superior Court had undisputed jurisdiction to act (see Phelps v. Superior Court, 138 Cal. App. 570, 32 P.(2d) 995), we think the demurrer should be sustained to the petition herein and the alternative writ should be discharged and the peremptory writ denied because the answer sought to be filed would serve no purpose.

And it is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3 Cal.App.2d 731

SECCOMBE v. DIONNE.

Civ. 1231.

District Court of Appeal, Fourth District, California.

Jan. 18, 1935.

1. Receivers ⇐102

Receiver has duty to keep accurate accounts, and may be held liable for failure so to do.

2. Receivers ⇐204, 213

Order discharging receiver appointed in unlawful detainer to take charge of realty and releasing surety *held* error, where receiver was appointed to harvest and sell crops, and receive rents, issues, and profits and his account showed merely that he joined with plaintiff in execution of cotton lease and crop waiver, that entire crop was mortgaged to finance company, and that he had nothing to do with proceeds of crop.

Primary idea of "account," whether in proceedings of courts of law or of equity, is some matter of debt and credit, or demands in nature of debt and credit between parties. It implies that one is responsible to another for moneys or things, either on the score of contract, or some fiduciary relation of a public or private nature, created by law or otherwise.

[Ed. Note.—For other definitions of "Account," see Words & Phrases.]

3. Receivers ⇐203

Account of receiver in charge of farm land should receive closest scrutiny where he was employee of mortgagee, to whom he executed crop mortgage, without court authority, blanketing crops produced on land under receivership with crops on other lands under lease by same tenant mortgagor, executed waiver of lessor's lien in favor of mortgage and made mortgagee's affidavit of good faith as its agent.

4. Receivers ⇐204

Receiver of farm land appointed in unlawful detainer action was improperly discharged where his account was incomplete, though plaintiff was active in management of receivership, since receiver held property as officer of court for equal benefit of all persons who might finally be adjudged to have rights therein, and his conduct was subject to control of appointing court and not of parties.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by A. H. Seccombe against Victor Dionne, wherein Joe Saller was appointed receiver. From an order settling the receiver's account and discharging receiver and his surety, plaintiff appeals.

Reversed.

Farnsworth, Burke & Maddox, of Visalia, for appellant.

W. M. Habesy, of Tulare, and Bradley & Bradley, of Visalia, for respondent.

ALLYN, Justice pro tem.

In an action for unlawful detainer brought in January, 1929, the respondent Saller was, on motion of plaintiff and appellant, appointed receiver of certain real property with powers and duties prescribed as follows: "That as such receiver he take immediate charge and possession of all of the real property described in the complaint on file herein pending the trial and final determination of this action; that he harvest and sell the remaining portion of the crop of cotton now standing and growing thereon; that he preserve and maintain said real property, including the wells and pumping plants thereon; that he cultivate and care for all of said real property, and that he harvest, sell and deliver all crops grown thereon and receive the rents, issues and profits of all said real property, and that he do any and all other things necessary and which are required or ordered by the Court."

Saller qualified as such receiver, and the property involved was in his possession and under his control as receiver until April 28, 1931, when an order was made discharging it from his control. On March 10, 1932, he was ordered to show cause why he should not file a report and account of his receivership, and in response to this order filed a verified document termed an "Account and Petition to be Discharged," in which he set up that after his qualification and appointment as a receiver he joined with plaintiff (appellant) in the execution of a cotton lease and crop waiver to one Revia, as tenant for the 1929 season; that the entire 1929 crop was mortgaged to a finance company; and that he, as receiver, "had nothing to do with the funds realized from the sale of said products and neither did he receive any funds for said purpose from said plaintiff or anyone else"; that he exercised general supervision over the cotton crop until July of 1929, when he was led to believe that he was discharged; that in 1931, as a matter of accommodation, he joined with the plaintiff in executing another cotton lease. The balance of his report and account deals exclusively with the matter of receiver's fees

and attorney's fees. Exceptions were filed, and upon a hearing thereof the trial court made its order settling the account and discharging the receiver and his surety.

Appellant rests his appeal upon two specifications of error: First, that the trial court erred in treating the document as a final account and in allowing and settling it as a final account; second, that the court erred in discharging the receiver and his bond without filing a proper account.

[1, 2] It is undoubtedly the duty of a receiver, as it is the duty of all fiduciaries, to keep accurate accounts, and he may in a proper case be held liable for failure so to do. Clark on Receivers, § 400. Under his order of appointment it was Saller's duty to take charge of the property and to harvest and sell the remaining portion of the crop then standing or growing upon it; to harvest, sell, and deliver all crops grown thereon; and to receive the rents, issues, and profits thereof. What is his account of the execution of these duties? Merely that, as receiver, he joined with the plaintiff in the execution of a cotton lease and crop waiver; that the entire crop was mortgaged to a finance company; and that he had nothing to do with the proceeds of the crop. Yet it appears from the record of the hearing on the so-called account that the receiver did actually harvest and sell some part of the 1928 crop, paid some expenses out of the proceeds thereof, and had a balance left. It further appears that, with the consent of plaintiff, the receiver made a cropping agreement with Revia for 1929, by which one-fifth of that crop should have been delivered into his hands as receiver and that later this crop, together with a crop on other land not the subject of the receivership, was mortgaged by the receiver to secure advances in the sum of $8,200; and that the receiver signed a "waiver of liens and claims" whereby all claims of the lessor were made subordinate to the lien of the crop mortgage. The plaintiff did not join in the execution of the mortgage or waiver. This is the crop covered by the so-called account with the statement "that the entire cotton crop was mortgaged to the finance company that financed the grower of the same, and that your petitioner herein had nothing to do with the funds realized from the sale of said products and neither did he receive any funds for said purpose from said plaintiff or anyone else." There is testimony that some 156 bales of cotton were produced on this land in 1929.

"The primary idea of account, computation, whether we look to the proceedings of courts of law or of equity, is some matter of debt and credit, or demands in the nature of debt and credit between the parties. It implies that one is responsible to another for moneys or things, either on the score of contract, or some fiduciary relation of a public or private nature, created by law or otherwise." Words and Phrases, First Series, vol. 1, p. 87. Certainly in this case there were demands in the nature of debits and credits between plaintiff, who had in the meantime been adjudged owner and entitled to the possession of the land in question, and the receiver; the latter being responsible for moneys and things on the score of the fiduciary relation existing. They were mutual demands and liabilities between the parties in the matter of debits and credits. The receiver here, as an officer of the court, might well have been accountable to the defendant in the action if the main litigation had resulted differently. It is impossible, on the basis of the document filed as an account, for the court to determine the rights and obligations of the parties.

It follows that since the instrument filed as a final account cannot as a matter of law be considered as an account it was error to discharge the receiver and release the surety on his bond from further liability.

There has been some question raised on this appeal as to the good faith of the receiver and as to the action of the plaintiff in attempting to exercise control over the properties of the receivership.

[3] It appears quite plainly from the record that Saller, at the time of his appointment and at the time of the execution of the crop mortgage and waiver of liens and claims, was in the employ of the mortgagee; that he made the affidavit of good faith of said mortgagee as its agent; and also executed the waiver of liens as receiver and without order of court. This record of itself suggests that his account and report should receive the closest scrutiny, especially in view of the fact that the crop mortgage, executed by him as receiver and without a court authorization, blankets the crops to be produced on the land in the receivership with other lands under lease by the same tenant mortgagor. Without passing upon the validity of these acts of the receiver, they do furnish additional reasons why an accurate and complete accounting should be had.

[4] It also appears that plaintiff was more or less active in the management of the receivership. This does not alter the fact that the receiver, until the final determination of the litigation, held the property as an officer of the court for the equal benefit of all the

persons who might finally be adjudged to have rights in it (22 Cal. Jur. p. 490, 491), and that his conduct was subject always to the control of the appointing court and not of the parties to the action. De Forrest v. Coffey, 154 Cal. 444, 98 P. 27; Atlantic Trust Co. v. Chapman, 188 U. S. 741, 23 S. Ct. 849, 47 L. Ed. 678. It would seem clear that no party to an action would be permitted to lead a receiver into error and then hold him liable for loss suffered thereby. These are matters, however, to be determined by the trial court upon the hearing of a proper account.

The order appealed from is reversed.

We concur: BARNARD, P. J.; MARKS, J.



3 Cal.App.2d 736

COOK et al. v. MIELKE.

Civ. 1381.

District Court of Appeal, Fourth District, California.

Jan. 18, 1935.

1. Specific performance ⇐39

Letters relied on by plaintiffs to prove contract to purchase realty in suit for specific performance thereof must show contract between parties and sufficient note or memorandum thereof to satisfy statute of frauds (Civ. Code, § 1624).

2. Contracts ⇐16

Contract is made by meeting of parties' minds through medium of offer and acceptance.

3. Vendor and purchaser ⇐16(4)

Rent owner's letter, stating terms of $5,000 cash and assumption of $3,000 mortgage for sale of land, in reply to letter offering to buy it for same amount of cash and balance of $3,000 secured by second mortgage payable from 30 per cent. of annual crops, was counter offer to sell and operated as rejection of original offer.

4. Vendor and purchaser ⇐16(4)

Letter, stating that writer was ready to raise $6,000 cash on basis of addressee's acceptance of writer's offer of such sum and $2,000 mortgage, payable from 30 per cent. of annual crops, for addressee's ranch, in reply to latter's letter, accepting offer of "$6,000 down with a $2,000 balance to carry," was at most counter offer operating as rejection of owner's proposal, so that no contract was consummated.

5. Specific performance ⇐39

Where minds of parties, negotiating by correspondence for sale of ranch, never met by offer and acceptance sufficiently definite and certain to make contract, there was no note or memorandum sufficient to satisfy statute of frauds, as required to entitle purchaser to specific performance (Civ. Code, § 1624).

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Suit by H. W. Cook and another against Pearl Mielke. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Halbert & Stone, of Porterville, for appellants.

Alex E. Nelson, of Kingsburg, for respondent.

ALLYN, Justice pro tem.

[1] Plaintiffs and appellants seek specific performance of a contract to purchase real property. As proof of the contract they rely upon a series of letters exchanged between the parties as furnishing the note or memorandum required by section 1624 of the Civil Code. Since all of the transactions between the parties relied on to prove the agreement of sale were had by correspondence, it follows that these letters must show first that there was a contract between the parties, and, second, that there was a sufficient note or memorandum thereof to satisfy the requirements of the statute of frauds.

Appellants rest their proof of the alleged agreement upon five letters, as follows:

A letter from Cook to Mrs. Mielke, dated June 7, 1933, in which he offers to purchase her ranch for "a total of $8,000, possession to be given upon completion of the deal; $5,000 cash and the balance of $3,000 in a second mortgage at 6 per cent interest to be held by yourself * * * 30% of each year's crop to be applied against the principal and interest." Mrs. Mielke replied that: "I would accept your offer if you would assume the $3,000 mortgage against the place."

On June 27th Cook, in response, wrote to Mrs. Mielke as follows:

"In reference to handling the deal for the full $8,000 I am afraid that is out of the question for me. * * *

"I am not certain yet but I believe that I will be able to raise $6,000 to pay on the place instead of $5,000, but of that I am not certain yet. If so, it would leave only $2,000 for you to carry. That is the very best I can offer."

In reply to this letter, Mrs. Mielke wrote on July 3: "Just received your letter of the 27th, and in answer will say that I will take you up on your proposition in the last letter, $6,000 down with a $2,000 balance to carry. I have a Mr. Guy Lewis looking after my place so suppose he rented it to the Armenians. He never wrote me but they could be given notice. So you could see him. Let me hear from you soon."

On July 10, Cook wrote Mrs. Mielke:

"I am in receipt of your letter of the 3rd inst. in which you accept my offer of $6,000 cash and a $2,000 mortgage which is to be paid out from 30 per cent of each year's crop. On a basis of your acceptance I am ready to proceed to raise the $6,000 cash.

"I am applying for a loan of $3,000 from the Federal Land Bank. The rest I will have available as soon as the Federal Land Bank loan has been approved. According to Mr. Milton Seligman it may possibly take 6 weeks to complete the Land Bank loan. In the meantime they have asked that I secure an agreement to purchase the property pending approval of the loan. Accordingly I have had an agreement to sell drawn up for your signature and am enclosing my check for $10.00 herewith.

"Upon approval of the loan by the Federal Land Bank they require that a certificate of title be furnished them within 15 days. As I have no idea as to which abstract company they will request the abstract from I will recommend that you appoint the National Bank of Orosi as your agent in the sale of the property so that everything may be handled promptly upon the approval of the Federal Land Bank.

"If this meets your approval I believe the next move for you would be to forward to the bank at Orosi a deed to the property made out in the name of H. W. Cook and Berniece C. Cook, along with the following instructions:

"1. To instruct the abstract company to furnish the Federal Land Bank a certificate of title in the form required by them.

"2. To secure a release and pay off your mortgage to Mr. Akard with accrued interest.

"3. To pay accrued state and county taxes in the approximate amount of $550.

"4. To pay delinquent 1931 Alta Irrigation assessment in the approximate amount of $56.00.

"5. To accept a mortgage in your favor from myself and wife in the amount of $2,000 under the terms as specified in the agreement to sell and have the same recorded for you.

"6. To authorize the abstract company to withhold from the proceeds the cost of furnishing the certificate of title.

"7. To furnish you a statement of deductions from the $6,000 received and forward you the balance.

"Whatever the cost will be of handling the deal through the National Bank of Orosi will be paid by myself.

"Now about the house. * * * If it is agreeable with you I would like your permission to move into the house."

There was inclosed in this letter a proposed agreement signed by Cook in substance as follows:

"For and in consideration of the sum of $10.00, receipt of which is hereby acknowledged, the party of the first part agrees to sell to the party of the second part that parcel of land described as follows: 40 acres comprising the northwest quarter of the northeast quarter of section 8, township 16, range 24, M. D. B. and M. including all water rights, located in Tulare County, California, for the sum of $8,000.00, under the terms and conditions set forth hereinafter.

"Upon payment of the sum of $6,000 the party of the first part agrees to furnish a good and sufficient title to said land vested in the names of H. C. Cook and Berniece C. Cook, his wife.

"Party of the first part agrees to accept a mortgage for the balance of $2,000, with interest at the rate of 6 per cent from the party of the second part, said mortgage to become a lien upon said property subsequent to that of $6,000.00 under the following conditions:

"1. That the party of the second part agrees to pay all taxes and interest during the crop year of 1933; and

"2. That 30 per cent of the moneys received from subsequent crops from the above described property is to be applied upon interest and principal of said mortgage of $2,000 until the full amount has been paid.

"It is further agreed between the parties hereunto that the sale of the above-mentioned property is subject to a lease made in favor of Charles Cowden for the year 1933 only upon the basis of 70 per cent of the crop to the

tenant; that any moneys representing the owner's 30 per cent received from the sale of the 1933 crop prior to the transfer of the deed to the property shall be placed in escrow in the National Bank of Orosi until such transfer has been completed; thereafter the National Bank of Orosi shall pay said sums to said H. W. Cook.

"It is further agreed by both parties hereunto that this agreement shall be effective for 90 days from date and should the party of the second part fail to meet the above requirements of sale within said 90 days this agreement shall become null and void."

On July 27th, Mrs. Mielke wrote Cook that there were terms in the contract which she did not like and stated that she would make a trip to California to settle the matter.

On this record the trial court found "that no contract in writing or otherwise was made," and appellants submit their appeal on two propositions; first, that there was established a contract of sale evidenced by sufficient written memorandum, and, second, that the court erred in not admitting evidence of oral statements subsequently made by the respondent to the effect that she had made a contract to sell the property to the appellants and had agreed to take a second mortgage to secure an unpaid balance of the purchase price.

[2-5] It is hornbook law that a contract is made by a meeting of the minds of the parties through the medium of offer and acceptance, so we are first concerned in analyzing the evidence to determine whether this was accomplished. Appellant's first letter offered to buy the land at a price of $8,000, payable $5,000 cash and the balance to be secured as to principal and interest by a second mortgage payable out of 30 per cent. of the annual crops. Respondent's reply clearly did not accept this offer, but stated terms of $5,000 cash, appellant to assume in addition a $3,000 mortgage against the property. This clearly was a counter offer to sell and operated as a rejection of the original offer. In response to this, Cook wrote that he could not handle the full $8,000 purchase price but believed he could raise $6,000 instead of $5,000, leaving a balance of only $2,000 for Mrs. Mielke to carry. In this letter Cook also stated the amount of taxes and assessments against the property and inquired as to the status of persons occupying the dwelling on the ranch. In reply Mrs. Mielke stated merely that she would take Cook's proposition of $6,000 down with $2,000 balance to carry, asking that Cook communicate with her soon. Unless this letter evidenced an acceptance of Cook's offer and furnished sufficient note or memorandum of their agreement appellants' case must fall. Assuming for argument that Cook's letter was an offer to pay $6,000 cash with a secured balance of $2,000 payable out of the crops, was there an acceptance thereof? Were the terms of the alleged offer and acceptance sufficiently definite and certain to constitute a contract? It is apparent that Cook himself did not consider them so, for on July 10th he again wrote Mrs. Mielke asking her to forward a deed to be delivered by her agent bank and instructing it to furnish a certificate of title, to pay off an existing mortgage, to pay off taxes and assessments, to accept a mortgage in the amount of $2,000, to authorize the escrow holder to pay for the certificate of title, and to forward the balance of the purchase price to her. In this letter Cook also stated that he was applying for a Federal Land Bank loan of $3,000, that the balance of the money would be available when this loan was approved, and that it would require about six weeks to complete the loan. At the trial it appeared that Cook planned to raise the $3,000 balance of the cash payment through a second mortgage securing what is termed a Land Bank Commissioner's loan. It is apparent that throughout, Mrs. Mielke had in mind a second mortgage to secure her balance of the purchase price, while Cook was attempting to give her security in the form of a third mortgage. Cook further stated that the Land Bank had requested that he secure an agreement to purchase the property and accordingly inclosed a proposed contract. It provided merely for a 90-day option to buy and was in no sense binding upon him as vendee.

Clearly, at no point in the entire correspondence did the minds of the parties meet upon the elements essential to a contract, and hence it follows that there was no memorandum showing the material elements thereof. Wineburgh v. Gay, 27 Cal. App. 603, 150 P. 1003. Since there was no offer and acceptance in the letters of June 27th and July 3d, the letter from Cook on July 10th was at most a counter offer which operated to reject Mrs. Mielke's proposal of July 3d, and since this counter offer was definitely rejected, appellants' case must fall. The most that can be said of the whole transaction is that the parties were negotiating by correspondence for the sale of the ranch and that at no time did the minds of the parties meet by offer and acceptance sufficiently definite and certain in terms to make a contract. Since this is true, it follows that there was no sufficient

note or memorandum to satisfy the statute of frauds.

This conclusion makes it unnecessary to consider the second point of the appeal, since clearly, if the appellants failed to establish a contract to sell, any oral statement or admission of the respondent that she had sold the property and agreed to take a second mortgage for a balance of the purchase price would be immaterial.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.



PEOPLE v. SKELLY et al. *

Cr. 2587.

District Court of Appeal, Second District, Division 1, California.

Jan. 17, 1935.

Rehearing Denied Jan. 30, 1935.

Hearing Denied by Supreme Court Feb. 13, 1935.

1. Criminal law ⇐1159(4)

Appellate court cannot disturb trial court's implied fact finding for prosecution on appeal from judgment of conviction, where prosecuting witness' testimony was not so inherently improbable that trial court should have disregarded its essentials.

2. Larceny ⇐65

Evidence that officer of stockbrokerage company knowingly aided and abetted another officer thereof in fraudulent conversion or embezzlement of securities, with knowledge of their deposit with company as collateral security for loans to depositors, *held* sufficient to support former officer's conviction of grand theft, though he did not personally profit from transaction.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Douglas L. Skelly and R. B. Skelly were convicted of grand theft, and they appeal.

Affirmed.

Harold Judson, of Los Angeles, for appellant Douglas L. Skelly.

Randall & Bartlett, of Los Angeles, for appellant R. B. Skelly.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment of conviction rendered by the trial court sitting without a jury on each of seventeen counts of grand theft contained in an indictment returned against each of the defendants, as well as from an order by which their motion for a new trial was denied, they have appealed to this court.

[1] On behalf of defendant Douglas L. Skelly, primarily it is contended that the evidence adduced against him was so incredible that in its effect it amounted to an insufficiency of the evidence to support the judgment. In addition thereto, it is urged that the evidence produced by the defendants led to an inevitable conclusion as to an ultimate specified fact; and that based upon such assumed fact, a judgment of conviction was contrary to law.

Other than the general statement that each of the defendants was an officer in a company or corporation that did a stockbroker business, and that the prosecuting witness testified that in the conduct of such business the defendant embezzled certain securities which had been deposited by him with such company as collateral security for a loan made by it to such witness, it is unnecessary to set forth herein a résumé of the voluminous facts that were introduced in evidence on the trial of the action.

With reference to the foundational transaction that occurred between said defendant Douglas L. Skelly and the prosecuting witness, the story related by the latter on the witness stand was not of that nature or character that this court may adjudge that it was so inherently improbable of being the truth that in its essentials it should have been disregarded by the trial court. And that court, with all its attendant opportunities at the trial, having in effect made its implied finding of fact in favor of the prosecution, this court, even if inclined to disturb such finding, is powerless in the premises. In such circumstances, the question suggested by said defendant regarding his lack of criminal liability had the trial court elected to believe the evidence presented by the defendants, rather than that adduced by the prosecution, obviously is of no materiality.

[2] Likewise, in behalf of defendant R. B. Skelly it is argued that the evidence was in-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 54 P.2d 1.

sufficient to support the judgment that was rendered against him.

Again, without herein setting forth the evidence at length, an examination of the record convinces this court that, with full knowledge of the conditions under which the collaterals that were owned by the prosecuting witness were deposited with the company or corporation of which said defendant was an officer, said defendant knowingly aided and abetted in a fraudulent conversion or embezzlement of such securities to the use and benefit either of his codefendant, or of said company. That said defendant personally did not profit by either of the several transactions which were the basis of the several counts contained in the indictment is of no consequence.

The judgment and the order by which the defendants were denied their motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.



3 Cal.App.2d 721

KNICKRIHM v. HAZEL.

PIOLA v. SAME.

Civ. 5287, 5288.

District Court of Appeal, Third District, California.

Jan. 18, 1935.

Hearing Denied by Supreme Court March 18, 1935.

1. Appeal and error ⇐1010(1)

On motion to dismiss appeals or affirm judgments for plaintiffs in actions tried by court without jury, judgments should be affirmed if records show sufficient testimony introduced by plaintiffs to sustain court's findings.

2. Automobiles ⇐245(87)

Guests *held* not contributorily negligent as matter of law because they accepted ride with drunken driver, where driver declined to permit guests to alight from automobile, notwithstanding guests requested to be permitted to alight (St. 1931, p. 1693, § 141¾).

3. Automobiles ⇐244(20)

In guests' action for injuries when automobile in which they were riding overturned, evidence *held* to show that driver was "intoxicated" within statute allowing recovery by guest when accident in which guest is injured results from intoxication of driver (St. 1931, p. 1693, § 141¾).

> "Intoxicate" as an adjective means intoxicated, inebriated, drunk, overexcited, transported; word "intoxicated" means affected by an intoxicant, or under the influence of an intoxicating liquor or drug; or emotionally wrought up; one is "intoxicated" when he is under the influence of an intoxicating liquor to such an extent as to dull his sense of sight, and to prevent, or tend to prevent, him from exercising the care and caution which a sober and prudent man would have exercised under the circumstances.
>
> [Ed. Note.—For other definitions of "Intoxicated; Intoxication," see Words & Phrases.]

4. Automobiles ⇐242(1)

While there is no presumption that one is intoxicated because he has taken a drink of liquor, trial court or jury may consider number of drinks of intoxicating liquor which one has imbibed and his subsequent actions, in determining whether at time of accident such person was "intoxicated" within statute allowing recovery by guest when accident in which guest is injured results from intoxication of driver (St. 1931, p. 1693, § 141¾).

5. Appeal and error ⇐1008(1)

In guests' action for injuries sustained when automobile in which they were riding overturned, on ground that driver was intoxicated, whether guests were contributorily negligent *held* for trial court sitting without jury (St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Actions by Christian A. Knickrihm and by Frank Piola against John Hazel. From judgments for plaintiffs, defendant appeals, and plaintiffs move to dismiss the appeals or affirm the judgments.

Motion to dismiss appeals denied; motion to affirm judgments granted, and judgments affirmed.

Barry J. Colding, Theodore Hale, and Carroll B. Crawford, all of San Francisco, for appellant.

Bradford, Cross & Prior, of Sacramento, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon motion of the respondents either to dismiss the defendant's appeals, or to affirm the judgments.

Two personal injury actions were begun, one by the plaintiff Knickrihm, and one by the plaintiff Piola, arising out of the same action, were consolidated for trial, are presented upon one transcript, and argued upon one set of briefs.

The record shows that on the evening of October 30, 1933, the plaintiffs were riding in an automobile as guests of the defendant, John Hazel. Accompanying the party was a fourth person named George Olsen. The car in which the party was riding was owned and was being driven by John Hazel in a southerly direction from the city of Sacramento, along what is known as the Riverside or "Pocket" road, which is a loop road by which, in a drive of some 15 to 16 miles, one can, by making the loop, return to the city of Sacramento. That at a curve in the road about 8 miles from the city of Sacramento, the automobile left the highway, went through a fence into a field, and turned over at a point distant from the highway from 100 to 125 feet. George Olsen was killed. The plaintiff Knickrihm was severely injured, and was awarded a judgment in the sum of $10,000. Piola was less seriously injured, and was awarded a judgment in the sum of $2,000. The liability of the defendant is based upon the alleged intoxication of the defendant while driving the automobile at the time of the injuries suffered by the respective plaintiffs.

From the judgments in favor of the plaintiffs the defendant appeals.

No exception is urged that the awards of damages are excessive, the real contention being that the evidence is insufficient to establish the fact of intoxication on the part of the defendant, and as a minor objection that the plaintiffs were guilty of contributory negligence in accepting a ride with the defendant. The trial was had before the court sitting without a jury.

[1] The record really presents only a conflict of evidence. If the evidence introduced by the defendant had been accepted by the court as a correct statement of the circumstances, then and in that case the plaintiffs should have been awarded nothing by reason of their actions. However, the court did not do so, and if the record shows sufficient testimony introduced by the plaintiffs to sustain the findings of the court, then, instead of dismissing the appeal, the judgments should be affirmed.

All four of the participants in the ride in the accident were employees of the Del Paso Country Club and were well acquainted with one another. The testimony set out in the plaintiffs' brief, and also a reference to the transcript, show that there is sufficient evidence to justify the court in concluding that the defendant imbibed at least one drink of gin, four highballs, and four glasses of beer during the late afternoon and evening, a short time preceding the accident. It appears that the defendant and George Olsen had a drink of gin at the country club, which is a few miles distant from the city of Sacramento. On their way to the city of Sacramento they stopped at a place known as the "Oasis," and had a drink of beer. Coming into Sacramento they stopped at 517 K street, characterized in the testimony as being a "bootlegging joint," engaged in rolling dice; were thereafter joined by a witness by the name of Perelli, and had several drinks of intoxicating liquor described as "highballs."

During the time that the defendant, Olsen, and the witness Perelli, were rolling dice and drinking highballs, the plaintiff Piola entered the same place for the purpose of getting his dinner, and took a seat at the bar or counter a few feet away from the parties we have just mentioned, sitting with his back partly toward the defendant, Olsen, and Perelli. He testified, however, that he observed highball glasses on the bar in front of the defendant, but did not testify as to the number of drinks taken by the defendant, or by Olsen or Perelli. Shortly after 7 p. m. all of the parties left the bootlegging joint with the intention of going to a show. Hazel, however, invited the plaintiff Piola and Knickrihm, who it appears had arrived at 517 K street, but was standing outside on the sidewalk, to drive over to a gambling joint in Yolo county, the plaintiffs objecting at first, stating that they wanted to go to a show. The defendant, however, it appears, stated that he was driving back to the Sacramento side of the river in time for the plaintiffs to go to a show. Getting into the car Hazel drove the parties over to the gambling joint on the Yolo side of the river, but when arriving there it appears that the party agreed not to enter the gambling joint. Just how long a time was consumed after leaving 517 K street before the parties returned to the Sacramento side of the river does not appear. However, after concluding not to enter the gambling joint, Hazel drove the car across what is called the "M Street Bridge," over the Sacramento river to the Sacramento side, but instead of driving toward the city of Sacramento

turned southward and started on the drive which terminated in the accident and the injuries to the plaintiffs upon which this action is based.

After leaving the city of Sacramento and driving southward, the plaintiffs observed that Hazel was driving in what they called a reckless manner; requested Hazel to stop and let them out of the car. Instead of stopping and letting them out of the car, Hazel told the plaintiffs to get out, and continued to drive in the same manner; one of the witnesses testifying that the car swayed from side to side as it was driven around the curves. One of the witnesses testified as follows:

"I always beg him to stop; I say, 'Let me go out.' 'Well,' he say, 'go out if you want to,' but he didn't stop the car so I couldn't get out; I have to sit right there.

"Q. After leaving the city limits did you again say anything to him? A. Oh, I told him, I say, 'Let me out,' I say, 'I will walk back,' and he laughed at me there, that is all, just laugh at me.

"Q. Do you recall in traveling that road that there were a great number of curves? A. Oh, I saw he made the curve there, I know one curve he made before the accident the wheels just come up like that, 'Oh,' I say, 'My gosh,' I say, 'slow up, slow up! Let me out.' I say, 'I walk back to town,' but he won't do it, he just keep on going.

"Q. Did he slow down when he reached those curves, or not? A. No, he don't slow down, he just laughed at me, that is all.

"Q. Now, just before the car left the road, do you know whether or not that was on a curve? A. Well, I see when he came around the curve, and I know right away, he was just coming right like that, and the car went up, and I don't remember nothing else at all."

The road on which the parties were riding was one of many curves, and while the appellant argues that the testimony does not show an excessive rate of speed, the defendant's own statement is to the effect that at the place of the accident he was driving between 40 and 45 miles per hour.

The plaintiff Knickrihm knew nothing of the drinking on the part of the defendant prior to the accident. The plaintiff Piola had some knowledge of the defendant's drinking, but testified that he did not become conscious that the defendant was intoxicated until he began driving recklessly out of the city of Sacramento, and down along what is called the "Pocket road," and that he also asked the defendant to slow up, and with the plaintiff Knickrihm, desired to leave the car.

The court had ample reason to conclude that when the parties entered the car driven by the defendant, he would, on returning from the Yolo side of the river, leave his guests in the city of Sacramento in order that they might attend a show, but on the contrary, without asking their permission or saying anything to them regarding his purpose, started on a drive southward from the city, and drove in the manner as testified to by the plaintiffs. Within a few days after the accident the defendant told the witness Titus, of the kind and number of drinks which he had had, and the places where the drinks had been obtained, including in the statement a mention of taking a drink of gin, and also of a few highballs. Upon the witness stand the defendant denied that he had drunk anything but beer. Two other witnesses testified that the defendant's face was flushed, one testifying that he smelled what he thought was gin on the breath of the defendant.

The testimony of the defendant relative to the cause of the accident, is to the effect that the car seemed to get out of control. We here quote that part of his testimony:

"Q. Just before your car went off the road for the last 200 feet, let's say it traveled anywhere from 140 to 150 feet after it went off the road; so taking a point back for 10 feet or 20 feet, just before it went off the road, was there anything unusual about the car? A. Well, the car seemed to be out of control, I could feel a pulling to the right; the wheels didn't respond to the steering wheel.

"Q. Well, what did you do? A. Well, I turned the steering wheel as far as I could, and that is all I could do.

"Q. And did the road wheels respond to it when you turned it? A. No, I had the impression that the road wheels did not respond to the steering wheel.

"Q. Had you then made the curve already? A. I am not quite positive, but I would say that I was at the end of the curve when I noticed this."

The defendant also testified that the car was in good condition. There was also testimony to the effect that the plaintiffs thought the defendant was acting "funny" after he started driving southward from the city of Sacramento. The defendant also testified that there were a great many curves in the road, two of them complete right-angle turns.

The defendant introduced the testimony of two deputy sheriffs and an interne at the

county hospital, to the effect that they saw the defendant a short time after the accident, and that the defendant was not intoxicated.

Following the summary of the testimony the appellant argues that there is a distinction between section 112 of the California Vehicle Act, as amended by St. 1929, p. 537, and section 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693, where in the former section it is made a penal offense for one to drive an automobile while under the influence of intoxicating liquor; and in the latter, allowing the recovery by a guest when the accident in which the guest is injured results from the intoxication of the driver.

Without attempting to draw a line of demarkation between the legal meaning of the words "under the influence of intoxicating liquor," and "resulting from intoxication," we will consider the circumstances presented in this case in the light of the conclusion of the trial court that the defendant had reached that condition known as "intoxication."

One of the definitions found in Webster's International Dictionary of the word "intoxicated" reads as follows: "Affected by an intoxicant; under the influence of an intoxicating liquor or drug." And the definitions of the word "intoxicate" as an adjective are by the same work: "Intoxicated; inebriated; drunk; over-excited; transported," etc. Also, "intoxicated" is defined as: "emotionally wrought up."

This court, in the case of Jones v. Pacific Gas & Electric Co., 104 Cal. App. 47, 285 P. 709, 713, had occasion to inquire into the meaning of the term "intoxicated," and therein approved the definition found in Jensen v. Chicago, etc., Ry. Company, 133 Wash. 208, 233 P. 635, where it is in substance said: "One is intoxicated when he is under the influence of an intoxicating liquor to such an extent as to dull his sense of sight, and to prevent, or tend to prevent him from exercising the care and caution which a sober and prudent man would have exercised under the circumstances."

Following this definition this court added the following: "The statute applies if the intoxication is to such a degree as to prevent, or tend to prevent, the driver of an automobile from exercising his normal faculties, and driving with the care and caution characteristic of a sober and prudent person."

[2] We also cited a number of authorities in the opinion in that case to the effect that when one gets into an automobile which is being operated by a drunken driver, he is guilty of contributory negligence to such a degree as to bar recovery if any injury results from the negligent driving of the drunken driver. In this connection we may properly call attention to the case of Anderson v. Pickens, 118 Cal. App. 212, 4 P.(2d) 794, where it is said in substance that in order to charge one injured, with contributory negligence in riding with a drunken driver, he must have had reasonable opportunity to alight from the automobile after becoming aware of the intoxicated condition of the driver. In the instant case the testimony which we have set forth shows that the driver declined to permit the plaintiffs to alight from the automobile, and kept on driving in a manner which aroused their fears, even though requested to allow the plaintiffs to alight from the automobile.

The vital question in this case is as to whether the testimony sustains the finding of the trial court that the defendant was intoxicated to such a degree as brought him within the definitions above stated. The testimony to which we have referred shows the drinking of a number of glasses of intoxicating liquor. Just what kind of beer was partaken of at the bootlegging joints is not explained, but there is testimony justifying the court in the conclusion that the defendant took a number of drinks of intoxicating liquor. We find the defendant's face was flushed after 4 p. m., indicating the drinking of some kind of liquor; we find him coming to Sacramento, stopping on the way to get another drink, presumably of beer, going to a bootlegging joint at about 5:30 p. m., and remaining there until after 7 p. m. rolling dice and drinking highballs, leaving there, going over to a gambling joint in Yolo, returning with his guests who desired to go to a show, but instead of turning toward the center of the city, proceeding in a southerly direction over a very crooked highway, driving, by his own testimony, at the time of the accident, at a speed of from 40 to 45 miles per hour. The plaintiffs, becoming aware of the condition of the driver, requested an opportunity to alight, and were answered only with a laugh. Shortly, the automobile, in the language of the defendant, "went out of his control," left the highway, and overturned. Does this constitute evidence of intoxication, and justify the conclusion that the injury suffered by the plaintiffs resulted from the intoxication of the driver?

[3] In Hasten v. State, 35 Ariz. 427, 280 P. 670, the Supreme Court of Arizona had occasion to pass upon one of the elements in-

volved in this action. We quote the following from the opinion: "There are three assignments of error. The first raises the question of the admissibility of certain evidence as to the speed at which appellant was driving when arrested. It is urged that the speed of his car has no connection with the particular offense charged. We cannot agree with this contention. It is a notorious fact that one of the first things a driver under the influence of liquor is apt to do is to drive at a high rate of speed, especially when an advanced state of intoxication has not yet been reached. Such being the case, the speed at which appellant was driving was one of the circumstances which the jury might properly consider in determining whether he was under the influence of liquor at the time." Citing a number of authorities. The speed at which an automobile is being driven, and whether it is being driven recklessly or is being driven in such a manner as a prudent person would drive under the circumstances, has direct relation to the highway over which the automobile is being propelled. If the highway is wide and straight, a prudent person, exercising due care, may properly drive at a high rate of speed without being charged with recklessness or intoxication; but when the car is being driven at the same rate of speed over a crooked highway where there are very sharp turns, the conclusion is necessarily enforced that due caution and prudence are not being used, and taken in connection with the fact that the driver of the vehicle has within a short period of time imbibed a considerable number of drinks of intoxicating liquor, supports the charge that the driver is in an intoxicated condition, and that his loss of control of the car is due to that condition. The testimony shows that the defendant was in an exceedingly exuberant condition, coming within the definition of "intoxicated" as found in Webster's International Dictionary, as "emotionally wrought up." His replies to the requests of the plaintiffs to be allowed to alight from the car were met only with laughter, which fact points again to the stimulus under which the defendant was acting, and the extent to which his prudence, judgment, and caution had been lessened.

[4] In the case of Tracy v. Brecht (Cal. App.) 39 P.(2d) 498, this court had occasion to examine the authorities touching upon the question of intoxication, the testimony supporting the finding that a driver of an automobile was laboring under such condition, and without extending this opinion by lengthy quotations therefrom, we refer to what is said in the opinion in that case, and approve the same as applicable to the conditions presented here.

The argument is presented in appellant's brief "that two highballs drank between 5:30 and 5:45 could not render any person unfit to drive an automobile at 8 p. m." This argument is not supported by the facts in this case. The defendant in this case, after having had a drink of gin and a drink of beer, entered a bootlegging joint at 517 K street in Sacramento, after 5 p. m., and did not leave that place (which is also called the "Walnut Bar"), until shortly after 7 p. m., during which time the highballs were being drunk. While there is no legal presumption that one is intoxicated because he has taken a drink of liquor, it is within the province of the trial court or the jury to take into consideration the number of drinks of intoxicating liquor which one has imbibed, and his subsequent actions, in determining whether at the time of the accident such person is in fact intoxicated, and if intoxicated to such a degree as hereinbefore defined, to render judgment to that effect.

[5] The question of contributory negligence of the plaintiffs was a matter for the trial court, primarily, and we find nothing in the record justifying any interference with the findings of the court in such particulars.

While this case has been submitted on a motion to dismiss or affirm, it has necessitated a more or less extended examination of the testimony, and is not to be considered as a precedent for subsequent motions because the court has performed the labor in the examination of the transcript which should have been set forth in respondents' brief. This examination of the transcript, appellant's brief, and respondents' memorandum attached to their motion, satisfy us that there is no merit in the appeal for the reason that it involves practically only a conflict in the testimony.

The motion to dismiss the appeals is denied.

The motion to affirm the judgments is granted.

The judgments are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

3 Cal.App.2d 554

DUNN v. CIVIL SERVICE COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9460.

District Court of Appeal, First District, Division 2, California.

Jan. 14, 1935.

Prisons ⇐8

Assistant keeper in sheriff's office of city and county of San Francisco, who was appointed and assigned by sheriff to fulfill duties of position of head keeper until permanent appointment could be made from civil service list, *held* not entitled to salary attached to position of head keeper.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action in declaratory relief and for writ of mandate by Howard E. Dunn against the Civil Service Commission of the City and County of San Francisco and others. From the judgment, the defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Thomas P. Slevin, Deputy City Atty., both of San Francisco, for appellants.

Joseph T. Curley, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff was appointed to the position of assistant keeper in the office of the sheriff, a civil service position, in August, 1928. On October 16, 1932, the position of head keeper became vacant and plaintiff was "appointed and assigned" by the sheriff to fulfill the duties of this position until a permanent appointment could be made from the civil service list. As assistant keeper, plaintiff received a salary of $160 per month; the head keeper received $200. When plaintiff was assigned to the latter position, he was given the salary of $175, which was the entrance salary set by the salary standardization ordinance which was adopted in 1930 by the civil service commission, but was never approved by the board of supervisors. However, the civil service commission based the salary on the annual salary ordinance, which provides that persons appointed to fill vacancies should receive the amount provided for in the standardization ordinance. Thereupon plaintiff commenced this action in declaratory relief and for a writ of mandate. Plaintiff had judgment declaring that he was entitled to a salary of $200 per month so long as he continued to perform the duties of head keeper. The defendants appeal on the ground that the judgment is against the law.

Section 71 of the charter provides that pending the adoption of salary standards as provided in the charter the salary rate shall be recommended by the officer "having appointing power for such position and fixed by the budget and annual salary ordinance." Section 73 of the charter gives the board of supervisors the power to enact the annual salary ordinance and states that this ordinance shall serve as a legal basis for check by the civil service commission as to the legality of rates of compensation. The annual salary ordinance for 1932-33 provides that persons appointed to fill vacancies shall receive no more than the entrance salary proposed in the salary standardization ordinance of 1930.

It is conceded that the position of head keeper is a civil service position, and also that, when respondent was appointed or assigned to perform the duties of that office, no civil service list of eligibles was available. The respondent alleged, and the trial court found, that the sheriff "appointed and assigned the plaintiff to perform the duties of head keeper * * * that * * * the Civil Service Commission gave their consent and approval" to such appointment and assignment.

When no civil service list of eligibles is available, there are but two methods by which a temporary appointment or assignment can be made to fill a civil service position. Section 141 of the charter provides in part: "No person shall hold a position outside of the classification to which he has been appointed, provided that every employee of any department or office shall discharge any of the duties pertaining to such department or office to which his chief may temporarily assign him." Section 149 provides that the civil service commission "may authorize the appointing officer to make an emergency appointment thereto for a period not exceeding sixty days and only until regular appointments under the provisions of this charter can be made." To prevent a long-standing abuse of this power to make "emergency" appointments, the same section provides that "No person shall be compensated under any emergency appointment or appointments * * * for a period exceeding ninety days in any fiscal year. * * *"

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

The respondent contends that his appointment rests in the provisions of section 141; the appellants contend that it comes under section 149. It makes little difference where the authority for the appointment is found. If, as contended by respondent, he was merely "assigned" to perform the duties of head keeper while still retaining his civil service status as an assistant keeper, it is manifest that he is entitled to the compensation attached to the position in which he has been duly classified and appointed. This is a rule which works both ways, because under section 141 an officer or employee may be assigned to perform duties attached to a position of a lower grade as well as to one of a higher grade. The explicit provisions of the section against one holding a position "outside of the classification to which he has been appointed" necessarily prohibit the payment of compensation outside the rating of the classification which determines the civil service status.

It is equally manifest that, if this appointment was made to meet an emergency under section 149, the respondent has been paid in excess of the limitations found in that section and is not entitled to any further compensation under the judgment.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.



3 Cal.App.2d 624

LAMB v. BELT CASUALTY CO. et al.

Civ. 9421.

District Court of Appeal, First District, Division 1, California.

Jan. 16, 1935.

Rehearing Denied Feb. 15, 1935.

Hearing Denied by Supreme Court March 14, 1935.

1. Trial ⇐343

By returning general verdicts, awarding damages to plaintiffs in actions wherein complaints alleged and trial was had on issues of defendant's negligent operation of both truck and attached trailer and resulting injuries to plaintiffs, jury impliedly found that both vehicles were negligently operated and that operation contributed proximately to plaintiffs' injuries, so as to authorize recovery by defendant on liability insurance policy covering truck as against contention that damage was done by trailer only.

2. Insurance ⇐514½

In determining whether company insuring truck owner against liability for injuries to others was bound to defend injured persons' suits for damages, insurer's denial of liability and refusal to defend after investigating facts must be disregarded and language of policy and allegations of complaints in such suits considered.

3. Insurance ⇐514½

Insurer's denial of liability on policy insuring truck owner against liability for injuries to others and refusal to defend damage suits against insured *held* breach of contract releasing insured from contract obligation to leave management of such suits to insurer and justifying him in defending them on his own account, though another insurer defended actions.

The policy provided that insurer agreed to defend in name and on behalf of insured any suits against latter to recover damages on account of happenings within liability peril clauses, even if groundless.

4. Indemnity ⇐14

One bound by law or agreement to protect another from liability is bound by result of litigation to which latter is party, if former had notice of suit and opportunity to control and manage it.

5. Insurance ⇐616½

Judgment against insured for damages on account of injuries sustained is conclusive evidence of insured's liability for amount of judgment in his action on liability insurance policy.

6. Insurance ⇐616½

Judgments on verdicts against insured in actions for injuries sustained as alleged result of negligent operation of truck and trailer covered by separate liability insurance policies *held* conclusive of insured's liability, arising from operation of both vehicles, in actions on policies.

7. Insurance ⇐512½

Owner of two instrumentalities, such as truck and trailer, through joint operation of which he inflicts injuries, giving rise to liability against which he is insured as to each instrumentality, is responsible for entire damage, and insurance on each instrumentality may be applied to satisfaction of his entire liability.

8. Insurance ⇐512½

Companies issuing separate policies, insuring owner of truck and trailer against liability for injuries caused by each of them, *held* liable on each policy for such proportion of total liability as limit of each policy bears to whole amount of collectible insurance.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

9. Appeal and error ⇐151(2)

Plaintiff, not being aggrieved by judgment against two of four defendants in action on liability insurance policies for total amount of judgments against insured in damage actions, is in no position to prosecute appeal.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by George W. Lamb, doing business under the fictitious name of King & Co., against the Belt Casualty Company, the American Indemnity Company, and others. From a judgment against named defendants, defendant indemnity company and plaintiff appeal.

Affirmed.

Cooley, Crowley & Supple, of San Francisco, for appellant American Indemnity Co.

Thornton & Watt, of San Francisco, for respondent Lamb.

JONES, Justice pro tem.

This is an action to recover on policies of liability insurance. The plaintiff owned an automobile truck and trailer which he had insured against public liability in different companies. The defendant American Indemnity Company, appellant herein, issued the policy covering the truck, and the Belt Casualty Company, another of the defendants, issued that covering the trailer. An excess policy on the trailer was also carried with Lloyds of London, also made a defendant in the action through its representative in California. The limits of liability in the policy of the American Indemnity Company were fixed at $50,000 on account of injuries to one person and $100,000 on account of injuries to two or more; in the policy of the Belt Casualty Company, the limits were fixed at $5,000 on account of injuries to one person, and $10,000 on account of injuries to two or more; in the policy of Lloyds of London the limits were fixed at $45,000 for injuries to one person, and $90,000 on account of injuries to two or more, it being provided in this policy, however, that liability should not attach until an admitted or adjudicated liability of $5,000 for one injury, or $10,000 for two, had accrued under the primary policy, which was that of the Belt Casualty Company.

On the evening of December 2, 1930, the truck and trailer, heavily loaded, were proceeding along the state highway in the direction of San Francisco. At the time it was dark enough to necessitate the use of lights in driving. The trailer was connected to the truck with a drawbar; the motive force of the truck propelling both truck and trailer. There was also an air brake connection between the truck and trailer by means of which the braking power of the trailer was derived from the truck. Also the lighting of the trailer was derived from the truck by means of wiring connections with the electric lighting system of the truck.

As the truck and trailer were proceeding along the highway under these conditions, Miss Adele Davis, driving a small coupé, and accompanied by a Mrs. Ida Barr, entered the highway from a side road some distance behind the truck and trailer and turned in the same direction. The automobile in which they were riding crashed into the rear end of the trailer which was without lights. After the collision, it was found that the lighting wire extending from the truck to the trailer had pulled loose from the plug which was inserted into a socket on the trailer to establish the lighting connection between the two. This was the only apparent defect in the lighting system. Both women were quite severely injured, and each filed suit against the owner of the truck and trailer, the plaintiff herein, on account of the injuries sustained. The cases came on for trial in May, 1931, and a jury found for the plaintiffs in each case. Miss Davis was awarded $7,500, and Mrs. Barr $5,000, for which sums, plus interest and costs, judgments were entered against the plaintiff herein, which he paid. He in turn instituted this action to recover on the insurance policies and obtained a judgment against the American Indemnity Company for $13,301.84, and against the Belt Casualty Company for $1,350.18. From this judgment the defendant American Indemnity Company has appealed, and the plaintiff has also appealed.

[1] The appellant, American Indemnity Company, contends that the damage was done by the trailer and not by the truck, and that, as its insurance covered only the truck, it cannot be held liable. In this connection attention is called to the indorsement upon its policy permitting the use of a trailer with the truck, which reads as follows: "It is understood and agreed that permission is hereby granted for the use of a trailer in connection with the operation of the machine insured under this policy, it being expressly understood and agreed, however, that damage done to or by said trailer is and shall not be construed

to be covered hereunder." The appellant's main reliance is upon the language of this indorsement in avoidance of liability. However, the complaint for damages filed by Mrs. Barr against the plaintiff herein alleges the ownership by him of the truck and trailer, and that C. Kasheroff, as his agent, "carelessly and negligently stood and operated and maintained said truck and trailer, and without lights or warning thereof, in and upon said public highway, and obstructed the passage of vehicles passing or traveling in a southerly direction thereon, and as a proximate result of the carelessness and negligence of defendants aforesaid, the automobile then and there being driven by said Adele Davis, as aforesaid, collided with the truck and trailer of defendants, injuring and damaging the plaintiff in the following particulars, to-wit," etc.

The complaint filed by Adele Davis contains substantially the same allegations of ownership and negligence and also alleges that "the plaintiff's automobile collided with the truck and trailer of the defendants as aforesaid, injuring and damaging the plaintiff," etc.

These complaints allege negligent operation of the truck as well as the trailer, and that the negligent operation of both resulted in injuries to the plaintiffs, and a trial was had upon these issues. By returning general verdicts awarding damages to the plaintiffs, Davis and Barr, the jury in each case impliedly found that both truck and trailer were at the time of the accident being operated negligently and that the negligent operation of the truck, as well as the trailer, contributed proximately to the injuries complained of and to the damage of the plaintiffs in the amounts awarded. 24 Cal. Jur. 893.

[2, 3] The general indemnity provisions of the policy are contained in sections A and B thereof, and are to the effect that the appellant American Indemnity Company does insure the plaintiff against loss from such of the perils as are described in the "Schedule of Perils," contained in the policy for which a specified premium charge is indicated, within the limits hereinbefore stated. Liability for injury to others is one of the perils so indicated and is defined in the schedule of perils as the "Legal liability imposed by law upon the Assured for damages on account of bodily injuries * * * caused by the ownership, maintenance or operation of the automobile described herein, accidentally suffered or alleged to have been suffered while this policy is in force," etc.

In addition the policy contains a provision embodied in the general conditions under the caption "Indemnity For Loss," which reads: "The Company hereby agrees to defend in the name of and on behalf of the Assured any suits, even if groundless, brought against the assured to recover damages on account of such happenings as are provided in the Property Damage and Liability Peril Clauses herein, and to pay irrespective of the limits of liability herein expressed all costs taxed against the Assured in any legal proceedings defended by the Company, all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the liability limits herein specified, and the expense incurred for such first medical aid as shall be imperative at the time of any accident together with all the expense incurred by the Company growing out of the investigation of such an accident, the adjustment of any claim or the defense of any suit resulting therefrom. The Company reserves the right to settle or defend, as the Company may elect, any such suit or claim brought against the Assured, but it shall never, under any circumstances, be liable to the Assured for any failure, neglect, wrong judgment or lack of care or diligence of the company or any of its representatives, in failing or refusing to settle any such suit or claim. In no event and under no circumstances shall the Company's liability, either under this Policy or as agent or representative of the Assured, exceed the limits of liability set out in Paragraphs C-5 and C-6 of the Perils insured against on Page 1 of this Policy."

Upon the happening of the accident on December 2, 1930, the said appellant was immediately notified, and, after an investigation of its own, denied liability. From this time on it did nothing by way of advising the insured in regard to the defense or settlement of the claims of Davis and Barr, until about April 15, 1931, when, in consonance with its denial of liability, it refused to accept a copy of the summons and complaint which were served on the plaintiff on that date; its superintendent of claims stating that the company was not interested. In the case of Interstate Casualty Co. v. Wallins Creek Coal Co., 164 Ky. 778, 176 S. W. 217, L. R. A. 1915F, 958, wherein, as here, the insurer in its policy reserved the right to exercise complete control over any suit filed against the insured for damages, it was held that inaction on the part of the insurer and refusal to advise or direct the insured as to what it wished done with respect to pending litigation for a period of approximately three months consti-

tuted in effect a denial of its liability, and warranted the insured in proceeding on the assumption that the insurer would further refuse to recognize liability. Not only does such an implied denial of liability appear in the case before us, but the appellant expressly denied its liability and refused to defend.

In determining whether or not the appellant was bound to defend, its denial of liability and refusal to defend, based upon its own investigation of the facts in the case, are to be disregarded. The language of its contract must first be looked to, and next the allegations of the complaints in each action for damages against the insured. The complaints clearly allege damages resulting from an alleged negligent operation of the truck, and the policy in unmistakable language binds the insurer to defend every such action even though the same be groundless. Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540, 174 P. 110.

The denial of liability on the part of the insuring company and its refusal to defend the suits constituted such a breach of the contract that the insured was released from his obligation to leave the management thereof to it, and was justified in proceeding to defend on his own account. Greer-Robbins Co. v. Pacific Surety Co., supra; Antichi v. New York Indemnity Co., 126 Cal. App. 284, 14 P.(2d) 598; St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712; Butler Bros. v. American Fidelity Co., 120 Minn. 157, 139 N. W. 355. 44 L. R. A. (N. S.) 609. It is immaterial that the actions were defended by the other insurer; the appellant having refused to defend.

[4, 5] The law is well settled that, where one is bound either by law or agreement to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the suit and an opportunity to control and manage it. Butler Bros. v. American Fidelity Co., supra; citing Swansey v. Chace, 16 Gray [82 Mass.] 303; Kansas City M. & B. R. Co. v. Southern R. News Co., 151 Mo. 373, 52 S. W. 205, 45 L. R. A. 380, 74 Am. St. Rep. 545; Southern R. News Co. v. Fidelity & C. Co., 83 S. W. 620, 26 Ky. Law Rep. 1217; Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N. W. 698. This doctrine also finds support in the following California cases: Greer-Robbins Co. v. Pacific Surety Co., supra; Antichi v. New York Indemnity Co., supra; Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 258 P. 602. The judgment recovered in such a case is the mode by which the insured proves to the insurer that the intrinsic character of the accident was such that he was liable for the consequences of it, and the judgment is conclusive evidence that the insured was liable, and to the extent of the amount of the judgment. Butler Bros. v. American Fidelity Co., supra; Ross v. American Employers' Liability Ins. Co., 56 N. J. Eq. 41, 38 A. 22.

On the other hand, where there is no trial and no judgment establishing the liability of the insured, but a settlement of the litigation has been made, the question whether the liability of the insured was one which the contract of insurance covered is still open, as is also the question as to the fact of liability and the extent thereof, and these questions may be litigated and determined in the action brought by the insurer to recover the amount so paid in settlement. The settlement, or a judgment rendered upon a stipulation of such a settlement, becomes presumptive evidence only of the liability of the insured and the amount thereof, which presumption is subject to being overcome by proof on the part of the insurer. Butler v. American Fidelity Co., supra; St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., supra. We are, however, not confronted with any question of settlement or stipulated judgment in this case.

[6] The judgments establish the liability of the insured arising out of the operation of both the truck and the trailer, and are conclusive as against the insurer on each vehicle, but do not express the proportion of the liability which each insurer is obliged to meet.

[7] The peril insured against here is the liability of the insured arising out of injuries to another caused in whole or in part by the truck in the one case, and in whole or in part by the trailer in the other. In the case of injuries caused in part by either truck or trailer, a liability on the part of the insured would ensue and the insurance on the particular vehicle be called into operation. Where, as is alleged in the damage actions against the plaintiff, the same injuries are caused by the concurrent operation of the truck and trailer, and wholly by the two, the peril is the same as to each. In such a case the liability relates from the injury back through each instrumentality to the owner, or, stated in another way, when the owner through the media of two different instru-

mentalities inflicts injuries on another from which a liability arises against which he is insured as to each instrumentality, the operation of the instrumentalities being joint, as here, each is responsible for the whole of the damage caused, and the insurance on each may be applied to the satisfaction of the whole of the owner's liability. The situation is different from those cases where insurance is carried against the peril of loss by fire in one company and against the peril of loss by collision in another, or of some other peril in a separate company. In such cases the insurer becomes liable only for the loss occasioned by the particular peril insured against.

[8] The total liability of the insured on account of the judgments in the two damage actions amounted to $14,632.07. In the absence of other insurance, the American Indemnity Company would be liable to indemnify the insured in this amount on the one hand, and the Belt Casualty Company and Lloyds of London on the other. The assured, however, having contracts of insurance with different companies insuring against the same liability, the provisions of the policies relating to such situations must be looked to and the liability be apportioned according to the contracts.

The policy of the American Indemnity Company contains the following provision: "No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insurance be valid and/or collectible or not, covering such loss, which would attach if this insurance had not been effected; provided, if the assured carries a policy of any other insurer covering concurrently a claim covered by this policy under property damage and/or liability peril clauses herein he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of such valid and collectible concurrent insurance."

The provisions of the policy of the Belt Casualty Company with reference to other insurance are as follows: "If the named assured has any other insurance applicable to a claim covered by this policy, the company shall not be obliged under this policy to pay a larger proportion of or on account of any such claim than the limit of the Company's liability under this policy, applicable to such claim, bears to the total corresponding limits of the whole amount of valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against the claim also covered by this policy, the said other person, firm or corporation shall not be entitled to protection under this policy."

The policy with Lloyds of London provides:

"It is expressly agreed that the underwriters hereon shall be liable only for the excess of loss over $5000.00 ultimate net loss in respect of any one person and $10,000.00 ultimate net loss in respect of each and every accident or series of accidents arising out of one occurrence and then only up to $45,000.00 of excess in respect of any one person and $90,000.00 excess in respect of each and every accident or occurrence, it being understood, however, that there is no limit to the number of accidents for which claims may be made hereunder, provided such accidents occur during the currency of this policy.

"It is further understood and agreed that liability under this policy in respect of any accident or occurrence shall not attach unless and until the primary insurer shall have admitted liability for the first $5000.00 in respect of any one person or $10,000.00 in respect of any one accident under its said policy, or unless or until the assured has by final judgment been adjudged to pay the said sum of $5000.00 in respect of any one person or $10,000.00 in respect of any one accident. * * *

"It is the intention of the parties that under this policy the assured is to be indemnified up to $45,000.00 in respect of any one person and $90,000.00 in respect of any one accident as aforesaid, against all liability in excess of the liability of the primary insurer under its said policy."

By reason of the fact that the American Indemnity Company insured against the liability concurrently with the Belt Casualty Company within the limits of its policy, the policy of Lloyds of London never attached and its insurance never became collectible insurance within the meaning of the other two policies. This leaves only the policies of the American Indemnity Company and of the Belt Casualty Company to be considered, each of which provides that the liability thereunder shall be that proportion of the total liability which the limits of the policy bears to the whole amount of such collectible insurance. The trial court applied this method in apportioning the liability, which method we hold to be correct.

[9] The plaintiff not being aggrieved by the judgment is not in a position to prosecute his appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

3 Cal.App.2d 642

PEOPLE v. CONNOR.

Civ. 2594.

District Court of Appeal, Second District, Division 1, California.

Jan. 16, 1935.

Hearing Denied by Supreme Court Feb. 14, 1935.

Criminal law ⇐998

Conviction on four counts of robbery in first degree and of other crimes, from which no appeal was taken, could not be vacated on motion some two years after entry thereof on ground that commitment failed to state that defendant was armed with a deadly weapon when robberies were committed and that the exact term of sentence could not be determined (Pen. Code, §§ 213, 1168 (b).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Frank Connor was convicted of robbery, and from an order denying defendant's motion to vacate a judgment against him, defendant appeals.

Affirmed.

Frank Connor, in pro. per.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From the record herein it appears that defendant was convicted on each of four counts of the crime of robbery of the first degree, as well as of each of the additional crimes of grand theft, and unlawfully having in his possession a firearm, etc. The fact also was adjudged that theretofore defendant had suffered a conviction of a felony, to wit, robbery, and had served a term of imprisonment therefor. No appeal was taken by defendant from the ensuing judgment; but more than two years after said judgment had been rendered, defendant presented to the trial court a motion to vacate such judgment on the ground, in substance, that it was indefinite and uncertain in that the term of imprisonment of defendant as provided in his commitment could not thereby or therefrom be ascertained. From an order by which such motion was denied, defendant has appealed to this court.

The crucial point presented by appellant is that because by the provisions of section 213 of the Penal Code the crime of robbery in the first degree is made punishable in the state prison by "not less than five years," and by subdivision (b) of section 1168 of the Penal Code the punishment for such offense is prescribed as follows: "For a person previously convicted of a felony either in this state or elsewhere, and armed with a deadly weapon, either at the time of his commission of the offense, or a concealed deadly weapon at the time of his arrest, ten years," and since the commitment in the instant case failed to state specifically that at the time when defendant committed the several crimes of robbery of which he was convicted he was armed with a deadly weapon, the exact term of his sentence could not be determined; and consequently that the judgment rendered against him was void.

Waiving the question of the legal right of defendant to appeal from the order here under consideration, it will suffice to state that, in principle, in each of several cases decided by the appellate tribunals of this state wherein the facts were analogous to those in the instant case, it has been decided that an order such as is herein presented for review should be affirmed. People v. Ramirez (Cal. App.) 33 P.(2d) 848; People v. Bayne, 136 Cal. App. 341, 28 P.(2d) 1068; People v. Rhodes, 137 Cal. App. 385, 30 P.(2d) 1026; People v. Brown (Cal. App.) 36 P.(2d) 194.

It is ordered that the order from which the appeal herein is taken be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.



3 Cal.App.2d 557

PHILLIPS v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 8447.

District Court of Appeal, Second District, Division 1, California.

Jan. 14, 1935.

Rehearing Denied Feb. 13, 1935.

Hearing Denied by Supreme Court March 14, 1935.

Fixtures ⇐21

Whether sprinkler system, installed on property conveyed by quitclaim deed of realty only, was personal property or became real property by being affixed to realty, *held* immaterial in action against grantor for conversion thereof, where plaintiff retained all rights which he had in personal property before execution of deed.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by E. J. Phillips, doing business under the name and style of Phillips & Co., etc., against the Bank of America National Trust & Savings Association. Judgment for plaintiff, and defendant appeals.

Reversed.

Joseph Musgrove, Fred O. McGirr, Edmund Nelson, and G. L. Berrey, all of Los Angeles, for appellant.

Arnold Praeger, of Los Angeles, for respondent.

YORK, Justice.

Judgment was rendered against the defendant upon the theory—which was the alleged cause of action—that it had unlawfully converted a sprinkler system to its own use, and the judgment was rendered by the trial court solely upon that ground.

The finding made by the trial court to that effect is not sustained by the evidence, and the matter discussed at great length in the briefs, as to whether the sprinkler system, which was installed on the property in question, was personal property or had become real property by reason of its having been affixed to the realty, becomes immaterial, since the form of deed given by defendant, by which it divested itself only of such title as it actually owned, was a quitclaim deed of the realty only, and all the rights which the plaintiff had in the personal property—if it was personal property—before the execution of the deed, were retained by him, unaffected by the making of the deed. The alleged conversion has no foundation in the evidence; and none is claimed, except by reason of the execution of said deed.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.



3 Cal.App.2d 691

DE MARTINI et al. v. SCAVENGER'S PROTECTIVE ASS'N et al.

Civ. 9625.

District Court of Appeal, First District, Division 2, California.

Jan. 18, 1935.

Hearing Denied by Supreme Court March 18, 1935.

Corporations ⇐151

Nonworking stockholders of scavenger corporation *held* entitled to full share of corporate profits distributed as wages to working stockholders since directors' resolution that no wages should be paid stockholders able but refusing to work did not authorize directors to term profits wages so as to deprive any stockholder of right thereto.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Angelo De Martini and others against the Scavenger's Protective Association and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

O'Gara & De Martini, of San Francisco, for appellants.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

STURTEVANT, Justice.

The plaintiffs sued to recover their portions of dividends and to obtain an injunction prohibiting certain wrongful practices. In deciding the case, the trial court made very full and complete findings. From the judgment entered thereon, the defendants have appealed.

The brief of the defendants proceeds as though they were making their contentions in the trial court, but as that court made full and complete findings, they are controlling in this court in so far as they are material and are supported by competent evidence. It is necessary therefore to briefly summarize the findings.

The Scavenger's Protective Association is a corporation organized under the general laws of the state of California and engaged in the business of collecting garbage and refuse in San Francisco. It has an authorized capital stock of $500,000 divided into 5,000 shares of the par value of $100 each. Stock has been issued to 169 stockholders, each one of whom is the owner of 20 shares. The natural persons named as defendants are the directors. De Martini, Bevalaqua, Chiappellone, and Elsie Cavagnaro, as executrix of her husband's estate, are stockholders, but not employed by the association. Each of them owns 20 shares.

"III. That at all times mentioned in said complaint approximately 160 stockholders of said defendant corporation have been employed either continuously or from time to time as scavengers and collectors of garbage

and money, and for the performance of other services and duties for said defendant corporation. That each and every one of said stockholders so employed by said defendant corporation at all times mentioned in said complaint as scavengers or collectors of garbage was so employed at a wage of $6.50 for each day of work performed. That said defendant also employed certain stockholders from time to time to collect money, and every such stockholder while so employed was paid a wage of $1.50 for each working day upon which such stockholder did not work as a scavenger or collector of garbage. That said daily wage of $6.50 and no more was, at all times mentioned in said complaint, a reasonable wage to be paid to each of said stockholders for each day of work as scavengers, and the said wage of $1.50, and no more, is a reasonable wage for each such stockholder employed as a collector of money for each working day upon which such stockholder does not work as a scavenger. That at all times mentioned in said complaint said defendant corporation has earned net profits, after the payment of all current expenses, in amounts varying from month to month. That said defendant corporation did, at all times mentioned in said complaint, monthly pay to all of its stockholders, except said plaintiffs, dividends from and out of said profits and earnings of said corporation and has distributed said earnings and profits in the following manner:

"At the expiration of each calendar month at all times mentioned in said complaint there has been paid to each of the said stockholders in the employ of said corporation the sum of $316, less $6.50 for each working day in each such month that the stockholder did not work in the employment of said defendant corporation, except in those cases where such stockholder was at the time employed as a collector of money, in which case the said defendant corporation paid to such last-mentioned stockholders the sum of $316 less $5.00 for each working day that each such stockholder did not collect garbage. That at all times since the filing of said complaint the sum of $6.50 and no more, was and is, a reasonable daily wage to be paid to said stockholders employed by said defendant corporation as scavengers and collectors of garbage, and the sum of $1.50 and no more, was and is a reasonable wage per working day for said stockholders employed in the collection of money when not collecting garbage. That each and all of said monthly distributions and payments to each of said stockholders in the employ of said defendant corporation were dividends to the extent that they exceeded $6.50 for each day of work of such stock stockholder as a scavenger or collector of garbage during the calendar month next preceding such payment, and $1.50 for each working day while such stockholder was a collector of money but did not work as a scavenger, although such excess payments were made to such stockholders under the guise and upon the pretense that the same were, in fact, payments of compensation and salaries due to the stockholders of said defendant corporation, in truth and in fact such payments monthly were not, and never were, paid to said stockholders, or any of them, as salaries or earnings, but wholly without regard to or reference to any services performed by any such stockholders for said corporation, and in many instances in the absence of the performance of any services whatever. That each such monthly distribution and payment to each of said stockholders in the employ of said defendant corporation in the sum of $316, less $6.50 multiplied by the number of working days in the month preceding such payment, has been paid from and out of the earnings of said corporation and constitute dividends. That the said working days in each calendar month were and are all days except Sundays. That the amounts so distributed and paid to each of said stockholders in the employ of said defendant corporation during the said period of time as dividends, and the dates of payment thereof, are hereinafter specified as follows: (Here follow amounts and dates.)

"IV. That neither the plaintiff Angelo De Martini nor the said plaintiff Pietro Bevalaqua has been in the employ of said defendant corporation since the 14th day of March, 1929, and that said defendant corporation has not paid to said plaintiff Angelo De Martini or said plaintiff Pietro Bevalaqua the said dividends so distributed and paid to its stockholders in its employ since said last-mentioned date, or any part thereof, excepting only that said defendant corporation did pay to said plaintiff Angelo De Martini in April of 1929 the sum of $95.50, and no more, and did pay to said plaintiff Pietro Bevalaqua in said month of April, 1929, the sum of $95.50, and no more. That said plaintiff Elsie Cavagnaro, as executrix of the estate of Philip Cavagnaro, deceased, has not been in the employ of said defendant corporation at any time whatsoever, and that said defendant corporation has not paid to said plaintiff Elsie Cavagnaro, as executrix of the estate of Philip Cavagnaro, deceased, the said dividends

so distributed and paid to its stockholders in its employ since the 31st day of May, 1929, or any part thereof. That said plaintiff Louis Chiappellone has not, since the 31st day of March, 1930, been in the employ of said defendant corporation, and that said defendant corporation has not paid to said plaintiff Louis Chiappellone the said dividends so distributed and paid to its stockholders in its employ since said last-mentioned date. That said plaintiffs are entitled to receive from and be paid by said defendant corporation the sums hereinafter set opposite to their names respectively, the said sums being the aggregate of the sums so distributed and paid to each stockholder employee of said defendant corporation, but not paid to said plaintiffs: (Here follow names and amounts.)

"V. That in addition thereto said plaintiffs, and each of them, are entitled to interest as follows: (Here follow names and amounts.)" In addition to the amounts distributed under finding No. III, $5 per share on each share of stock outstanding was declared on April 1, 1929, July 1, 1929, and October 1, 1929. To the plaintiffs De Martini, Bevalaqua, and Cavagnaro $100 was paid April 1, 1929, July 1, 1929, and October 1, 1929, but no more since the 14th day of March, 1929. But to plaintiffs Elsie Cavagnaro and Louis Chiappellone no additional payments have been made. That such distributions will continue unless enjoined. That after the commencement of the action the defendants continued the same practice down to the date on which an accounting was had. That they threatened to and will unless restrained continue the same practice.

After making the foregoing findings, the trial court appointed a referee to state the accounts. When his report came in, the court made additional findings as to amounts paid and amounts due but not paid to the plaintiffs. Thereupon it ordered judgment in favor of each as to the balance so found due to each of them.

No claim is made that any error in calculations was made. Except as hereinafter noted, no claim is asserted that any provision contained in the articles of incorporation, the bylaws, or in any formal contract authorized the practice followed by the defendant. However, they strenuously contend that this entire proceeding is an unwarranted attack on a resolution adopted by the board of directors on February 5, 1929, and ratified by the stockholders on February 7, 1929, by vote of 102 to 23. The resolution provided:

"Resolved that the wages of all boss scavengers who perform services for this corporation shall, on and after the adoption of this resolution, be set at three hundred and sixteen ($316.00) dollars per month, and be it further

"Resolved that all boss scavengers who are absent from work shall suffer a deduction of only five ($5.00) dollars per day for each day when such boss scavengers are absent from work in the event that said boss scavengers so absent shall, during the months, attend to the collection of money from customers, and that such boss scavengers who are absent from work, but who do not perform such collection services, that is to say, who do not collect the money due from customers on the route, shall suffer a deduction of six and 50/100 ($6.50) dollars per day, but unless such absentees shall present either a certificate of sickness or be given a leave of absence by the board of directors or the president of said corporation, they shall suffer a deduction of full and complete wages for each day absent based upon the monthly wages of three hundred and sixteen ($316.00) dollars per month, it being the purpose of said deduction to provide for the employment of men as substitutes to assist in the collection of garbage in the place and stead of the absentee to such an extent and to such a degree as said substitutes may be able, it being further understood that the said boss scavengers so absent from work, shall use their best endeavors upon their return to work, to make up the loss in business and work incurred by the necessity of hiring said substitutes who are unable to perform the full amount of work ordinarily performed by boss scavengers, and be it further

"Resolved, however, that no wages at all shall be paid to any boss scavenger who is able to work but refuses to work." Having quoted it in full the defendants state in their brief:

"The appellants contend, first, that the foregoing resolution was intended to be effective as a rule or order fixing the rate of wages of the working stockholders employed by the defendant corporation at $316.00 per month; second, that the Board of Directors had full power and authority to adopt and enforce the terms of said resolution; third, that the resolution when accepted by the stockholders constituted a contract and operated as a promise binding on the corporation to pay the wages specified when the stockholders complied with its condition; fourth, that the

corporation had full power to enter into the contract to pay said monthly wages to its working stockholders in return for their services, even if said wages exceeded the reasonable value of such services, especially because of its possession of cooperative features; and fifth, that the Superior Court was not authorized to limit, restrict or condition the corporation's contract to the alleged reasonable value of $6.50 per day in the case of stockholders working as scavengers or of $1.50 per day in the case of stockholders working as collectors of money, or to make a new contract of any kind for the corporation or to award judgment to plaintiffs for dividends which were never declared or intended by the corporation, because the parties to such contracts are protected by the provisions of Article I, Section 1, of the Constitution of California."

Except as said resolution by its terms, or by its application by the board of directors, purports to authorize the distribution of profits among a part of the stockholders and not among all, we do not understand the plaintiffs make any objection to it. There is not a particle of evidence that the plaintiffs ever made any contract waiving their rights to share in the profits. The resolution, as found by the trial court, was in effect a continuing order for the distribution of the profits and, to that extent only, was involved in this action. We are not asked to hold, and we are not holding, that a valid contract of employment by a corporation may not be made which provides for a distribution of the profits to its stockholding employees. But, by merely calling the distribution wages, a corporation may not so distribute the profits as to deprive any stockholder of his rights thereto. The entire subject came before the Supreme Court of Washington in the litigation over the affairs of Olympia Veneer Company. In Nichols v. Olympia Veneer Co., 135 Wash. 8, 236 P. 794, at page 797, the court said: "Ordinarily courts will not interfere with the sound judgment of the officers of a corporation in determining the wages to be paid; but, in a suit brought by a protesting stockholder owning stock in a company, which is of no tangible value unless dividends are paid upon it, we have no hesitancy in saying that, when the amount allowed to stockholder employees becomes grossly disproportionate to the amount paid to hired employees in the plant, then the attempted action on the part of the trustees, called by whatever name, is in reality a distribution of dividends in which every stockholder is entitled to share." When the same case again came before the court, Nichols v. Olympia Veneer Co., 139 Wash. 305, 246 P. 941, at page 943, 48 A. L. R. 504, Mr. Justice Fullerton writing the opinion said: "The appellant's right is to share in the profits of the corporation. As a stockholder she is entitled to a just proportion of all the earnings of the corporation that may justly be classed as a division of the profits, whatever may be the form adopted for their distribution. The respondent is permitted to select the manner, and, if it chooses to do so in the form of wages, it is acting within its rights. But by calling the distribution wages it cannot deprive the appellant of her just proportion thereof. It cannot, by paying excessive or extravagant wages to the working stockholders, deprive the appellant of her share of the profits of the business." In that case, as in this, the board of directors had passed formal resolutions. In that case, as in this, it was shown that the resolution was but an attempt to call the payments wages although, in truth and in fact, the payments were only in part wages and the balance was a distribution of the profits. The general principle enunciated in the Veneer Cases has been stated in numerous cases. Cliffs Chemical Co. v. Wisconsin Tax Commission, 193 Wis. 295, 214 N. W. 447; People v. Gilchrist, 209 App. Div. 120, 204 N. Y. S. 509, 513; Id., 220 App. Div. 362, 221 N. Y. S. 683; Lorimier, Greenbaum Co. v. Gilchrist, 212 App. Div. 733, 209 N. Y. S. 633, 635; United States v. Philadelphia Knitting Mills Co. (C. C. A.) 273 F. 657, 659.

The defendants also assert that the trial court did not make a finding on the "purpose" of the defendants in adopting the resolution hereinabove set forth. It is sufficient to state that the trial court made a finding on every material issue and other findings were not necessary.

We find no other point that requires discussion.

The judgment appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

2 Cal.2d 235

PEOPLE v. DORLAND.

Cr. 3801.

Supreme Court of California.

Dec. 31, 1934.

1. Criminal law ⇐1144(½)

Every presumption must be indulged in favor of judgment after conviction.

2. Criminal law ⇐1159(2)

Although verdict may be set aside where entire evidence is so improbable and incredible as to amount to no evidence, such improbability must amount to incredibility and must very clearly appear to justify reversal.

3. Criminal law ⇐742(1)

Inconsistencies in testimony of witness are for jury.

4. Assault and battery ⇐92
Infants ⇐20

Evidence *held* to support conviction for assault with deadly weapon upon person of boy and for violation of Juvenile Court Law by doing acts tending to cause boy to become a delinquent person.

5. Witnesses ⇐374(2)

In prosecution for assault upon boy and for violating Juvenile Court Law, evidence of conversation between wife of defendant and father of boy in which defendant's wife asked boy's father to drop charges and intimated that defendant's family would take care of defendant by putting him into asylum, or in some other manner, *held* admissible as affecting interest or bias of witness.

6. Criminal law ⇐1169(2)

In prosecution for assault upon boy and for violating Juvenile Court Law, error, if any, in admitting evidence of conversation between defendant's wife and boy's father, in which defendant's wife asked boy's father to drop charges and intimated that defendant's family would take care of him by putting him into asylum, or in some other manner, *held* harmless, in view of entire evidence.

In Bank.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Robert E. Dorland was convicted of assault with a deadly weapon and of a violation of the Juvenile Court Law, and he appeals.

Affirmed.

For prior opinion, see 32 P.(2d) 1097.

Edgar A. Luce, of San Diego (Fred Kunzel, of San Diego, of counsel), and Stearns, Luce, Forward & Swing, and Wright, Monroe, Thomas & Glenn, all of San Diego, for appellant.

Thomas Whelan, Dist. Atty. (by John T. Holt, Deputy Dist. Atty.), and Gordon Thompson, Asst. Deputy Dist. Atty., all of San Diego, for the People.

PER CURIAM.

This appeal, being within the original appellate jurisdiction of the District Court of Appeal, was heard and determined in the Fourth Appellate District Court of Appeal, Presiding Justice Barnard writing the opinion of that court.

On petition for hearing, an order of transfer was made to this court. In granting the petition for hearing, we were influenced largely by the unusual nature of the offense itself, the character of the parties involved, and the manner in which the offense was perpetrated. An important question of law also appeared to be involved as to whether prejudicial error was committed by the district attorney in asking the wife of appellant, on cross-examination, if upon her visit with her brother on the day following appellant's arrest to the home of the parents of the boy against whom the act of delinquency is alleged to have been committed, she did not request the father of said boy to drop the charges and give assurances, if he consented to do so, that the family of appellant would care for the appellant by placing him in a sanatorium or an asylum. It was made to appear that she had talked the matter over with the appellant's family. The inference to be drawn, being the subject-matter of the foregoing question, was that the family had agreed upon such a plan.

We have given full consideration to this assignment of error, as well as to the other assignments urged by appellant, and we have been compelled to conclude that the wife of appellant having been called as a witness on behalf of her husband, her activity in attempting to weaken or break down the prosecution by persuading or inducing those most directly affected by the wrong committed to relax their efforts or use their influence to have the case dismissed, placed her on the same level with all other witnesses in the case, and that her interest was to be considered by the jury in the same manner as would the interest of any other witness in the case. Of course, whether the acts of a wife, under the circumstances of the case, were committed with a view of willfully attempting to ob-

struct justice, or whether the result sought to be accomplished was committed in good faith and with the conviction that the charges were false, would be an element that should enter into the determination as to what credit the testimony of the witness should be given. The bona fides would be a question for the jury. Three or four persons testified to the proposition made by the Dorlands to the effect that the appellant would be taken care of in a public or private institution, if the case should be dropped, while the appellant's wife and brother deny that any such proposition was made.

The opinion of the District Court of Appeal fully meets the objection made to the admissibility of said testimony. The trial court took extraordinary pains to, and did repeatedly admonish the jury, both by oral and written charges, that said testimony was limited exclusively to the activity or interest as shown by said persons in attempting to induce the father of the boy to abandon prosecution of said case.

This action has received meticulous consideration by the trial court, by the District Court of Appeal, and by ourselves. We have read the entire record, consisting of five hundred pages of testimony taken both at the trial and upon the application of appellant to be released on probation. The trial court was exceptionally indulgent and considerate of every legal right to which the appellant was entitled. It was the opinion of these two courts, after a trial and examination of a record which presents a most unusual course of human conduct, that the jury's verdict could not be disturbed. This court, having considered every question which no doubt disturbed the judicial poise of said two courts, finds itself in a like frame of mind.

The fourteen year old boy, victim of the alleged immoral acts, was assailed by the defense from every conceivable angle. He was examined and catechized by psychiatrists, physicians, and lawyers. His former teachers, officers of the school board, and persons who had known him from early childhood were called as witnesses as to his mental and moral qualities. He stood the test to the satisfaction of the jury, and we may add that the evidence tending to show a normal, moral American boy outweighed any suggestions made to the contrary. It is true that some of the acts which he testified to as having been committed by the appellant almost challenge human credibility, but this may be said generally of most all persons who commit unnatural sexual acts. There is no rule of logic by which these acts may be tested. There are but few serious contradictions in the boy's testimony.

The appellant's attempt to account for his presence in the neighborhood and his reason for courting the company of a fourteen year old boy are not impressive. He hailed the boy, he claims, to gain information about persons in a locality in which he was a stranger and about which matter the boy would probably have no knowledge. He at first stated that he was attempting to locate homestead No. 25, the location of which he afterward admitted he knew was not situate in the neighborhood in which he was making inquiry. He was on the highway at the time he hailed the boy, within sight of and but some 300 feet from an oil and gas station, where he could have made inquiry of three or four men, who would have been more likely to have given him the desired information concerning land ownership than would the boy. During all of his stay of approximately one hour and a half in the locality in question, he made no inquiry of a single other person for the information which he says he was in search of, and he was in the boy's sole company during all of said time. This, too, in view of the fact that he testified that, after the boy had been in his company but a short while, the boy made reference to lustful subjects and he, a man of thirty-five years, did not reprove the boy, but remained in his company. The appellant utterly failed to give any satisfactory reason why he sought the boy's company or why he was in the particular locality, with no apparent objective, at about the time school was dismissed.

When brought into the presence of the boy and the officer, he listened to the boy relate a direct accusatory account of appellant's mistreatment of him and, when the boy concluded, he was asked by the officer if he wished to interrogate the boy as to his accusatory charges. He declined to admit or refute the charge. His only anxiety was as to the boy's ability to identify the gun.

[1] There are other facts tending to corroborate the testimony of the boy. Of course, corroboration is not essential to an affirmance of the judgment. Every presumption must be indulged in favor of the judgment after conviction. This is the rule in criminal appeals. The jury accepted the testimony of the prosecution's witnesses as against the accused and his witnesses, and there is no legal reason why this court should disturb its findings.

The case is very fully and fairly reviewed by the District Court of Appeal. Every mate-

rial objection raised against the judgment has been fully and ably considered. Without further duplication of the facts or discussions of the law, we herewith adopt said opinion as our opinion in words and figures as follows:

The defendant was charged with an assault with a deadly weapon upon the person of Elmer Perigo and, in a second count, with a violation of the Juvenile Court Law alleged to have been committed by doing certain acts with the said Elmer Perigo, a boy of the age of 14 years, and causing him to do certain acts which would cause and manifestly tend to cause him to become a delinquent person. He was found guilty by a jury on both counts and was sentenced to serve a year in the county jail on each count, the sentences to run concurrently. This appeal is from the judgment and from an order denying a motion for a new trial.

The appellant, who was about 35 years old, lived on a homestead which he was improving near Temecula, in Riverside county. His wife taught music in San Diego and in Pasadena and usually spent about two days of each week at the homestead. On Tuesday, October 31, 1933, the appellant drove to Temecula for some supplies, returning about noon. His wife missed certain things which she had ordered and searched the car for them without success. At his wife's request the appellant started to Temecula about 2:30 p. m. to secure the missing supplies. As additional reasons for the trip the appellant testified that he desired to take a ride, since his wife was gone with the car during most of the week, that he wanted to look for a homestead for a man named Newman, who was employed by him, and for which they had both made a search a week before, and that he desired to locate a road which ran into Temecula canyon.

The testimony of the appellant and of the prosecuting witness is in agreement as to the following: Shortly after 3:30 on that afternoon, while he was driving south along a paved road that runs between Temecula and Fallbrook, the appellant came upon the boy, Elmer Perigo, who was on his way home from school. The boy got into appellant's automobile and they proceeded south toward Fallbrook. Somewhere from 400 to 700 feet south of the point where the boy entered the car a dirt road leads off to the left and up over a hill, there being an oil station at the point where this road leaves the paved highway. The boy lived over the hill on this road and about a mile and a half from the oil station. The appellant turned to the left on this dirt road and, in so doing, passed within a few feet of the oil station. When he had proceeded about 400 feet along this dirt road leading uphill to the boy's home, the appellant turned to the right and went down an old stage road which had long been overgrown but which had recently been cleared off by the "C C boys." The appellant had gone down this old stage road with Newman about a week before when they had searched, without success, for a homestead. On the occasion here in question the appellant drove down this road a distance of about three miles, turned around and came back to the beginning of this road, and then turned to the right toward the boy's home. This road was narrow and upgrade and the boy got out of the car at a point which he told the appellant was about a half mile from his own home. The appellant turned around by entering a driveway which led to a house and then backing into the road. He then proceeded back to the paved highway and went on toward Fallbrook.

The boy testified that he looked at the license number as the car turned around, that he wrote the number on the ground two or three times so that he would not forget it, and that he then put the number down on a piece of pasteboard which he found by the roadside. Although his father scolded him when he returned home for being in the car, the boy told his father nothing at that time of what had occurred and did not tell any one until the next Friday. The next Friday afternoon he reported the incident to a traffic officer, without giving any details, and that night he told the full story to his brother and to his father, and later to deputies from the sheriff's office. His story as related on these occasions was essentially the same as that related on the witness stand. He gave the officers the number of the appellant's automobile, described the appellant and how he was dressed, and described the gun which he said had been used. He first described this gun as having a white barrel and a black handle and then as one that was nickel-plated with a black handle. A revolver answering this general description was later found in the appellant's house on the homestead. The appellant was arrested on the night of November 10, and later that night was confronted with the boy, whose story was repeated to him.

While the appellant admits giving the boy a ride on this occasion and agrees with the boy's statement as to where they went and where the boy got out of the car, their testimony is directly conflicting as to what oc-

curred at the time the boy got into the car and what occurred on the old stage road at the point where the appellant turned around. The boy testified that shortly after 3:30 o'clock on this afternoon he walked from the schoolhouse to the paved highway with another boy named Robert Boren; that as they arrived at the highway Boren started north and he started south; that almost immediately after he left Boren the appellant came along in his car and stopped; that the appellant asked him if he knew where a man named Alexander lived; that he walked over to the side of the car and replied that he did not know any one around there by that name; that the appellant immediately stuck a gun in his face and told him to get in the car or he would shoot him; that he had the gun in his right hand but did not reach outside of the car, although he held it above the door; that he did not see a gun when the appellant first spoke to him and that he must have had it lying on the seat; that when he got into the car he saw the gun in the appellant's left hip pocket; that as the appellant turned to the left around the oil station and onto the dirt road, he saw the man who ran the oil station, whom he knew well, and perhaps another man or two; that he did not see his father there; that as they proceeded down the old stage road they passed a boy whom he knew and also saw a man whom he knew working near a house; that he was frightened and afraid that the appellant would shoot him, but that he did not cry out or ask for help from any of the people he saw; and that as they proceeded down the old stage road the appellant made some immoral statements which need not be here repeated. With reference to the place on this road where the appellant turned around, the boy testified that the appellant stopped for what he thought was about twenty minutes. It would serve no useful purpose to recite the boy's story of what there occurred. It is sufficient here to say that the acts thus charged to the appellant, if committed by him, were entirely sufficient to justify his conviction upon the second count of the information. In this connection the boy testified that the appellant threatened to shoot him if he did not do as he was told, that he then saw the gun in the appellant's left hip pocket, and that at all times he was afraid the appellant would shoot him if he did not do as he demanded.

The appellant testified that the boy made some remarks of an immoral nature to him as they were going down the old stage road, denied that he had made any to the boy, denied all of the boy's statements as to what occurred at the point where they turned around, and testified that he turned his car around without stopping and proceeded back and to the point where the boy got out of the car. He denied the boy's statements about the use of a gun at the time the boy got into the car and testified that he did not have a gun with him on this occasion and that he had never carried one with him.

There was evidence that the boy's father was at the oil station when the appellant's car went by, that he recognized his son, although the boy did not see him, that he asked the station operator who it was the boy was with, that the station operator replied that he did not know, that he then asked two school children who came along, that they replied that it might have been the scout master, and that he gave the matter no further thought. There was also evidence that the boy attended a party at the schoolhouse that night, but told no one there about these occurrences. The boy's father testified that during that night the boy talked in his sleep, that when he went into the room the boy was saying, "Oh don't kill me, don't kill me," that when he came in the boy roused and said he was all right, and that such a thing had never occurred before. The appellant sees in this only evidence that the boy had eaten too much at the party.

[2] The main contention here made is that the evidence is legally insufficient to support the verdict, in that the boy's statements are so inconsistent and his evidence so inherently improbable as to be unworthy of any belief. While it is conceded that the testimony of the prosecuting witness, if believed, is sufficient to support the verdict, it is contended that the same is without corroboration and is in itself so improbable as to furnish no support therefor. While it has been held that a verdict may be set aside where the entire evidence is so improbable and incredible as to amount to no evidence at all, the rule is that such improbability must amount to incredibility and must very clearly appear in order to justify a reversal. People v. Weaver, 123 Cal. App. 347, 11 P.(2d) 69; People v. Niino, 183 Cal. 126, 190 P. 626; People v. Willard, 150 Cal. 543, 89 P. 124; People v. Fleming, 166 Cal. 357, 136 P. 291, Ann. Cas. 1915B, 881; 8 Cal. Jur. 590, and cases there cited.

[3, 4] It is argued that it is improbable and unbelievable that an educated man of good family with previous good reputation, and who is happily married, would do the acts attributed to him by the boy; that such a man would use a gun in daylight in such

proximity to an oil station where there were other people at the time; that such a man would, after doing such acts, drive toward the boy's home instead of fleeing at once; that a boy would, under such circumstances, refuse to do the first thing requested of him and then accede to the second command; and that a boy of that age, after such an experience, would not immediately report the matter to his parents. It is further urged that the boy's story was definitely proved false by the fact that he testified that he did not see a scar on the appellant's body when a photograph, which was introduced in evidence, shows a scar on the appellant's groin. Not only was this last matter one for the jury, but the photograph rather clearly indicates that this scar would probably not be seen under the circumstances narrated by the boy. While it is always hard to believe that a man of previous good standing will commit such an act, experience demonstrates that this, in itself, cannot be taken as conclusive. It is entirely possible and not improbable that such a person might consider that he was taking less chance of being reported by taking his victim to the vicinity of his home than by leaving him several miles away. There are many reasons which might impel a boy, under such circumstances, to be slow in reporting such a matter to his elders, and the records of such cases show that this frequently happens. The most improbable part of the boy's story is that portion relating to the use of a gun at the time he entered the appellant's automobile and in the fact that he did not appeal for help as they passed the oil station and as they passed near to other people. While this portion of the story contains an element of improbability it is not impossible that some such thing could occur. Under the circumstances as related by the boy the gun could not have been seen by any one else. A boy of fourteen might not realize how easy it would be to get help at the oil station and he might be too frightened to think and act quickly. There is one piece of evidence, which need not here be mentioned, which indicates that the boy was badly frightened while down on the old stage road. His talk in his sleep that night, though not conclusive, may well have been the result of a severe fright. The boy described the gun he said was used and one of that description was found in the appellant's home. While it may be true, as argued, that many people have guns of this general description, the fact is not without its significance and the appellant, after his arrest, expressed particular interest in whether the boy could identify the gun. The boy's story as told to the officers, as told in the presence of the appellant after his arrest, and as told on the witness stand, was clear cut and, in the main, unshaken by a most thorough and grueling cross-examination at the hands of exceedingly able counsel. It is true that the boy testified at the trial that as he passed the oil station in the appellant's car he saw the station operator and another man in an automobile, that he first reported the occurrence to a traffic officer and that, in telling of what occurred on the stage road, he told of the appellant using the contents of a cold cream jar, while at the preliminary hearing he had referred to this as a cold cream bottle, had said that he first told his brother and had testified that he saw no one at the oil station except a boy. These were the only inconsistencies which were developed in the boy's direct testimony, filling fifteen pages of the transcript, and in a cross-examination covering eighty-six pages thereof. Variances in statements as given at different times may indicate honest intentions on the part of the witness rather than the contrary, and the inconsistencies here pointed out were matters to be weighed by the jury and are far from sufficient to enable a reviewing court to upset the findings of a jury.

Not only was the boy's story unshaken in its essentials, but it finds support and some corroboration in other portions of the evidence. Before the defendant was located the boy described him to the officer, described the clothes he wore, described the gun, and gave the number of his automobile. While no good reason appears for the boy making up such a story about a man whom he had never seen before and who had merely given him a ride, it is argued that the boy had heard other stories of this nature, that his father undoubtedly severely reprimanded him for riding with a stranger, and that the boy undoubtedly exercised his imagination for the purpose of justifying such an action. Had he desired to thus justify himself, it would seem likely that he would have told the story at the time and not after the incident was presumably forgotten, and it is to be noted that he took down the number of the appellant's car immediately after he alighted therefrom, a matter which is most unusual and in no way explained on the theory that the appellant had merely given him a ride. We think some corroboration of the boy's story is also to be found in the inconsistent and improbable story told by the appellant and in his conduct when confronted by the boy.

A deputy sheriff testified that when he questioned the appellant about the boy's charges the appellant first stated that the boy hailed him and later that he stopped the boy and asked him where a certain person lived. Whether the boy hailed him first or whether he first stopped the boy, he insists that the boy asked him for a ride. He was heading south on the paved highway leading to Fallbrook and the boy would have no reason to believe that he was intending to leave that highway. It was only a few hundred feet to the oil station where a dirt road led off to the left and uphill to the boy's home. It seems unreasonable that the boy would expect him to take that narrow uphill road or that he would ask for a ride for those few hundred feet to the oil station. The appellant testified that he had intended going toward Fallbrook as he was looking for a road that led off to Temecula canyon and that when the boy asked him for a ride he told him he could not take him far and that the boy said he would get out when they came to his road. If the boy could have guessed that the appellant would leave the highway and then leave the dirt road within four hundred feet from the oil station, it seems unreasonable that he should have asked for a ride for this short distance, that when they arrived at that point and the appellant turned onto the stage road the boy would say nothing about leaving the road to his home, and that the appellant would not discover that this had occurred until he was on his way back and had again arrived at that point. Although the appellant says he had warned the boy he could take him only a short distance he left the highway almost immediately, left the other road almost immediately thereafter, and proceeded along an old little-used road without asking the boy whether or not he wished to continue in that direction. Why he left the highway and why he later left the other dirt road and took the old stage road is not satisfactorily explained anywhere in the evidence. The only explanation given seems so improbable as to add considerable support to the boy's story. He said that he was looking for a homestead for his employee Newman, for which they had looked the preceding week. Not only had he testified that his main purpose was looking for a road to Temecula canyon and that he intended going on toward Fallbrook in looking for this road, but he admits that he had driven down this old stage road with Newman the week before, at which time they were unable to find any homestead. There is evidence that that very morning he had seen maps and other information which disclosed that the homestead in which Newman was interested was not in that direction. He further testified that when he went down that road on this occasion he did not stop anywhere or make any inquiry as to any homestead. It is not a little strange that the appellant should stop this boy and inquire about certain parties who were supposed to know about this homestead and then, without making any inquiries elsewhere in the neighborhood, should proceed at once to this road which he had already learned did not lead to the desired homestead, and which he also knew was not the road to Temecula canyon of which he was in search when he met the boy. Under the circumstances, his explanation of why he took the boy on this side trip on this lonely road, over which he had gone the week before, is most unsatisfactory. It also seems strange that after telling the boy he could not take him far, he would not only take him farther from home, but upon returning to the point of digression would again go out of his way to take the boy nearly, but not quite, to his home. He explains his leaving the boy at this point by saying that the road was getting narrow and he desired to turn by going into a private driveway and backing into the road. No reason appears why he could not have made a turn in a similar way at the boy's home or why any possible desire to aid the boy in escaping punishment for tardiness could not have been better accomplished by taking him the rest of the way. There is also evidence that the boy did not get home until one and one-half hours after the appellant picked him up on the highway and that the boy's father had walked more than one and one-half miles during less than the time in which the appellant says he drove seven miles without stopping. While the latter is possible, it may be added to the other improbabilities appearing in the story as told by the appellant.

It further appears that while the appellant denied the boy's charges when first informed of them by the officers and again after a conference at which the boy was present, he had nothing to say when confronted by the boy and the boy's story in the presence of the officers and the boy's father. One of the officers testified that immediately following this incident he took the boy and the appellant into a separate room and there suggested that the appellant question the boy about his story, and that the only question then asked by the appellant was as to whether the boy could identify the gun. With reference to this occurrence, the appellant testified as follows:

"After that, Mr. Macomber took me into the sheriff's room with the boy alone, and at that time there was just the three of us in the room, Mr. Macomber, the boy and myself, and he asked me to question the boy, and I said, 'Well, how do you mean?' 'Well,' he said, 'Go ahead and ask him questions.' And I said, 'Well, I couldn't do that, it was not my place.' He said, 'All right, I give you permission to ask the boy questions.' And I hesitated, and felt that it wasn't my place to question the boy. It wouldn't do any good anyhow obviously, although I did ask him one question, I forget what it was, whether he was a city boy or not, but then I felt it wasn't my place to ask the boy any further and I told him I wouldn't question him any further. We then went out of the sheriff's room. Both before and after that I had denied several times that that thing had happened in any way."

We cannot help but conclude that any doubt that may have been left in the minds of the jurors by the testimony of the complaining witness must have been removed by the corroborating circumstances, by the improbabilities and inconsistencies in the appellant's account of his admitted trip with the boy, and by his conduct when brought into the presence of the boy after his arrest. The verdict is amply supported by evidence the credibility of which was for the jury and not to be determined as a matter of law. While there is an element of improbability in connection with the use of a gun in so public a place and with the failure of the boy to call for help, there is some corroborating evidence and it cannot be held that the incident is so impossible that the jury could not have believed it occurred, especially when considered in connection with the entire evidence. Since the sentences were made concurrent, no additional prejudice has resulted and the evidence is sufficient to support the verdict in its entirety.

It is next contended that the court erred in permitting certain questions to be asked of the appellant while on the witness stand with reference to a conversation between him and Newman which occurred the week before, while they were on the trip in search of a homestead. The appellant had testified in chief as to certain things that were said in this conversation and, on cross-examination, the court permitted more of the conversation to be brought out. Not only does no error appear, but the court sustained an objection to some of the questions asked and the matters permitted to be received in evidence could not reasonably be expected to have affected the result.

[5, 6] Error is assigned in the admission of evidence of a conversation between the wife of the appellant and the father of the complaining witness which occurred on the night after the appellant was arrested, in which the wife of the appellant asked the father of the complaining witness to drop the charges and intimated that the family of the appellant would take care of him by putting him into an asylum, or in some other manner, so that he could not further molest the boy. The witness testified that she had talked over the matter referred to in the conversation with the whole family, which would naturally include her husband. In any event, the evidence was received only as affecting the interest or bias of the witness and the court fully instructed the jury that the evidence was not received for the purpose of determining the opinion of the witness in the matter nor for the purpose of showing the truth of the particular facts stated in the conversation, but that it was limited to the matter of interest or bias which the witness might have in the case and that it was to be considered by them only for that purpose and only as affecting the credibility of the witness. We are of the opinion that the evidence was admissible for the limited purpose stated. People v. Mack, 14 Cal. App. 12, 110 P. 967; People v. Lee Ah Chuck, 66 Cal. 662, 6 P. 859; People v. Wong Chuey, 117 Cal. 624, 49 P. 833. It may be added that if the court's ruling were to be held erroneous it could not be held sufficiently prejudicial to require a reversal after a reading of the entire evidence.

The only other point raised is a claim of prejudicial misconduct on the part of the district attorney during his argument to the jury. Most of the matters complained of were well within the freedom of argument permitted under established rules. In others, the court instructed the jury to disregard the statements made. Nothing in this regard approaching reversible error is brought to our attention.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.

PURDY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

S. F. 15193.

Supreme Court of California.

Jan. 28, 1935.

Rehearing Denied Feb. 25, 1935.

1. Banks and banking ⇐136

Bank cannot under banker's lien, apply trust fund deposit to a personal indebtedness of trustees to bank (Civ. Code, § 3054).

2. Trusts ⇐212

If testamentary trustees had authority to borrow money for purpose of managing and conducting ranch held by them as trustees, their overdraft on bank account was obligation of trust estate (Civ. Code, § 2267).

3. Trusts ⇐212

Testamentary trustees holding ranch as trustees *held* to have implied power to bind trust estate by borrowing money needed to operate the ranch and avoid loss without first obtaining court order, and bank lending money to trustees for such purpose was not, in absence of bad faith or collusion, required to ascertain whether such funds were applied to purposes of trust (Civ. Code, §§ 2244, 2267).

4. Banks and banking ⇐136

Where testamentary trustees who had implied power to borrow funds to operate ranch made overdraft on trust deposit account in bank, bank *held* authorized, under banker's lien, to apply deposited trust funds toward satisfaction of renewal note given for the overdraft (Civ. Code, §§ 2267, 3054).

In Bank.

Appeal from Superior Court, San Benito County; Maurice T. Dooling, Judge.

Action by Anita Christal Purdy against the Bank of America National Trust & Savings Association. Judgment for plaintiff, and defendant appeals.

Reversed.

For prior opinion, see 32 P.(2d) 672.

C. F. Lacey, of Salinas, and Louis Ferrari and Keyes & Erskine, all of San Francisco, for appellant.

Edward T. Houghton and Houghton & Houghton, all of San Francisco, for respondent.

PER CURIAM.

The plaintiff sued to recover a trust fund deposit of $7,296.19 applied by the predecessor of the defendant bank under its claim of banker's lien on a certain promissory note for $14,500 executed by the trustees of the trust property. The plaintiff recovered judgment, and the defendant appealed.

Alberto Trescony died testate in 1892. In 1894, pursuant to the provisions of his will, there was distributed to Julius A. Trescony and Robert F. Johnson, as trustees, a one-third interest in certain real property of the estate consisting of some 45,000 acres of grain land, the same to be held, invested, managed, and controlled for the benefit of Anita Christal, now Anita Christal Purdy, the plaintiff herein, and her brother Leo Christal, the children of a predeceased daughter of the testator, until they attained the age of thirty years. In 1895 the estate was partitioned and the trustees received title to 15,336 acres, the balance going to other issue of the testator including Julius A. Trescony, a son of the decedent and one of the trustees herein, and a daughter of the deceased, the wife of Robert F. Johnson, the other trustee. In 1895 the trustees opened an account with the Salinas City Bank, originally the defendant herein but since merged with the predecessor of the defendant, Bank of America National Trust & Savings Association, in the names of themselves as trustees for Anita Christal and Leo Christal. Between the years 1895 and 1908 an overdraft in the account to the extent of $13,836.97 was created. In January, 1909, the trustees opened a new account with the bank in their names as trustees for Anita Christal Purdy to which they caused to be charged the full amount of the overdraft. In September, 1909, they executed and delivered to the defendant their promissory note for $14,500, signed by themselves as trustees for Anita Christal Purdy and Leo Christal, which purported to cover the amount of the overdraft. On October 30, 1916, there appeared on the bank's books as a credit in said trustees' account the sum of $7,296.19. It is conceded that this represented funds belonging to the trust estate of Anita Christal Purdy. On the same date the bank applied the credit as part payment on a renewal note of $14,500 dated December 20, 1914. In the same year, 1916, the plaintiff, having attained the age of thirty years, brought the present action to recover the amount of the credit, alleged by her to have been wrongfully appropriated by the bank.

The defendant contends that it has the right to claim the credit as an offset by virtue of the banker's lien authorized by section 3054 of the Civil Code and recognized and ap-

plied in First National Bank of Corona v. Coplen, 39 Cal. App. 619, 179 P. 708. It also contends that pursuant to section 2244 of the Civil Code it was not required to see to the proper application of the funds drawn by the trustees. This, however, is not a case such as State ex rel. Davis v. Farmers' & Merchants' Bank, 112 Neb. 840, 201 N. W. 897, wherein the plaintiff sought to recover from the bank certain trust funds paid out by the bank on the trustees' checks and claimed to have been misapplied by the trustees. In such a case the power to draw out trust funds on the trustees' checks is not questioned and the bank is not required to see to their proper application. A distinction between that case and the case where the plaintiff is seeking to recover a deposit of trust funds appropriated by the bank to apply against the indebtedness of the trustee or the trust estate was pointed out in the case of Keeney v. Bank of Italy, 33 Cal. App. 515, at page 518, 165 P. 735. The affirmation of the contention that the bank is not required to ascertain that the moneys drawn by or loaned to the trustees have been applied to trust purposes does not dispose of the main issue in this case, which is whether the trustees had the power to borrow the funds for which the note was given.

[1, 2] The bank could not apply the trust funds to a personal indebtedness of the trustees. Keeney v. Bank of Italy, supra. The answer to the question whether the bank may claim the lien provided by section 3054 of the Civil Code by applying the deposit of trust funds to the overdraft evidenced by the trustees' note depends therefore upon whether the obligation was an obligation of the trust estate. Under the provisions of section 2267 of the Civil Code it was an obligation of the trust estate if the trustees had authority to borrow the funds for the purposes of the trust, i. e., to manage and conduct the 15,000-acre ranch. Irvine v. MacGregor, 203 Cal. 583, 586, 265 P. 218; 25 Cal. Jur. 335. No claim is made that the authority is expressly conferred by the language of the testamentary trust or by the provisions of the Code; but it is contended by the defendant that from the history of the operations of the trustees and from the facts produced on the trial, it is conclusively shown that the power to borrow money was necessarily incident to the power to manage and conduct the ranch in order to preserve the estate from appreciable loss.

[3, 4] We think the contention must be sustained. There is no conflict in the evidence on any material issue. The trustees were bound and it was their duty to operate the ranch to the best interests of the beneficiaries. It is indisputably shown that the extensive acreage was not productive in every year. The history of the operations and production of the ranch as reflected in the decisions in Purdy v. Johnson, 174 Cal. 521, 163 P. 893, and Purdy v. Johnson, 78 Cal. App. 310, 248 P. 764, and in the trustees' final account attached as an exhibit to the plaintiff's supplemental complaint in the present case, discloses that the land was practically unproductive except in years of sufficient rainfall, and that in dry and semidry seasons the receipts barely met the expenses of operation or fell short thereof. It is also shown that the court, in settling the several accounts of the trustees during the period when the overdrafts were created, allowed but $1,000 to be retained by the trustees in each year with which to pay the expenses of conducting the ranch during the succeeding season. That this was an inadequate sum for the purposes contemplated is obvious, and was also so considered by the court in deciding the case of Purdy v. Johnson, 78 Cal. App. 310, at page 324, 248 P. 764. That amount was barely sufficient to pay taxes. It would have been a violation of the trust reposed in them if the trustees for lack of funds had allowed the ranch to remain idle and depreciate. In such a case it is no answer to say that they could have applied to the court to borrow such funds each time the necessity arose to do so in order to carry on operations. The decisions in Purdy v. Johnson, 174 Cal. at page 530, 163 P. 893, and Id., 78 Cal. App. at page 323, 248 P. 764, indicate that such course was not required if otherwise the necessity to borrow existed. In the latter case the court recognized that borrowing money for the payment of taxes and the support of the beneficiaries and other expenses was one of the many onerous duties of the trustees. No charge of bad faith or misappropriation was ever sustained by the plaintiff. The most that is shown by the foregoing cases of Purdy v. Johnson is that the trustees were farmers unfamiliar with the keeping of accounts and did not always record full and timely reports of all their operations, although all funds received by them were fully accounted for. Whatever loss, if any, they personally were compelled to sustain by virtue of that shortcoming was undoubtedly reflected in the amount found to be due from them to the plaintiff by the order of the court approving and settling the final account of the trustees, and in the account as finally settled which was the subject of the litigation in the case of Purdy v. Johnson.

In the present case there was no attempt to show that the trustees were insolvent or unable to respond to the plaintiff's claim against them for the balance due her. The plaintiff does not contend that the credit applied to the indebtedness involved would not approximate the proportion thereof chargeable to trust funds in which she had a beneficial interest.

From the record it is apparent that the trial court was of the opinion that the trustees were not empowered to borrow funds for trust purposes so as to bind the trust estate without first obtaining an order of court authorizing them to do so. The court found that the notes of the trustees were executed and delivered without first obtaining such an order.

The plaintiff does not question the authorities which hold or recognize that the trustees as general agents for the trust property have power to borrow money when the exercise of such power is necessary to protect the trust estate and the interests of the beneficiaries. 65 Cor. Jur. 710; Consolidated Nat. Bank v. P. C. S. S. Co., 95 Cal. 1, 12, 30 P. 96, 29 Am. St. Rep. 85; Roberts v. Hale, 124 Iowa, 296, 99 N. W. 1075, 1 Ann. Cas. 940; Barnes v. Lyles, 110 S. C. 465, 96 S. E. 723. The plaintiff relies upon decisions of this state and other jurisdictions where it has been held that the power did not exist under the facts of the particular case because not implied from any necessity in the management of the property or business. However, in those cases, as in Consolidated Nat. Bank v. P. C. S. S. Co., supra, the existence of the power, in the absence of express authority, is recognized when the facts are appropriate to create it. The proposition most favorable to the plaintiff, gleaned from the cases relied upon, is that the authority to borrow money is regarded in law as one of the most dangerous powers which may be conferred upon an agent, and the courts are slow to find that such a power may be implied. The wisdom of that policy may not be gainsaid, but it is not conclusive in the present case, and is not indicative that the power may not be held to be implied where the facts establish the necessity and the trustee has acted in good faith.

It may be assumed that in order to hold the trust estate liable the creditor, the defendant in this case, has the burden of proving that the power to borrow funds for trust purposes was within the scope of the trustees' authority. 2 Cor. Jur. 925. However, when, as in the present case, the power has been shown, the further necessity to ascertain whether the funds borrowed have been applied to the purposes of the trust does not devolve upon the lender in the absence of bad faith or collusion on his part, and no claim is made that any bad faith or collusion existed. Civ. Code, § 2244; 26 R. C. L. 1279.

The foregoing renders it unnecessary to discuss other points raised on the appeal.

The judgment is reversed.



2 Cal.2d 285

McCOLGAN v. SCOBLE et al.

S. F. 14995.

Supreme Court of California.

Jan. 23, 1935.

Rehearing Denied Feb. 21, 1935.

Appeal and error ⇐1227

Sureties on undertaking to stay execution of judgment *held* not released by their failure to justify after judgment creditor had excepted to their sufficiency and because of which insufficiency appeal was dismissed, but were bound to judgment creditor for amount specified in undertaking (Code Civ. Proc. § 948).

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by R. McColgan against Thomas Scoble and another. From an adverse judgment, defendants appealed, and gave an undertaking staying execution with A. J. Harwood and another as sureties, whereupon appeal was dismissed because of insufficiency of sureties, and thereafter judgment was rendered against sureties for amount specified in undertaking, from which judgment sureties appeal, and plaintiff moves to dismiss the appeal or affirm the judgment.

Motion to dismiss appeal denied, and judgment affirmed.

A. J. Harwood, of San Francisco, for appellants.

Keyes & Erskine, of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for respondent.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

CURTIS, Justice.

Plaintiff, in an action of ejectment, recovered judgment against defendants Thomas and Alice Scoble for the possession of the real property involved in said action and damages for the wrongful use and occupation of said property. The defendants appealed, and gave an undertaking staying execution, with the appellants, A. J. Harwood and Hyman Harris, as sureties. Plaintiff excepted to the sufficiency of said sureties, and a day was noticed for their justification. The time thus noticed was by stipulation of the parties continued on several occasions; the last continuance carrying the time beyond the statutory period within which said sureties might justify. No further attempt was made to have said sureties justify, and no undertaking was given in the place of that executed by said sureties. Thereafter the appeal was dismissed by this court upon the request of the defendants Thomas and Alice Scoble. Upon the going down of the remittitur, and upon the motion of the plaintiff, the court entered judgment in his favor and against the defendant sureties for the amount specified in said undertaking as damages for the wrongful use and occupation of said premises and for costs. From this judgment against them, the sureties have appealed. The matter comes before us upon respondent's motion to dismiss the appeal or affirm the judgment.

Appellants' sole contention is that, where the respondent on appeal excepts to the sufficiency of the sureties on an undertaking to stay execution, and the sureties fail to justify within twenty days after the appellant has been served with notice of such exception, the sureties are no longer bound, and judgment entered against them on the undertaking was erroneous. In support of this contention, the appellants cite section 948 of the Code of Civil Procedure, in pursuance of which said undertaking was given, which provides that, unless the sureties justify within a period of twenty days, the execution is no longer stayed. Appellants argue that the respondent in such action cannot have the right to enforce the judgment and at the same time to hold the sureties.

The only authority bearing directly upon this question is the case of Fried v. Rivkin, reported in 96 Misc. 697, 161 N. Y. S. 94, 95. In that case, the statute provided: "If the sureties fail or refuse to justify after service of the notice of exception, the respondent may proceed as if no undertaking had been executed." This quoted provision of the New York statute is substantially the same in effect as the provision of section 948 of the Code of Civil Procedure of this state, which fixes the liability of the defendant sureties in the present action and provides that, unless they or other sureties justify, execution of the judgment, order, or decree appealed from is no longer stayed. In either case, the effect of the failure of the sureties to justify is simply that the execution is no longer stayed, and the respondent may proceed to have execution issued as if no undertaking had been executed. In Fried v. Rivkin, supra, the question arose upon the construction of a section of the Municipal Court Code (Laws N. Y. 1915, c. 279, § 160), which had been amended in 1915. Prior to said amendment, the section read as follows: "The effect of a failure so to justify and procure an allowance [that is an approval of the undertaking by the court], is the same as if the undertaking had not been given." Laws N. Y. 1902, c. 580, § 315. After said amendment, the language of the provision read as follows: "If the sureties fail or refuse to justify after service of the notice of exception, the respondent may proceed as if no undertaking had been executed." In considering this section as amended, the court said (page 95 of 161 N. Y. S.): "Without suggestion from any source, any one reading the two sections would concede that a complete change had been made in the law. The language used is appropriate to make a change. Before the revision the failure to justify left the parties in the same situation as if the undertaking had not been given. Since revision the failure of the sureties to justify has no effect upon the undertaking itself, but it does vacate the stay which the undertaking creates, and permits the respondent to 'proceed as if no undertaking had been executed.' In one case the undertaking is wiped out, and in the other the undertaking is left in full force and effect, but the stay is vacated. No more appropriate and effective method of making a change occurs to me. This interpretation of these sections is strengthened and confirmed by the fact that the revisers intended to make a change." The court then referred to the report of the municipal court commission, which proposed said amendment and which stated that the section was amended, "so as to avoid the rule that, when the sureties fail to justify, they are relieved from liability unless the exception is withdrawn."

Objection was made in that case, as is made by the appellants here, that such an interpretation of the bond would be inequitable, as it would permit the judgment creditor to proceed against the judgment debtor pending the

appeal, where the sureties have failed to justify, and when the judgment is affirmed, against the sureties. Answering this objection the court said (page 97 of 161 N. Y. S.): "Viewed from an equitable standpoint, the execution and filing of the undertaking procures some stay. Before an execution can issue, the stay created by the filing of the undertaking must be annulled by a notice of exception and the failure of the sureties to justify. This may be but a few days, but it may be of real importance to the judgment creditor, and may also enable the judgment debtor to avoid payment. This is sufficient to afford a consideration for the undertaking, and makes it entirely equitable to enforce the undertaking against the sureties."

While the case of Fried v. Rivkin was decided by an inferior court, we do not find that any appeal was taken from the judgment or that it has ever been reversed. Neither do we find any other authority in conflict with the conclusion reached therein. It seems to us that its reasoning is sound and that its construction of the statute is unquestionably correct.

Appellants seek to overcome the force and effect of this decision by reference to other cases arising in the courts of New York and elsewhere, among which is Manning v. Gould, 90 N. Y. 476, which appears to be the leading case upon the subject, and which was followed and formed the basis of the decisions in the other cases cited by appellants.

The controversy in each of these cases involved the consideration of a statutory provision entirely different from that which was applied in the case of Fried v. Rivkin, supra. In fact, the provision of the statute involved in all of the cases cited by appellants was substantially like the section of the Municipal Court Code, considered in Fried v. Rivkin, prior to its amendment in 1915, referred to above. This difference in statutes was clearly pointed out and distinguished by the court in Fried v. Rivkin, supra. The court there, after referring to certain language in the decision of Manning v. Gould, supra, which the appellants claim is favorable to them, makes the pointed statement that: "This assertion must be read in the light of the law then under consideration." The law then under consideration was unlike the statute considered in Fried v. Rivkin, supra, in the same respect as it differs from section 948 of the Code of Civil Procedure of this state. These authorities cited by appellants are not in point and do not in any way govern the decision in the present action.

Frequent reference is made in the briefs of counsel to the case of Moffat v. Greenwalt, 90 Cal. 368, 27 P. 296, which was an action on a bond given on appeal from a judgment rendered in the justice court, and which resulted in a judgment holding the sureties liable on their undertaking. Respondent relies upon that case as authority favorable to him, while the appellants seek to distinguish it from the present action. In our opinion, this case is readily distinguishable from the instant case. The section of the Code, section 978, Code of Civil Procedure, as then in force, involved in that action, was not like the provision of section 948, Code of Civil Procedure, which governs the present action, but was substantially like the provision of the New York statute considered in Manning v. Gould, supra. Moffat v. Greenwalt, supra, is therefore in the same class with Manning v. Gould, supra, neither of which cases is controlling in the decision of any question involved in the present action. Under the authority of Fried v. Rivkin, supra, however, we are of the opinion that the appellants as sureties on the undertaking which was the subject of this action were not released by their failure to justify after the respondent had excepted to their sufficiency, and that they are bound by the judgment herein, which was entered against them for the amount specified in said undertaking.

These views render it unnecessary for us to answer the further questions raised by respondent, that he had waived the justification of said sureties, and that said judgment was not appealable.

The motion to dismiss the appeal is denied, and the judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J; SEAWELL, J.; THOMPSON, J.

2 Cal.2d 351

PEABODY et al. v. CITY OF VALLEJO.

Sac. 4526.

Supreme Court of California.

Jan. 31, 1935.

Rehearing Denied March 1, 1935.

1. Waters and water courses ⇐130

Where surplus remains after reasonable beneficial use of water by riparian owners or prior appropriators, no injunction can issue against taking of surplus waters of stream, and appropriators may take surplus without compensation (Const. art. 14, § 3, as added in 1928).

2. Waters and water courses ⇐78

Riparian owner whose lands form delta at about sea level has no right to have full flood flow of stream overflow his land, or to remove saline content of soil by artificial check dams and levees (Const. art. 14, § 3, as added in 1928).

3. Waters and water courses ⇐130

Riparian owners have no right, as against subsequent appropriators of stream, to freshet waters which leave natural channel and overflow their lands without returning to channel (Const. art. 14, § 3, as added in 1928).

4. Waters and water courses ⇐42, 101, 143

Rule of reasonable use of waters applies to all water rights whether grounded on riparian rights or right of overlying landowner, or percolating water rights, or appropriative rights (Const. art. 14, § 3, as added in 1928).

5. Waters and water courses ⇐152(11)

One having paramount water right who proves no substantial damage resulting from another's appropriation is entitled merely to judgment declaring his right and to injunction against assertion of adverse right based on user or lapse of time, or to compensation for extinguishment of paramount right if such course is preferred (Const. art. 14, § 3, as added in 1928).

6. Waters and water courses ⇐152(3)

Owner of paramount water right who sustains substantial damage from appropriator's use of water is entitled to compensation and to injunctive relief if public use has not attached (Const. art. 14, § 3, as added in 1928).

7. Waters and water courses ⇐146

Overlying landowner may possess right to subsurface stream analogous to riparian rights and is entitled to protection against unreasonable depletion by appropriator (Const. art. 14, § 3, as added in 1928).

8. Waters and water courses ⇐144

Use of entire flood flow of stream to press small amount of water into adjoining land is unreasonable use, and riparian and overlying landowners could not enjoin appropriation of flood water which served no useful purpose for ground water replenishment (Const. art. 14, § 3, as added in 1928).

9. Waters and water courses ⇐152(3)

Mere inconvenience or extra expense to overlying landowner within limits which are not unreasonable will not justify granting injunction against subsequent appropriator of underlying waters (Const. art. 14, § 3, as added in 1928).

10. Waters and water courses ⇐85

Persons claiming prior water rights as overlying or riparian landowners *held* not entitled to injunction to restrain impounding of creek waters by city by means of reservoir, since public use had intervened (Const. art. 14, § 3, as added in 1928).

11. Waters and water courses ⇐152(3)

Owners of water rights are not entitled to injunctive relief against subsequent appropriation, but only to damages, where public use of water has intervened.

12. Waters and water courses ⇐152(13)

Owners of paramount water rights who were erroneously granted injunction to restrain appropriation of water by city *held* entitled to have costs taxed in their favor as in ordinary condemnation action.

13. Eminent domain ⇐273

Court has power to insure by injunctive order payment of damages awarded owners of paramount water rights for city's appropriation of water for public use.

14. Waters and water courses ⇐152(6)

Appropriator asserting right to take water, on ground that there is an excess over amount necessary for reasonable beneficial uses by person having prior water rights, has burden to prove that excess exists (Const. art. 14, § 3, as added in 1928; Code Civ. Proc. § 1981).

15. Waters and water courses ⇐79

Town *held* not entitled to compel use of entire stream flow to feed percolating waters, where enjoyment of right was limited to its operation of wells usually inactive and necessary only in years of great shortage (Const. art. 14, § 3, as added in 1928; Code Civ. Proc. §§ 1240, 1241).

16. Waters and water courses ⇐152(11)

Court in suit to determine water rights should make reasonable regulations for use of water and should reserve power in itself to modify its orders (Const. art. 14, § 3, as added in 1928).

In Bank.

Appeal from Superior Court, Napa County; Pat R. Parker, Judge.

Suit by George L. Peabody and others against the City of Vallejo. Judgment for plaintiffs, and defendant appeals.

Reversed and cause remanded.

For prior opinion, see 25 P.(2d) 454.

Harry A. Gee and Russell F. O'Hara, both of Vallejo, and Athearn, Chandler & Farmer, Frank R. Devlin, and Robert Duncan, all of San Francisco, for appellant and petitioner.

Thos. J. Straub, of San Francisco, and W. B. Dunn, amici curiæ in support of appellant.

Hankins & Hankins, of San Francisco, Thomas C. Boone, of Modesto, A. L. Cowell, of Stockton, Albert J. Lee, of San Diego, John J. O'Toole, City Atty., and Dion R. Holm, Asst. City Atty., both of San Francisco, J. Leroy Johnson, City Atty., of Stockton, Hugh Bradford, City Atty., of Sacramento, Harold P. Huls, City Atty., and John W. Holmes, Deputy City Atty., both of Pasadena, W. G. Irving, Sp. Counsel, of Riverside, J. F. Goux, City Atty., W. G. Irving, and Heaney, Price & Postel, Sp. Attys., all of Santa Barbara, Bernard Brennan, City Atty., and W. G. Irving, Sp. Counsel, both of Glendale, Ralph W. Swagler, City Atty., and W. G. Irving, Sp. Counsel, both of Burbank, and M. A. Fitzgerald, City Atty., of San Luis Obispo, amici curiæ on behalf of Irrigation Districts' Ass'n of California and certain cities.

T. P. Wittschen and L. W. Irving, both of Oakland, amici curiæ on behalf of East Bay Municipal Utilities Dist.

U. S. Webb, Atty. Gen., amicus curiæ on behalf of State of California.

C. C. Carleton, of Sacramento, amicus curiæ on behalf of Department of Public Works.

Spencer Burroughs and Henry Holsinger, both of Sacramento, amici curiæ of behalf of Division of Water Resources.

W. U. Goodman and Joseph M. Raines, both of Fairfield, Hadsell, Sweet, Ingalls & Lamb, Dan Hadsell, and C. L. Josephson, all of San Francisco, Theodore W. Chester, of Sacramento, Kenneth Jones, City Atty., of Suisun City, and Robbins & Van Fleet, of San Francisco, for plaintiffs and respondents.

Robert M. Searls, of San Francisco, Glenn West, of Lodi, Russell Scott, City Atty., of Salinas, Arnold Rumwell, City Atty., of Palo Alto, W. U. Goodman, City Atty., of Fairfield, Loyd E. Hewitt, City Atty., of Yuba City, Frederick J. Heid, City Atty., of Tulare, R. T. Walters, City Atty., of Whittier, Eugene Best, City Atty., of Riverside, Hurley T. Bailey, City Atty., of Santa Maria, Clyde C. Downing, City Atty., of Santa Ana, Chas. F. Blackstock, City Atty., of Oxnard, Nowland M. Reid, City Atty., of Long Beach, Arthur H. Blanchard, City Atty., of Santa Paula, Ralph K. Pierson, City Atty., of Compton, H. L. Dearing, City Atty., of Orange, and N. D. Thomas, City Atty., of Davis, amici curiæ in support of respondent.

SHENK, Justice.

This is an appeal from a judgment permanently enjoining the defendant, city of Vallejo, as an appropriator, from storing any of the waters of Gordon Valley creek. The operation of the injunction was stayed upon certain conditions pending a determination of the appeal.

Gordon Valley creek and Wooden Valley creek have their sources in separate watersheds in Napa county and flow southerly to their junction in the southern portion of said county. From this point of confluence the stream is known as Suisun creek, which flows southerly through Suisun valley in Solano county and empties into the tidal sloughs connected with Suisun bay a short distance west of the town of Suisun. Except for a short distance near its mouth, the channel of Suisun creek is narrow and deep. Almost paralleling Suisun creek on the easterly side is Ledgewood creek, which rises in Napa county and empties into the bay near the town of Suisun.

In July, 1920, the defendant, city of Vallejo, applied to the division of water rights of this state for a permit to store 37,000 acre feet of water in Gordon Valley. In 1921 the application was amended to limit the storage to 10,000 acre feet. After investigation by the division of water rights and a hearing at which some fifty users of water in the Suisun creek area filed protests against the application, a permit was granted to the defendant city authorizing it to store waters of Gordon Valley creek not in excess of 10,000 acre feet in any one year, and to divert said stored waters to the city of Vallejo not in excess of 5058.9 acre feet annually. In pursuance of said permit the city constructed a dam in Gordon Valley on Gordon Valley creek, about three miles above its confluence with Wooden Valley creek. This dam was completed in December, 1925, and the reservoir formed by it has been in operation since that date. The capacity of the reservoir is 10,000 acre feet. In excess of $1,000,000 was expended in the

construction of the dam and reservoir and the pipe line conveying water therefrom to the city of Vallejo.

Gordon Valley creek is a small mountain stream about five miles in length from its source to the dam of the defendant. Its watershed is of a decidedly precipitous nature and its area above the dam is seventeen square miles. The combined watershed of Wooden Valley creek and of Gordon Valley creek below the dam is twenty-two square miles. The watershed of Suisun creek below the confluence of its tributaries is seventeen square miles. The watershed of Ledgewood creek is twenty-seven square miles. The waters of these streams are not fed from melting snows. The rainfall is practically the same for the mountain or upper area and the valley or lower area. The records for a period of seventy years from 1849 to 1921 show a normal rainfall of 31.0 inches on the upper watershed and 29.01 on the lower watershed. The average annual rainfall for thirty-four years prior to 1921 was 25.5 inches. In the season 1923-24, an exceptional year of drought, the rainfall was 12.2 inches. The records disclose that the average annual rainfall in the watershed and valley for at least eighty years has been in excess of 25 inches. The first substantial rainfall begins in October or November and continues well into the month of April of the following year.

A gauging station (No. 1) is maintained at a point just below the dam, and another (No. 4), near the railroad crossing at the lower end or outlet of Suisun creek. The record shows the amount of the flow in acre feet at the respective stations from 1920-21 to 1926-27 to have been as follows: Season 1920-21, No. 1, 6,115; No. 4, 16,382. Season 1921-22, No. 1, 3,392; No. 4, 8,844. Season 1922-23, No. 1, 3,942; No. 4, 11,176. Season 1923-24, No. 1, 249; No. 4, 101; Season 1924-25, No.1, 2,996; No. 4, 5,973. Season 1925-26, No. 1, 6,908; No. 4, 13,503. Season 1926-27, No. 4, 13,700, up to March 31, 1927, when, during a storm the lower station was washed out. From the time of the completion of the dam in December, 1925, to March 31, 1927, the entire flow of Gordon Valley creek above the dam was stored in the reservoir. The foregoing record of the creek flow as shown at the gauging stations is in substantial corroboration of the conclusions of the plaintiffs' main engineering expert that Gordon Valley creek above the dam contributed to the flow of Suisun creek in proportion to the respective watersheds, viz., 17/49, or about 35 per cent. This record is also a demonstration that, even eliminating the diminution in 1925-26 and 1926-27 due to storage, a tremendous volume of water passed on to the bay. Due to the gradient and the flashiness of the streams this water rushes in great velocity from the upper regions to the lowlands and into the bay.

The plaintiffs are riparian owners on Suisun creek. They commenced this action on October 13, 1926. In their complaint they described the riparian nature of their lands and the orchards, vineyards, and products grown thereon. They alleged that Suisun Valley is a detritus cone formed by Suisun creek and its said tributaries; that they use the waters of Suisun creek for irrigation and other beneficial uses; that all of the water of the creek is needed for these purposes, and that the defendant's project will permanently injure their water supply. The answer, with certain exceptions not necessary to be noted, denied all of the allegations of the complaint. As a part of a special defense, the defendant alleged that on Gordon Valley creek above its dam there occur at irregular times and intervals unusual and heavy rainstorms; that no one can tell when such rainstorms will occur, nor the extent thereof, nor how long such storms will last; that when said rainstorms occur the waters of Gordon Valley creek rise very rapidly within a few hours and become storm and freshet waters of great volume; that said waters flow down into Suisun creek and from there into San Francisco bay with great rapidity and are forever lost; that said storm and freshet waters are of no benefit whatever to the lands of the plaintiffs; that the ordinary and normal flow of Suisun creek is three second feet from December to February and one second foot in March and April; and that the defendant desires to impound only the waters in excess of this normal flow.

One of the principal issues at the trial was whether there were any extraordinary flood waters in Gordon Valley creek, and whether any of the waters flowing in that stream during period of high flow were being put to a beneficial use by the plaintiffs. The trial court found that Suisun creek is a rather narrow and winding stream with a considerable gradient; that during certain periods of the year large quantities of water flow therein with considerable velocity; that rainfall in the watersheds of Suisun creek begins usually in October and continues to almost the first of May of the next year; that the water begins to flow earlier and continues to flow later in Gordon Valley creek than in Wooden

Valley creek; that the flows in the three streams vary from a few second feet to hundreds of second feet, depending upon the rainfall; that during the months when rainfall usually occurs, there are usually from three to five heavy rainstorms on the watersheds of Suisun creek and its tributaries; that when these heavy rains will occur is not known with exactness, nor is it known with exactness how long they will endure or how much run-off they will produce, but it is the usual, ordinary, and expected thing for these rainstorms to occur during these months; that it would be and is unusual, extraordinary, and unexpected if such rainstorms and accompanying flood, fresh and storm waters in Suisun creek do not occur; that the watersheds of Suisun creek and its tributaries are comparatively small and that the streams are comparatively short; that, in consequence thereof, the rainfall in said watersheds runs off with considerable rapidity, and that it is usual, ordinary, and expected that the rainfall in said watersheds runs off and will run off with considerable rapidity; that the runoff in Suisun creek and its tributaries in considerable quantities always occurs during the rainstorms and for some days to several weeks thereafter; that all of the waters in Suisun creek, including the waters flowing in the stream during peak flows, were being put to a beneficial use by the plaintiffs, and that the impounding of any portion of these waters by the defendant would result in material and substantial damage to the plaintiffs; that all of the waters of Gordon Valley creek are part of the usual, ordinary, and expected flow, and are beneficially useful to the plaintiffs; that if at any time any unusual, unexpected, or extraordinary waters do flow in Gordon Valley creek, all thereof will be and are beneficially useful to the plaintiffs; that the plaintiffs are entitled to have all of the waters that run off Gordon valley watershed accumulate in Gordon Valley creek as in the course of nature without interference by the defendant.

With particularity the court found the ownership in the several plaintiffs of lands in the Suisun valley and the uses to which the waters of Suisun creek had been put by them. As to the plaintiff Peabody the court found that the natural mouth of the creek is upon his lands, the lower portions of which were salt marsh lands at about sea level; that the waters of the creek by nature flowed in all directions over, along, across, about, and upon said lands. The evidence further shows that this plaintiff has guided the waters of the creek on to the bay by the construction of artificial channels and has dyked against the flow at certain places. He has built levees along the south side of his lands to keep the waters from overflowing them. He claims a benefit from the overflow by deposits of silt on his lands and by the washing of salt out of a portion thereof, as well as saturation from the overflow of the waters of the creek. Other plaintiffs claim a benefit by reason of seepage into their land of waters of the creek at the normal flow as well as from the storm or freshet flow. Some claim a benefit from overflow of storm water which leaves the channel, passes over their land, never to return, but thereby further saturating their lands and depositing silt thereon. Other plaintiffs are required to levee against the storm waters in times of heavy rainstorms. Still others farther up the valley base their claims on the right to the maintenance of the underground water table to serve wells constructed on their property.

It is unnecessary to recount in further detail the findings and evidence with respect to the lands of the several plaintiffs. The defendant contends that the findings and conclusions of the trial court are unsupported by the evidence on any proper theory of the present law of this state. In this connection it may not be successfully questioned that the trial court's approach to the problem before it and the application of the law to the facts presented was on the theory that under the law in force when the judgment was entered the riparian owner was entitled to all of the waters of the stream as the same were wont to flow in the course of nature, including the flood and freshet flows thereof, regardless of any waste or surplus that might result from the exercise of such a right and regardless of any rule of reasonable use. It is clearly apparent, in fact not disputed, that the trial court applied to the facts in the case the doctrine of Miller & Lux v. Madera Canal & Irr. Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, and Herminghaus v. Southern California Edison Company, 200 Cal. 81, 252 P. 607, the opinion in the latter case having been filed after the present action was commenced but before the trial thereof. Going still further, the trial court found and concluded that even if there were any unusual or extraordinary flood waters passing down the stream they would be useful and beneficial to the plaintiffs. Throughout the proceeding the court disregarded the effect of the policy declared by the amendment of the Constitution adding section 3 to article 14 thereof. This amend-

ment became effective in November, 1928. The present action was decided on June 28, 1929, and the findings and judgment then ordered. It is true that the effect of the constitutional amendment had not, prior to that time, been under review by this court. But its declaration was plain and its history and purpose were well known. It was then within the province, in fact the duty, of the trial court to adhere to, and apply to the facts before it, the rule and policy declared in the constitutional amendment then in effect. See Funk v. United States, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369, 93 A. L. R. 1136. Failing to do so it must be concluded that the trial court applied the wrong theory to the facts presented and to the prejudice of the defendant. In such case the judgment should be reversed (Seneca Consolidated Gold Mines Co. v. Great Western Power Company, 209 Cal. 206, 287 P. 93, 70 A. L. R. 210), and the cause be retried in accordance with the theory and policy of the constitutional mandate, for it is clear that if such a state policy had been applied to the facts, the present findings and judgment would not have been the result of the trial.

The conflicting views of opposing counsel and numerous amici curiæ as to the effect of the constitutional amendment render it necessary to set forth certain general observations for the guidance of the court on a retrial. Counsel for the plaintiffs and amici curiæ in that behalf stand their ground on the doctrine of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772; Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, and other cases claimed to be in approval thereof, and contend that the constitutional amendment has not materially modified that doctrine. Counsel for the defendant and supporting amici curiæ contend for an extension of the doctrine of Modoc L. & L. S. Co. v. Booth, 102 Cal. 151, 36 P. 431; Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 P. 1054; Town of Antioch v. Williams Irr. Dist., 188 Cal. 451, 205 P. 688, and a further exposition of the effect of the constitutional amendment in line with Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.(2d) 5.

It is agreed on all hands that waters in the rivers and streams of the state which waste into the sea should, if possible, be conserved for beneficial uses. The question is as to how this result may be accomplished. The contentions of the parties are in a measure irreconcilable. On behalf of the plaintiffs it is urged that the riparian owner is entitled to the full flow of the stream as it is wont to flow in the state of nature, without diminution, for any present or prospective beneficial uses, regardless of the reasonableness of such uses and regardless of waste or surplus which such uses might entail, and that any interference with that right is an infringement of a vested property right protected by the State and Federal Constitutions. The defendant insists that the plaintiffs are entitled only to the ordinary, as distinguished from the flood or freshet flow of the stream and that any flood or storm waters which would otherwise flow on to the sea may be appropriated without any expense to the appropriator. Neither view reflects the present policy of the state with reference to the use of waters. Such policy must now be set at rest. Otherwise the protracted and expensive efforts of the state and other public authorities to conserve the unused waters of the state for beneficial purposes have been of little fruition. By the declaration of certain guiding principles the necessary result may be brought about. And this should be done with full recognition of the rights which the riparian owner may properly assert, but still place the law of the state in such condition that he may not, by assuming an arbitrary position, forestall by injunction proper programs of conservation, or assert such claims for compensation for any alleged infringement of his right as are fanciful and would be prohibitive.

As the subject is approached, it is readily apparent that it is for this court, which has largely created the water law of this state without constitutional direction, to cause the law to conform to the state policy now commanded by our fundamental law.

In adopting a policy modifying the long standing riparian doctrine of this state, California has done by constitutional amendment what many of the western states have done by statute or court decisions. Of the seventeen western states which are generally referred to as the irrigation states, nine now recognize the modified doctrine of riparian rights and eight have entirely abrogated the doctrine of riparian rights and recognize only the doctrine of appropriation. The nine are North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Washington, Oregon, and California; and the eight are Montana, Idaho, Wyoming, Nevada, Utah, Colorado, Arizona, and New Mexico. Wiel on Water Rights, §§ 117, 118. Mr. Wiel at the time properly listed Montana as a riparian state, but in

1921 it was held in Mettler v. Ames Realty Co., 61 Mont. 152, 201 P. 702, that the doctrine of riparian rights was abrogated and that the doctrine of prior appropriation obtained exclusively in that state.

In further clarifying the new state policy we have no hesitancy in doing so without fear of infringing upon any provision of the Federal Constitution. The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, which do not involve federal or interstate interests, to the control of local state policies. United States v. Rio Grande Dam & Irr. Co., 174 U. S. 690, 702, 703, 19 S. Ct. 770, 43 L. Ed. 1136; Hudson County Water Co. v. McCarter, 209 U. S. 349, 356, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; State of Connecticut v. Commonwealth of Massachusetts, 282 U. S. 660, 670, 51 S. Ct. 286, 75 L. Ed. 602.

Section 3 of article 14 of the California Constitution, inserted as a new section by amendment in 1928, is as follows: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

The rule of reasonableness of use as a measure of the water right has been applied by this court as between riparian owners (Pabst v. Finmand, 190 Cal. 124, 211 P. 11); as between owners overlying an underground water supply (Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35); as between appropriators (Natoma W. & M. Co. v. Hancock, 101 Cal. 42, 31 P. 112, 35 P. 334); as between overlying owners and exporters from an underground basin to nonoverlying lands (Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 P. 260); and as between riparian owners and overlying owners under the doctrine of common source of supply (Hudson v. Dailey, 156 Cal. 617, 105 P. 748); but the court has denied its application as between a riparian owner and an appropriator. The constitutional amendment, from its effective date, and as interpreted in the Gin S. Chow Case, has enjoined the doctrine of reasonable use as between the riparian owner and an appropriator. The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:

1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.

2. Such right does not extend to the waste of water.

3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed. The problem is to apply these rules in the varying circumstances of cases as they arise.

The waters of our streams are not like land which is static, can be measured and divided, and the division remain the same. Water is constantly shifting, and the supply changes to some extent every day. A stream supply may be divided but the product of the division in no wise remains the same. When the supply is limited public interest requires that there be the greatest number of beneficial uses which the supply can yield.

The right to the waste of water is not now included in the riparian right. As to what is waste water depends on the circumstances of each case and the time when waste is required to be prevented. In sections of the state, few in number, where the rivers and streams are plentifully supplied, and there is no need for the conservation of the product thereof, the water flows freely to the sea. When needed for beneficial uses it may be stored or restrained by appropriation subject to the rights of those who have a lawful priority in a reasonable beneficial use. That priority has been subjected to limitations and regulations prescribed by the Constitution, but it has by no means been abolished. Under the new policy the vested right theory, that is, the right of the riparian owner to all of the waters of the stream, as it is wont to flow in the state of nature, and without regard to the reasonableness of such use as against an appropriator, has been subjected to such limitations that the old doctrine declared in Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, is no longer the law of this State. Also distinctions heretofore made between the unusual or extraordinary and usual or ordinary flood and freshet waters of a stream are no longer applicable.

[1] The problem now has three aspects: First, after excluding all of the reasonable beneficial uses present and prospective (considering in connection therewith reasonable methods of use and reasonable methods of diversion) to which the waters of the stream are put, either under the riparian right or by prior appropriation, is there then water wasted or unused or not put to any beneficial use? If so, the supply or product of the stream may be said to be ample for all, a surplus or excess exists, no injunction may issue against the taking of such surplus or excess (City of San Bernardino v. Riverside, 186 Cal. 7, 20, 198 P. 784), and the appropriator may take the surplus or excess without compensation.

Secondly, where all of the waters of the stream are put to reasonably beneficial uses under reasonable methods of use and reasonable methods of diversion and there is no unusual waste or surplus water to be captured, there is nothing left for appropriation. This is self-evident.

Thirdly, where, as the result of rainstorms and resulting floods, or of melting snows, or of natural flow otherwise, a large volume of water flows on to the sea, unused, wasted, and lost, how may the same be conserved for useful and beneficial purposes, having due regard for the rights of riparian owners, prior appropriators, and overlying landowners?

The answer to the last question involves many considerations, all of which cannot be disposed of under the facts of a single case and must be dealt with in connection with each case as it arises. As to the case at bar, the following conclusions would seem to be inescapable:

[2] The asserted right of a riparian owner, whose lands in a state of nature form a delta at about sea level, to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon, or by artificial check dams and levees to remove the saline content of the soil which in a state of nature are salt marsh lands, cannot be supported. So far as we are advised, this asserted right does not inhere in the riparian right at common law, and as a natural right cannot be asserted as against the police power of the state in the conservation of its waters. This asserted right involves an unreasonable use or an unreasonable method of use or an unreasonable method of diversion of water as contemplated by the Constitution. This conclusion applies to much of the lands owned by the plaintiff Peabody.

[3] The same conclusion applies also to the asserted right of other plaintiffs to have the flood and freshet waters which leave the natural channel of the stream, overflow their lands and never return to the channel. See Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 588, 77 P. 1113.

[4] The asserted right of some of the plaintiffs to have the benefit of the full flow of the stream to maintain the underground and percolating water supply has been and is recognized as a "natural" right analogous to the riparian right, but subject to the limitations of the new state policy. The rule of the common law applicable to percolating waters gave to the owner of land all that lay beneath it, with the right to interrupt and take away waters passing by percolation to his neighbor's land. This rule was modified by the decision in Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, and the more reasonable doctrine of sic utere tuo was applied to percolating water rights. In Burr v. Maclay Rancho Water Company, 154 Cal. 428, 98 P. 260, 264, this court defined the rights of an overlying landowner who had purchased his land in reliance upon the

underground supply as against an appropriator from the same supply for use on distant land, and said:

"The land being so situated that it has the natural advantages afforded by the underlying water, the conditions are analogous to those affecting land riparian to a stream, which, because of its situation with reference to the stream, is given rights to the waters thereof, so far as necessary for use thereon, which are paramount to the right of another riparian owner to divert the water to lands not riparian. The reasonable rule here would be to hold that the defendant's appropriation for distant lands is subject to the reasonable use of the water on lands overlying the supply, particularly in the hands of persons who have acquired it because of these natural advantages, and we therefore hold this to be the law of the case with respect to the lands upon which no water has been used by the plaintiff.

"In the case of either class of owners of overlying lands, the appropriator for use on distant land has the right to any surplus that may exist. If the adjoining overlying owner does not use the water, the appropriator may take all the regular supply to distant land until such landowner is prepared to use it and begins to do so. It is not the policy of the law to permit any of the available waters of the country to remain unused, or to allow one having the natural advantage of a situation, which gives him a legal right to water, to prevent another from using it, while he himself does not desire to do so. * * * The most that should be allowed in such circumstances is to give a party the aid of the courts to protect his right and prevent the destruction of his source of supply by excessive use or other cause. The court unquestionably has power to make reasonable regulations for the use of such water by the respective parties, fixing the times when each may take it and the quantity to be taken, provided they be adequate to protect the person having the paramount right in the substantial enjoyment of that right, and to prevent its ultimate destruction."

The foregoing declaration is in harmony with the present state policy which, however, has gone still further and extended the doctrine to reasonable use and reasonable methods of use and reasonable methods of diversion as between riparian owners and appropriators.

About two years after the Burr Case this court decided Miller v. Bay Cities Water Company, 157 Cal. 256, 107 P. 115, 27 L. R. A. (N. S.) 772. The plaintiffs herein place great reliance on the decision in the latter case. There the owner of land overlying and dependent upon an underground water supply sought to enjoin a diversion to foreign parts of all of the underlying and percolating waters of Coyote river. It was taken for granted that at common law the plaintiff's grievance would not be actionable, but the correlative rights doctrine declared in Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35, was reaffirmed. It was held that, although the plaintiff was not strictly a riparian owner, he had shown a right analogous to the riparian right in that his lands had an advantage conferred by nature and entitled to protection as against a diversion of all of the underground waters beyond the watershed. By pleading and proof in the trial court the defendants contended that the plaintiff was not a riparian owner and had no right to prevent the diversion of the waters of the river, either surface, subsurface, or percolating, and that the defendants had the right to divert all of such waters irrespective of any benefit afforded thereby to the plaintiff. On appeal, and confronted by adverse findings supported by the evidence, the defendants insisted that the trial court should have framed a decree adopting an artificial plan, not suggested at the trial, permitting them to store waters in the upper reaches of the stream with appropriate provisions for a release of certain quantities of water for the protection of the plaintiffs and others similarly situated. There was a definite intimation in the opinion that if the defendants had, by pleading and proof in the trial court, sought the establishment of the rights insisted upon on appeal, including the right to store water which it was claimed would otherwise leave the basin and flow into San Francisco bay, such relief might have been granted; but that under the circumstances disclosed by the record they were in no position to complain.

Furthermore, the Miller Case recognizes that an appropriator may divert for use beyond the watershed any portion of the waters of the underground stream which can serve no useful purpose to overlying landowners. The rights of such owners and of those dependent upon the underground supply are paramount to the rights of appropriators for use on distant lands; but such paramount rights must be exercised in subordination to the new state policy.

Notwithstanding the common-law rule to the contrary, this court, in the cases referred to, accorded to the underlying and percolating water right a status analogous to the riparian right. The attitude of some of the plaintiffs herein in effect is that, possessing that status, they are entitled to have the underground waters flow and percolate as in a state of nature regardless of the quantity of the supply or the reasonableness of use. But since the riparian right as against an appropriator has by the new state policy been subjected to the doctrine of reasonable use, no good reason has been advanced why the asserted underground and percolating water right should not be subjected to the same regulation as against an appropriator. In whatever respects the Miller Case, or any other case, may be said to hold otherwise, they must be deemed to yield to the new constitutional policy with reference to the use of the waters of the state.

In the case at bar there is no irrigation to any considerable extent directly from the open stream. Some of the plaintiffs who pump water from the underground water supply for irrigation on their lands have experienced no diminution of their supply since the defendant's reservoir was placed in operation. Others made a showing that the water table had receded since 1925, but the extent of the damage to them by reason thereof was not attempted to be shown. Nor did it clearly appear just what damage would accrue to the lands of the plaintiffs by reason of impounding in the defendant's reservoir water from 35 per cent. of the drainage area contributing to the underground supply normally tributary to the valley. The expert testimony on behalf of the plaintiffs as to the effect of the defendant's diversion on the percolating water supply was that such diversion would have a tendency to cause the water plane to decline principally in dry years or during a series of dry years, but that no conclusion would be justified in years of normal or more than normal rainfall. While the question as to the extent of the interference, if any, with the underground water rights of some of the plaintiffs by reason of the defendant's storage is necessarily involved in some speculation, the field is one for expert testimony based on established or ascertainable facts. On a retrial the influence, if any, of the defendant's storage for the last six years on the underground water supply will undoubtedly be susceptible of more definite admeasurement. One of the conditions of the judgment which stayed the injunction pending the appeal was that the defendant release from an outlet at the bottom of the dam a steady flow of 5 second feet of water, until the further order of the court. The effect of this artificial feeding of the underground waters, and the influence generally of the defendant's storage on the underground water table may be made a matter of proof in the light of experience since the judgment was entered.

In this connection it is appropriate to say that the decisions of this state have long since encouraged the impounding and distribution of unused and storm and flood waters. San Joaquin, etc., Co. v. Fresno Flume & Irr. Co., 158 Cal. 626, 112 P. 182, 35 L. R. A. (N. S.) 832. The fundamental law of the state now commands it when it can be done without substantial damage to the existing rights of others. This command is enjoined upon trial courts as well as upon the reviewing courts, and the former cannot avoid the responsibility of weighing the evidence in conformity with constitutional requirements and framing their decrees accordingly. This is especially true when the power of a court of equity is invoked to enjoin the economic use of the waters of the state. If the attitude of the parties in a particular case be such as to embarrass the court in the proper determination of the case in view of a larger public interest involved and for the protection of all concerned, or for other sufficient reasons, the court might well invoke the aid of the division of water rights of the board of public works under section 24 of the Water Commission Act (St. 1913, p. 1027, as amended by St. 1931, p. 2421; Deering's General Laws 1931, vol. 3, Act 9091, p. 5017) in the determination of the rights to water and the use of water in accordance with the constitutional policy. See Wood v. Pendola (Cal. Sup.) 35 P.(2d) 526. The purpose of that state authority to safeguard rights in the use of water for domestic and agricultural purposes against a subsequent appropriator was evidenced in the case of East Bay Municipal Utility District v. Department of Public Works (Cal. Sup.) 35 P.(2d) 1027.

[5, 6] There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, the owner of an underground and percolating water right, and the prior appropriator are entitled to the protection of the courts at law or in equity. When there is no substantial infringement of the right, that is, when there is no material diminution of the supply by

reason of the exercise of the subsequent right, the owner is entitled to a judgment declaring his preferential and paramount right and enjoining the assertion of an adverse use which might otherwise ripen into a prescriptive right. City of San Bernardino v. Riverside, supra. If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands. But the technical infringement of the right is not actionable (Modoc, L. & L. S. Co. v. Booth, supra; Holmes v. Snow Mountain W. & P. Co., 36 Cal. App. 394, 172 P. 178; Stratton v. Mt. Hermon Boy's School, 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57, Ann. Cas. 1915A, 768), except to establish priority. This is but another way of saying that the appropriator may use the stream surface or underground, or percolating water, so long as the land having the paramount right is not materially damaged. Any use by an appropriator which causes substantial damage thereto, taking into consideration all of the present and reasonably prospective recognized uses, is an impairment of the right for which compensation must be made either in money or in kind, and in the event public use has not attached the owner of the paramount right is entitled to injunctive relief.

The problem in any case is to ascertain what portion of the product of the stream is subject to appropriation after all reasonable beneficial uses on the part of those having paramount rights have been enjoyed or safeguarded. It is suggested that the application of the doctrine of reasonable use of water lays the matter open to too much uncertainty. Conceding that the ascertainment of reasonable use is difficult, it does not follow that it cannot be done. The requirements of public welfare demand that it be done, and the uncertainty ends when a definite application of the rule has been made to the facts in each case.

[7, 8] Some of the plaintiffs assert the right to the full flood and freshet flow of the stream to press water into their riparian lands as an aid in maintaining the level of the underground water supply. This is not strictly a riparian right at common law, but it cannot be said that under some circumstances such right is not a substantial right conferred by nature, to be enjoyed subject to the test of reasonable use. It would seem to be obvious that the use of an entire flood and freshet flow of a stream to press a small amount of water into adjoining lands would be an unreasonable use of the waters of the stream, especially when otherwise there is no appreciable lowering of the water table due to nature's processes or to artificial regulation of the stream flow. There is evidence in the present case that, because of the geological formation in the valley, Suisun creek is not only a surface but a subsurface stream as well, the latter extending a considerable distance on either side of the trough through which the surface stream flows. In such a situation the riparian landowners and the overlying landowners may be said to possess a right to the stream, surface and subsurface, analogous to the riparian right, which should be protected against an unreasonable depletion by an appropriator. There is now no room for a distinction between the so-called pressure right and the overlying landowner's right, whether the latter be founded on a strictly percolating water right or a right in an underground stream. Each, however, is a paramount right subject to the test of reasonable use. It was in evidence in this case that the flashy flows which pass below the Scarlett place serve no useful purpose for ground water replenishment. In such a situation only a technical interference with the asserted right is shown, and this would not support an injunction without conditions. The Scarlett place is about halfway between the dam and the Suisun branch of the Southern Pacific Railroad in the lower end of the valley. The extent to which the defendant's project interferes with the plaintiffs' natural ground water replenishment above the Scarlett place or elsewhere, to their substantial damage, will assumably be shown on a retrial. The defendant calls attention to the fact that since the dam was constructed and water impounded therein, and before that time, eleven out of twenty-five parcels of land involved showed no recession in the water plane. The recession in the remaining fourteen, variable in extent, has necessarily been only in part due to the impounding project, taking into consideration that but 35 per cent. of the entire drainage area is contained in the Gordon valley watershed above the dam. To require more than 13,000 acre feet of water to flow to the bay in order to make an insubstantial contribution to the underground supply of land bordering on the stream suggests the following comment of this court in Antioch v. William Irr. Dist., 188 Cal. 451, at page 461, 205 P. 688, 693: "It would be hard to conceive of a greater waste for so small a benefit."

[9] Relying further on the Antioch Case the defendant contends that mere inconven-

ience or extra expense suffered by the overlying land owner would not justify an absolute injunction, nor require that damages for the interference with the right be paid. The claim is too broad. The correct rule is stated with its appropriate limitations in the italicized words in the following language of the District Court of Appeal in Waterford I. Dist. v. Turlock I. Dist., 50 Cal. App. 213, at page 221, 194 P. 757, 761: "The mere inconvenience, or even the matter of extra expense, *within limits which are not unreasonable*, to which a prior user may be subjected, will not avail to prevent a subsequent appropriator from utilizing his right." The further statement in the Antioch Case that the city, by moving its pump a few miles up the river, could obtain water free from saline solution, and therefore, inferentially, had no actionable grievance, should be considered in connection with the unusual factual background of that case and should not be taken as a guide as to the extent of inconvenience or damage to which the owner of a paramount right might be put without compensation. Here again we state that any interference with the prior right which would cause substantial damage is actionable.

[10, 11] As to the question of intervention of public use in this case: The defendant contends that public use had attached at the time of the commencement of this action and therefore the plaintiffs were not entitled to the injunction sought and granted to the extent of enjoining the defendant from impounding or diverting *any* of the waters of Gordon Valley creek and of according to the plaintiff the right to have all of said waters continue to flow in the course of nature without any interference by the defendant. The defendant bases its contention on the undisputed facts that its reservoir was completed in December, 1925; that 6,903 acre feet of water were stored therein prior to May 1, 1926, and that this action was not commenced until October 13, 1926. In view of these facts it is urged that the utmost relief to which the plaintiffs were entitled was the ascertainment of whatever damage the operation of the defendant's project would result to the plaintiffs, and that a prohibitionary injunction should not have been granted except as an aid in the enforcement of payment of damages.

When public interests are involved, "a prohibitory injunction should only be granted if any and all other forms of relief should be found inadequate." Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113, 1122. Again, with reference to the question of compensation in lieu of injunction, this court, in Newport v. Temescal Water Co., 149 Cal. 531, at page 538, 87 P. 372, 375, 6 L. R. A. (N. S.) 1098, said: "And, finally, upon this proposition it may be said that, where the interests of the public are involved and the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. Such an action, if successful, should be regarded in its nature as the reverse of an action in condemnation." This doctrine was definitely applied in Collier v. Merced Irrigation Dist., 213 Cal. 554, 2 P.(2d) 790, wherein it was also held that when the public use intervened it attached to the reservoir's capacity within the limits of the defendant's permit. The plaintiffs attempt to meet the defendant's showing by urging that in any event the bar of the right to an injunction by the intervention of public use rests in estoppel, which must be, but it is claimed was not, pleaded, and even if pleaded would have been unavailing under the facts. The defendant alleged in its answer that the water impounded by means of said reservoir was then being distributed in the city of Vallejo for public purposes, and that it was necessary that the city and its inhabitants continue to so use the same. This allegation was sufficient to raise the issue of intervention of public use; and on the trial it appeared beyond question, although apparently not seriously urged, that the public interest had intervened more than five months prior to the commencement of this action. The Collier Case was not decided until 1931, but it was established by decisions of this court long prior to the trial that when public interests had intervened through the construction and operation of public agencies before the actions were commenced, any right of the parties to disturb them in their possession of the property was thereby lost, and only an action to recover compensation for the land taken could be available. Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 117 P. 906, 36 L. R. A. (N. S.) 185; Miller & Lux v. Enterprise C. & L. Co., 169 Cal. 415, 147 P. 567; Newport v. Temescal Water Co., 149 Cal. 531, 87 P. 372, 6 L. R. A. (N. S.) 1098.

There is much argument and citation of authority on both sides as to the foundation for the doctrine that intervention of public use will foreclose the right to an injunction, the plaintiffs insisting that it rests solely in waiver and estoppel which must be pleaded and

proved in the trial court, and the defendant contending that it is grounded in public policy of which the court even on appeal may take cognizance when the fact appears. This court has referred to both as a foundation for the doctrine. It has noted the claim or applied the theory of waiver and estoppel in Barton v. Riverside Water Co., 155 Cal. 515, 101 P. 790, 23 L. R. A. (N. S.) 331; San Bernardino v. Riverside, 186 Cal. 7, 198 P. 784; Northern California Power Co. v. Flood, 186 Cal. 301, 199 P. 315; San Joaquin, etc., Canal & Irrigation Co. v. Worswick, 187 Cal. 674, 203 P. 999; Conaway v. Yolo Water & Power Co., 204 Cal. 125, 266 P. 944, 58 A. L. R. 674; Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.(2d) 790; and other cases. In Gurnsey v. Northern Cal. Power Co., 160 Cal. 609, 117 P. 906, 911, 36 L. R. A. (N. S.) 185, quoted with approval in Miller & Lux v. Enterprise Canal, etc., Co., 169 Cal. 425, 147 P. 567, the court took the position that "this rule is not based so much upon the application of the doctrine of estoppel. * * * It is based mainly on the great principle of public policy, under which the rights of the citizen are sometimes abridged in the interest of the public welfare." There is little doubt that the application of the doctrine may be invoked on either ground when public use has attached prior to the commencement of the action and depending on the circumstances of the case. It is unnecessary to recount further the history of litigation with reference to the water rights here involved or the facts on which the plaintiffs claim that they should not be foreclosed from resisting the application of the rule of intervention of public use. Under the circumstances here appearing it is improbable that this litigation would, and it is highly desirable that it should not, result in an injunction without conditions prohibiting the defendant from diverting and impounding the waters of Gordon Valley creek for its municipal uses, and that the only proper procedure should be a remanding of the cause for the ascertainment of damages, if any, and for other appropriate relief.

[12, 13] The plaintiffs insist that if this course be pursued the reversal of the judgment should be on condition that the defendant be compelled to pay all expenses to date of the plaintiffs and other landowners in Suisun valley for engineer's expenses and fees, court costs, briefs, witness fees and costs, as may be determined by the trial court; that when the amount of damages has been ascertained, the defendant be enjoined from impounding or diverting water until the damages be paid; that if the trial court can find a physical solution which will minimize or eliminate damages to landowners in Suisun Valley by reason of the defendant's project, then, in lieu of damages, it shall prescribe such solution and direct the city to provide and maintain it permanently at its own expense and enforce such requirements by prohibitory or mandatory injunction; that if such solution does not entirely provide against damages, then damages to be awarded to the ascertained extent; that the defendant be compelled to pay all costs and expenses on the new proceeding both in and out of court, including engineer's and attorney's expenses and fees as may be determined by the trial court; and that the defendant be compelled to waive the statute of limitations as to any claims for damages which the landowners may assert by reason of the defendant's project.

The suggestion of the plaintiffs that in the event the trial court should find a physical solution which would minimize or eliminate any damages otherwise recoverable, it should do so by appropriate order, is helpful. It is also apparent that if the court find such a physical solution appropriate it should by its judgment preserve its continuing jurisdiction to change or modify its orders and decree as occasion may require. Therein may lie a solution of many of the difficulties and uncertainties in safeguarding the rights of the parties. As to the question of costs, other than costs on this appeal, the Collier Case affords the answer to the extent here justified. It was there held that the cause having been converted practically into a condemnation proceeding, the law seems to be sufficient to vouchsafe the award to the plaintiffs free from costs of the defendant and with the plaintiffs' costs as well. Collier v. Merced Irr. Dist., 213 Cal. 554, 572, 2 P.(2d) 790. Under this ruling the plaintiffs herein would be entitled to their costs taxed by the trial court the same as in an ordinary action in condemnation and from the inception of the present action. As to other conditions sought to be imposed, there can be no question of the power of the trial court to insure by injunctive order the payment of any damages to which the plaintiffs or any of them may be entitled, and it is obvious that the defendant under the facts is in no position to urge the statute of limitations as a bar to the recovery of such damages. The Collier Case also answers certain objections raised by the plaintiffs as to the operation, under the facts here presented, of section 14 of article 1 of the Constitution.

[14] On the question of the burden of proof the defendant relies on the rule stated in

Brown v. Chase, 125 Wash. 542, 217 P. 23, 27, where it is stated: "That where the supply of water in the stream is more than ample for all possible riparian uses, the presumption is that the diversion by a nonriparian user will not injure any riparian right, and the burden is upon the riparian owner who claims that his riparian rights are being injured by the diversion of such water to prove substantial injury."

The plaintiffs contend for the rule stated in Miller v. Bay Cities Water Company, 157 Cal. 256, 272, 107 P. 115, 122, 27 L. R. A. (N. S.) 772, as follows: "If the accustomed flow is more than necessary to supply the underground stratum, the burden of proof is upon the appropriator seeking to appropriate the surplus to show that there is a surplus. In the case at bar the burden of proof was upon the defendants, setting up a claim to an alleged portion or surplus of flood waters upon the ground that such waters were waste or lost waters, to prove that fact."

The general rule in this state as to the burden of proof is laid down in section 1981 of the Code of Civil Procedure as follows: "The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." However, when one enters a field of water supply and seeks by appropriation to take water from such supply on the claim that there is more than sufficient for all reasonable beneficial uses by those who have the prior and preferential right, it would seem to comport with the principles of fairness and justice that the appropriator, in whatever way the issue may arise, should have the burden of proving that such excess exists. We therefore reaffirm the rule to that effect in the Miller Case.

[15] The town of Suisun is a plaintiff in this action. This plaintiff is the owner of one acre of land in Suisun Valley not riparian to Suisun, Gordon Valley or Wooden Valley creeks. Its asserted rights are based on its ownership of the land overlying the underground water supply in the Suisun Valley and an appropriation by use prior to that of the defendants and the construction of wells and pumping plants on the land. The town of Suisun obtains its main water supply from the Twin Sisters reservoir located at what is called the west end of the valley. This supply is in no wise disturbed by the defendant's project. The wells on said acre of land are maintained as a means of a standby or emergency supply. The only pumping therefrom in any quantity was in the excessively dry years of 1923–24. None of these wells was active at the time of the trial. One had been equipped and tested in 1926 but had not been operated. The court decreed that the defendant, as against the town of Suisun, "is not entitled to impound or divert, * * * and is hereby permanently enjoined and restrained from both impounding and diverting any of the waters of Gordon valley watershed or Gordon Valley creek." This injunction was undoubtedly granted on the theory of Miller v. Bay Cities Water Company, which accorded to an overlying landowner the right analogous to the riparian right, but which, as has been seen, is subject to the limitation that the exercise of the right must be reasonable under all of the circumstances. The defendant's rights against the town of Suisun differ materially from its rights against private landowners. It is persuasively argued that the defendant has not the power of eminent domain as against the town of Suisun, because of the latter's municipal status. Sections 1240, 1241, Code Civ. Proc. Without the existence of the defendant's project and with the entire stream flow to feed the underground supply, the benefit accruing to the one acre of land would be almost negligible, estimated in a dry year as little as thirty-seven hundredths of an inch. No attempt appears to have been made to show any interference with these wells by the storage by the defendant. Can the town of Suisun, because of its municipal status, compel the use of the entire stream flow to feed such a percolating right, the enjoyment of which is limited to the operation of a well or wells usually inactive and necessary only in years of great shortage? The answer must be in the negative. Any interference by the defendant's storage with the underground supply on this acre of land is technical and unsubstantial. Conceding, however, that this town's right should be protected by the decree, the prior right could be declared and, if necessary, the duty imposed on the defendant to make up the loss, if any, in kind, thus supplementing the town's supply to the extent of the loss by means other than by the percolating water process. We find no justification in law or the evidence for this absolute injunction in favor of the town of Suisun where it appears that in any event other forms of relief are available and would be adequate.

We therefore conclude:

1. That the rule of reasonable use as enjoined by section 3 of article 14 of the Constitution applies to all water rights enjoyed

or asserted in this state, whether the same be grounded on the riparian right or the right, analogous to the riparian right, of the overlying landowner, or the percolating water right, or the appropriative right.

2. That the test of reasonable use as so enjoined was not applied to the facts in the present action and the judgment should be reversed, and the cause remanded for trial as a condemnation action.

3. That upon a retrial the rights of the parties should be determined in harmony with the new constitutional policy of conservation of waters and in accordance with the views expressed in this opinion.

4. That if, as to any plaintiff, no substantial damages be proved, but a paramount or preferential right be shown, he is entitled to a judgment declaring such right and an injunction against the assertion of an adverse right based on user or lapse of time, or to compensation for the extinguishment of the paramount right, if such course be preferred; that if substantial damages result to the plaintiffs or any of them by reason of the continuance of the defendant's enterprise, taking into consideration the tests to be applied in the conservation and reasonable use of water now required by the law, such plaintiffs are entitled to the ascertainment of such damages and to an injunction in aid of securing timely payment thereof.

[16] 5. That if a physical solution be ascertainable, the court has the power to make and should make reasonable regulations for the use of the water by the respective parties, provided they be adequate to protect the one having the paramount right in the substantial enjoyment thereof and to prevent its ultimate destruction, and in this connection the court has the power to and should reserve unto itself the right to change and modify its orders and decree as occasion may demand, either on its own motion or on motion of any party. See San Bernardino v. Riverside, supra, and other cases cited to like effect.

6. That under the circumstances appearing in this case the plaintiffs should recover their costs in the trial court and on appeal.

The judgment is reversed.

We concur: WASTE, C. J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; PLUMMER, Justice pro tem.

PRESTON, J., is disqualified by reason of having been one of the counsel in the case prior to his election to the Supreme Court.

2 Cal.2d 178

RUCKSTELL CORPORATION, Limited, v. GREAT LAKES AIRCRAFT CORPORATION.

L. A. 14892.

Supreme Court of California.

Dec. 28, 1934.

Principal and agent ⇨41

Evidence in action against manufacturer for damages *held* insufficient to establish existence of direct contract with manufacturer for distribution of manufacturer's products.

In Bank.

Appeal from Superior Court, Los Angeles County; Allan B. Campbell, Judge.

Action by the Ruckstell Corporation, Limited, against the Great Lakes Aircraft Corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Prior opinions, 33 P.(2d) 32; 34 P.(2d) 495.

O'Melveny, Tuller & Myers, Homer I. Mitchell, Albert Parker, and Walter K. Tuller, all of Los Angeles, for appellant.

Kaye & Johnstone, of Los Angeles, for respondent.

PER CURIAM.

Upon a thorough reading of the evidence and briefs, we are satisfied with the disposition made of this cause by the District Court of Appeal, Second District, Division 2, and we therefore adopt its opinion as and for the decision of this court. It reads:

From a judgment in favor of plaintiff entered on the verdict of a jury, defendant has appealed.

Plaintiff's last amended complaint claims damages by reason of the breach by defendant of an alleged contract with plaintiff under which the latter alleged it was acting as distributor in southern California and Arizona of airplanes manufactured by defendant. A part of the damages allowed by the jury for such alleged breach was the sums of money laid out in preparing to perform and in performing such contract, less the income received from such performance and the value of materials on hand at the time performance was prevented.

Many points are urged by appellant, but most of them are based on the contention that the evidence does not support the finding of the jury by special verdict that a contract was

entered into between plaintiff's assignor and defendant, as alleged in the complaint, on July 18, 1929, or in fact at any time, and that in consequence there was no such contract to breach. It is not questioned that there were some sums due plaintiff from defendant for labor done, supplies furnished, and money advanced at plaintiff's [defendant's] request, but such amounts do not aggregate the large judgment given, $26,570.87, which can only be justified by the existence of the contract alleged.

The evidence shows without dispute that on April 19, 1929, J. G. (Tex) Rankin was appointed distributor for defendant corporation's products in California, Washington, Oregon, and Idaho, and that he had contracted to buy from defendant one hundred airplanes of different models, it being provided in such contract that if within ninety days from date of the agreement he increased such contract by agreeing to purchase one hundred additional planes, the following states would be added to his territory, viz., Montana west of the Rocky Mountain continental divide, Nevada, Utah, and Arizona. The contract also provided that it could be canceled by either party with or without cause by mailing the other written notice of its intention so to do, and that such cancellation should operate as a cancellation of all orders for planes or parts not actually shipped; and, further, that the relation created between the parties by the contract was that of "vendor and vendee and not principal and agent, and neither the distributor nor any of its associate dealers, subdealers or employees shall be deemed the representatives of the company for any purpose whatever." It was further provided that before closing an agreement with any associate or subdealer a copy of the proposed agreement should be submitted to defendant corporation. This contract was canceled by defendant "about the first of October, 1929."

On or about July 18, 1929, G. E. Ruckstell, who was well and favorably known as the manufacturer and distributor of an improved axle for Ford cars, met Rankin, who interested him in selling planes made by defendant. Ruckstell testified that Rankin said "that if I would make the arrangement to properly establish such an account such as a suitable hangar and location and have the proper personnel that was necessary for the conduct of such a business, and that if I would agree to take five planes per month until sixty total were taken, delivery to be made one carload at the time, each carload to include five airplanes per month, and if I would endeavor to establish dealers throughout the territory, and provided after talking with the Great Lakes Company * * * and it had their approval, he would appoint me distributor for Southern California and Arizona. * * * He said they had the approved type certificate and that * * * there should be no difficulty in licensing of these planes, * * * and as far as he knew they was satisfactory, and that if it was not that the factory would take care of any difficulty that would come with that product, or replace anything that was defective. * * * I said that providing these things we were to get would be actually carried forth, it would be agreeable to me to make such an agreement on that territory. * * * Mr. Rankin said he would like to put into writing these various things that we had talked of. I also stated that I would like to have it in writing. So * * * he said upon his return to Portland that he would send me a written arrangement or understanding of what we had entered into, and I was to do likewise. And that is generally what took place there. * * * I told him I had formed this corporation with my name to directly connect whatever little business acquaintance I had in this territory with my business, and that I would do all the necessary things to properly conduct such an account." Mr. Ruckstell further testified that he had talked with Rankin prior to July 18th and that on one occasion "Mr. Rankin said that he would like to make me a dealer or distributor for the Great Lakes Aircraft Company. * * * I told Mr. Rankin that I did not want to be just a local dealer or a small dealer. If I went into the agreement it would have to be for a larger territory. Mr. Rankin said he would release Southern California and Arizona."

Miss Eleanor Straka, secretary of plaintiff corporation and prior thereto "secretary to Mr. Ruckstell, personally, for seven years," who was present at the conversation between Ruckstell and Rankin, testified that "Mr. Rankin said in substance that in consideration of the organization of the corporation by Mr. Ruckstell and the embodying of Mr. Ruckstell's name and the renting of the necessary hangars and the employing of personnel and all the facilities for handling a business of the kind that was in contemplation, and the purchase or rather I should say the agreement to take sixty airplanes, four of which were then in Los Angeles, Mr. Rankin was to see to it that Mr. Ruckstell was given the exclusive distribution of Great Lakes airplanes by the Great Lakes Company," and that as a step to accomplish it he would communicate with Mr. Van Sicklen, vice president of the

Great Lakes Corporation. "Mr. Rankin said Mr. Ruckstell at that time would receive five per cent of the commission to be paid." A telegram sent in furtherance of such understanding reads in part: "Have closed Southern California and Arizona with Ruckstell subject to minor changes regarding exclusive territory," and requested the diversion of a car of planes from Portland to G. E. Ruckstell, that draft be sent to Bank of Italy, Olive street branch, Los Angeles, and that the next car be sent to Portland. It also asked where Rankin could communicate with Van Sicklen the next morning at six.

Mr. Ruckstell further testified that Rankin told him that he (Rankin) had an agreement with defendant corporation giving him the exclusive right to sell their planes on the Pacific Coast, and that he wanted Ruckstell to sell planes in the southern part of his territory under an arrangement "whereby I would take a part of the commissions and he would take a part. He said that he would make me a subdistributor in the southern part of his territory. As such subdistributor I would get fifteen per cent of the twenty per cent commissions, and would give him or see that he got five per cent. I said I would agree to buy sixty airplanes. He told me he had agreed with the Great Lakes Aircraft Company to buy some planes; that sixty of these he wanted to turn over to me." At that time Rankin had five planes with the Pacific Finance Company of Los Angeles, which company held them for payment of a balance due on the purchase price. Four of these were turned over by Rankin to Ruckstell, who paid the finance company's balance and repaid Rankin's company for the amount it had paid on the purchase price, Ruckstell taking his 15 per cent. commission and Rankin getting 5 per cent. Mr. Ruckstell then reiterated: "I told Rankin that if he would give me a subdistributorship, giving me the exclusive right to sell in Southern California, I would go out and try to sell airplanes, that I would pay him five per cent, that I would organize the corporation, that I would carry parts and put in the proper persons to take care of service and do a certain amount of demonstrating and advertising—all things that are expected of anybody handling an account of that character. Mr. Rankin said if I would organize the corporation and put in this personnel, and buy sixty airplanes, that he would get me the territory—that he would make me the exclusive dealer in this territory that we had discussed."

Fourteen planes were purchased by plaintiff or its assignor, Mr. Ruckstell, and the evidence shows that the commission was divided as stated, except on the last five. As to the commission on these, Mr. Rankin testified, apparently without contradiction, that plaintiff or its assignor, Ruckstell, owed his company $845 for parts shipped and charged to Rankin Airplane Sales Company, as well as commissions on the last five of the fourteen planes, for all of which bills had been sent; that in the meantime he, Rankin, came to Los Angeles, and inasmuch as Ruckstell still had the "ships" he, Rankin, "really felt I should not charge him any commission on it, and so I said if you will pay us the $845.00 we will forget about the commission, which he did."

While Mr. Van Sicklen, with whom Mr. Rankin talked from Los Angeles after his conversation with Mr. Ruckstell above referred to, and who was vice president and general sales manager at the time, * * * was not a good witness, it is perfectly clear from his evidence that the only understanding he had from such conversation was that Rankin, "acting as distributor for the territory of the Pacific Coast, had given Ruckstell, subject to my approval, a dealership or subdistributorship that was to include Southern California and Arizona," and that he did not understand "that the Great Lakes Aircraft Corporation was entering into any contract with G. E. Ruckstell or Ruckstell Corporation Limited."

In addition to the testimony already quoted, there is a letter on the letterhead of plaintiff corporation, signed by its director Burkhardt and dated September 12, 1929, relative to the difficulty of licensing the fourteen planes mentioned, addressed to Rankin Airplanes Sales Company, 409 Corbett Bldg., Portland, Or., stating in substance that defendant had reported the first four ships sold to Rankin Flying Service, and inasmuch as "Tex" Rankin gave G. E. Ruckstell a bill of sale for them, the department of commerce and labor had returned their applications for licenses with request for "bills of sale from Great Lakes to Rankin Flying Service and from Rankin Flying Service to Tex Rankin, to complete the line of ownership," and that the same were required as to the second car of five planes, but that as to "the last carload, your bill of sale is O. K. and we need only that of Great Lakes to you for completion." W. D. Sheffey, who had charge of the bookkeeping of plaintiff corporation, testified that the books of that company showed the "purchase of the fourteen Great Lakes airplanes from Rankin." The evidence shows without conflict that during September of 1929 plaintiff was dissatisfied with the arrangement

made with Rankin and was trying to get him to release his claim on the territory in which it was selling, and a telegram from G. E. Ruckstell to C. F. Van Sicklen, Great Lakes Aircraft Corporation, dated the 18th of that month says in part: "If agreeable with you Rankin will relinquish California, Nevada, Utah and Arizona, for which I will pay him thousand dollars giving me these states direct with you," to which Van Sicklen replied, in part: "Hold deal with Rankin until I arrive." This was followed by a wire from Ruckstell as follows: "Consummation deal with Rankin can await your arrival here but must know your attitude regarding direct distributorship which I cannot close without additional discount and territory and which delay may forfeit. * * * If you are forwarding proper bills of sale to Rankin on all ships and Rankin in turn forwards us proper bills of sale on all ships licenses will be issued. Certified invoices are not acceptable." To this defendant answered by wire to plaintiff: "Our attitude regarding your acting as direct distributor is favorable. Want to discuss with you personally general details covering territory dealers number of ships and schedule also discounts. * * *"

Following this exchange of telegrams Van Sicklen came to Los Angeles and an agreement dated October 2, 1929, was signed by plaintiff and Van Sicklen for defendant subject, however, to approval at the office of defendant, which agreement, except for the territory named, was very similar to that theretofore given Rankin, including the provision for cancellation by either party, and which appointed plaintiff distributor for California, Nevada, Arizona, Utah, and the Hawaiian Islands. Plaintiff deposited the sum of $1,750 upon the execution of this agreement. Defendant's approval of such contract was not given, as a new plan of distribution was contemplated, and plaintiff, treating the failure to approve as a cancellation, through G. E. Ruckstell wired defendant as follows: "We hereby accept cancellation your contract. As our order for show planes was subject to contract this cancels our order for these planes so do not ship them. * * * Please return our deposit money. * * *"

We do not believe, under the evidence in this case, that any other conclusion can be drawn than that the alleged oral contract of July 18, 1929, was simply an arrangement between Rankin, the Pacific Coast distributor of defendant corporation, and plaintiff's assignor, by which plaintiff, under Rankin, acquired the exclusive right to sell planes manufactured by defendant in part of Rankin's territory, plus the state of Arizona, which was not allotted Rankin by contract but (which he had the option under his contract to acquire and) which defendant was apparently satisfied to let him have; that there was no direct contract of agency between defendant and plaintiff or its assignor; and that when Rankin's contract was canceled, any right plaintiff had fell with it. Nor in our opinion does the use of the word "distributor" by defendant, in speaking of plaintiff at various times, mean anything more than that it had the exclusive right of sale which resulted from its arrangement with Rankin and under the Rankin contract; and we fail to see any conflict with the direct and positive evidence which shows that no direct contract existed with defendant.

Judgment reversed.



2 Cal.2d 294

BARTON v. STATE BAR OF CALIFORNIA.

S. F. 15223.

Supreme Court of California.

Jan. 28, 1935.

Attorney and client ⇨53(2)

Evidence *held* to warrant disbarment of attorney alleged to have attempted to extort money from oil company on charges of dumping gasoline, as against attorney's plea for leniency, where there were no extenuating circumstances and attorney had twice before been disciplined by Supreme Court and had on each occasion been accorded leniency (Code Civ. Proc. §§ 278, 282, 287; Pen. Code, §§ 518, 519, 524).

In Bank.

Proceeding by Daniel Barton against the State Bar of California, to review an order of the Board of Governors of the State Bar, adopting findings of the local administrative committee and recommending to the Supreme Court that petitioner be disbarred.

Petitioner ordered disbarred, and his name ordered stricken from the roll of attorneys.

Daniel Barton, of San Francisco, in pro. per.

Philbrick McCoy, of Los Angeles, for respondent.

PRESTON, Justice.

This proceeding was instituted to review an order of the board of governors of the State Bar of California, adopting findings of the local administrative committee, and recommending to this court that petitioner be disbarred from further practice of the law in this state.

The facts, as taken from the fair and complete review of the evidence incorporated in said findings, are substantially as follows: Prior to October, 1933, one Childs, employed at a garage as maintenance and service man, believed that his employer and the Castor Oil Company were engaged in the practice of putting gasoline of said company in the tanks of the garage bearing Union Oil Company 76 labels and selling said gasoline to customers as Union gasoline. This practice is termed "dumping." Childs talked the matter over with Simpson, a customer, and they decided that, for benefit of the public, the Castor Company should be notified to discontinue the deception. A few days prior to October 24, 1933, they called at petitioner's office and disclosed to him the foregoing information, stating that they did not expect any money, but merely wished, without having the matter become public, to report it in some way so as to stop the "dumping." Petitioner told them he would have to make an investigation. However, on October 24th, without having made any investigation, he wrote on his legal letterhead, to the Castor Company as follows: "I have a client by whom a complaint for damages has been lodged with me to prosecute and file action on same, but before commencing such, I would be pleased to interview your Mr. Castor, as, you may rest assured that I have no desire to do any injustice, but am called upon for the performance of a duty. The matter involved is surely very imperative and important to your business. Hence I would suggest that you come in and see me on or before the 28th day of October and I further suggest that the afternoon is the best time to find me here in the office. Thanking you for your attention and early call, I am, Yours very truly, Daniel Barton."

Upon receipt of this letter the Castor Company consulted Mr. Haven, its attorney, who immediately telephoned petitioner to ascertain the nature of the claim. Petitioner declined to discuss it over the telephone, but made an appointment for Mr. Haven to call at his office the following morning. At this meeting petitioner informed Mr. Haven that the matter was really for the district attorney, that the Castor Company had been adulterating gasoline, and that petitioner's clients had been damaged from $2,000 to $3,000, refusing, however, to reveal who the clients were or what their claim was, and stating that he did not want to file suit, but would consider a settlement. The next day he telephoned Mr. Haven and told him that his clients' claim was for "dumping," of which practice Mr. Haven stated he was sure the Castor Company had not been guilty, asking for further details, which petitioner promised to obtain. Thereafter, between November 1 and 4, 1933, following several unsuccessful attempts, petitioner and Mr. Haven finally made connections by telephone. The latter had his telephone so arranged that his two office associates could listen in on the conversation. Petitioner stated to Mr. Haven that he had affidavits from six people who had worked in pairs checking deliveries made by said company and had found very definite proof of "dumping"; when pressed for details, he said the matter was a "shakedown" and he was going to withdraw. The conversation as testified to by Mr. Haven, corroborated by his associates, and not denied by petitioner, was substantially as follows:

Petitioner: "Frankly, Mr. Haven, I consider this matter a 'shakedown,' nevertheless, Mr. Haven, my clients are very insistent in this matter and I would advise you to make some sort of settlement with them. * * *"

Mr. Haven: "Mr. Barton, you are withdrawing from the matter. If my clients want to communicate with your clients how can I do it?"

Petitioner: "If you want to communicate with them, just communicate with me."

Petitioner had no affidavits or proof of "dumping," and his statements to Mr. Haven were false. On November 10th he again telephoned Mr. Haven and asked if the company, or Mr. Castor, had determined to settle the matter, stating that his clients were getting very insistent and would cause trouble, which statement was also untrue. Mr. Haven replied that his client would not settle, and that, if he heard anything further about the matter, petitioner could "have a fight." Three days after this conversation Mr. Castor, of said oil company, received an anonymous letter, of some length, referring to the "little Gasolene scandel" of which he had "been warned" and stating that the full story would be given to the press, with de-

tails and "plenty of affidavits to back up everything that goes into one of the leading newspapers," unless the matter was straightened out.

The letter further said: "We have also been reliably informed, that after it becomes public, the Standard Oil of California will file suit for damages. your mr. Haven may be interested in the publicity? however if you intend to look into this matter, get in touch with Mr. Daniel Barton (attorney) 704 Mkt., otherwise the story will go to the Press after fortyeight hours have elapsed, from the tim you receive this."

There was no testimony to show that petitioner either wrote or had knowledge of this letter. It was not connected up with him in any way whatsoever.

Petitioner's explanation of his conduct was that he was trying to ascertain if his clients, or some of the major oil companies whom he did not represent, had a claim against the Castor Company.

The charge against petitioner was of violation of his oath and duties as an attorney (sections 278, 282, and 287, Code Civ. Proc.) and of the commission of acts involving moral turpitude and dishonesty (subdivision 5, § 287, supra). The local administrative committee concluded that in persistently attempting to obtain money from said oil company, through misrepresentation and dishonesty, when employed for the sole purpose of protecting the public by requiring said company to discontinue "dumping," and when told by his clients that they neither had been damaged nor wanted money, and after, according to his own words, he had concluded it was a "shakedown," petitioner was not only guilty as charged, but also that his conduct constituted an attempt to extort money as said crime is defined in sections 518, 519, and 524 of the Penal Code.

Said committee further concluded that there were no extenuating circumstances in the case; that the plan was boldly conceived and persistently pursued until reported to the police; that the offense was violative of public interest and such as to bring criticism and odium upon the legal profession; and that petitioner had conclusively shown that he was unfitted for the practice of his profession.

We have set forth the findings and conclusions of the local committee at some length because we are in accord with them and they express our own analysis of this cause.

Petitioner's application for review is in the nature of a plea for leniency. He fears that disbarment will deprive him of his livelihood and urges that our examination of the record must convince us that the evidence is wholly insufficient to warrant punishment so severe.

In this view we cannot concur. Petitioner has twice heretofore been disciplined by this court, and has on each occasion been accorded leniency. In Barton v. State Bar, 209 Cal. 677, 289 P. 818, the board of governors of the State Bar recommended that petitioner be suspended from the practice of law for three months, but this court adopted the recommendation of the local administrative committee that he merely be reprimanded. In Barton v. State Bar, 213 Cal. 186, 2 P.(2d) 149, where petitioner was guilty of serious misconduct in connection with a bankruptcy proceeding, and disbarment was recommended, this court again extended leniency by ordering a six months' period of suspension. Thereafter petitioner sought to challenge the effectiveness of the decision. In re Barton (D. C.) 54 F.(2d) 810.

After considering carefully the full record in the present case, together with petitioner's prior record in order to determine his fitness to continue in practice [Marsh v. State Bar (Cal. Sup.) 39 P.(2d) 403], we can reach no conclusion but that his disbarment is warranted.

It is therefore ordered that petitioner, Daniel Barton, be, and he is hereby, disbarred from practicing law in all of the courts of this state, and his name is stricken from the roll of attorneys of the state of California.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.

In re JACKSON'S ESTATE.

S. F. 15255.

Supreme Court of California.

Jan. 22, 1935.

Rehearing Denied Feb. 20, 1935.

Appeal and error ⇐790(3)

Appeal taken from decree of distribution by attorney whom heirs originally employed on contingent fee contract, but thereafter discharged, should be dismissed as moot, where final judgment had been rendered in separate action allowing attorney recovery from reserve funds of estate for reasonable value of services.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Mathilde Hermann Jackson (alias), deceased. From a decree of distribution, H. L. McAllister, attorney for certain heirs, appeals.

Appeal dismissed.

H. L. McAllister, of San Francisco, in pro. per.

Fred B. Hart, of Oakland, for respondent Melos and others.

Hilary H. Crawford, of San Francisco, for respondent Annie M. Gordon.

Heller, Ehrman, White & McAuliffe and Jos. D. Toohig, all of San Francisco, for Wells Fargo Bank and others.

WASTE, Chief Justice.

Respondents, the executor of the estate and certain legatees of the deceased, moved to dismiss the appeal in this matter on the ground that the issues involved have become moot. The motion appears to be good.

From the record supporting the motion it appears that the appellant, an attorney at law, appeals from a decree of distribution made in the matter of the estate of the deceased. He is not a party interested in the estate, but, for a time, represented, as attorney, certain of the heirs of the deceased under a contract of employment, to secure which these heirs assigned to him one-quarter of the total amount of their interest in the decedent's property. Prior to the time when a decree of ratable distribution was made, these heirs discharged appellant as their attorney, and disputed his claim to the compensation mentioned in the contract of employment. In consequence, the court, by the decree, set aside the moneys claimed by appellant for and as his compensation, directed the executor to hold in reserve such moneys, and reserved jurisdiction to determine the controversy over it.

Appellant appeals from that portion of the decree which withheld the moneys from him. It is the contention of the moving parties here that the question has become moot for the reason that the issue has been determined and settled in another action between all the interested parties, instituted and decided after this appeal was taken. Such appears to be the case.

The action instituted by the interested heirs of the decedent against this appellant (Maibaum et al. v. McAllister, S. F. No. 15218) was one for declaratory relief. After answer by the defendant (appellant here), trial was had, findings of fact and conclusions of law were made and filed, and judgment was entered. The court held that the contract on which defendant rested his claim did not vest in him a power coupled with an interest, nor vest in him a present interest in 25 per cent. of the legacies or devises to be distributed to his former clients; that the contract of employment had been abrogated; and that any services thereafter performed were performed under employment different from that specified in the contract. On this basis, the defendant was given judgment "for the reasonable value of his said services," payable out of the money held in reserve by the executor of the estate, under the terms of the decree of ratable distribution; said moneys to "constitute payment in full, defendant [to] receive no further property or moneys from said estate." From this judgment the defendant appealed, but the appeal not having been perfected within time, it was dismissed by order of this court on October 2, 1934, and the remittitur issued 30 days later.

The judgment in the Maibaum action, supra, having become final, it only remains to be determined if the same issues were considered and decided in the decree of ratable distribution and in the action for declaratory relief. We are of the view that they are precisely the same.

Such being our conclusion, it becomes unnecessary to pursue the consideration further.

The motions to dismiss the appeal are granted, and the appeal is dismissed.

We concur: PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.

2 Cal.2d 263

DUCKETT et al. v. ADOLPH WEXLER BUILDING & FINANCE CORPORATION.

L. A. 14912.

Supreme Court of California.

Jan. 21, 1935.

1. Quieting title ⇐51

In action to quiet title, where court found defendant to be owner of property in controversy, defendant was entitled to possession (Code Civ. Proc. § 380).

2. Mortgages ⇐542

In action to quiet title, possession was properly awarded to defendant who purchased property at foreclosure sale under trust deed, notwithstanding absence of showing that defendant served on plaintiffs 3 days' notice to quit and surrender possession, which procedure was required only in summary proceeding to recover possession (Code Civ. Proc. §§ 380, 1161, 1162, and § 1161a, subd. 3).

In Bank.

Appeal from Superior Court, Los Angeles County; Isaac Pacht, Judge.

Action to quiet title by H. L. Duckett and another against the Adolph Wexler Building & Finance Corporation. From a judgment for defendant, plaintiffs appeal. On motion to dismiss the appeal or affirm the judgment.

Motion to dismiss the appeal denied, and judgment affirmed.

H. L. Duckett, Jr., and F. E. Davis, both of Hollywood, for appellants.

Amend & Amend and Joseph Hansen, all of Los Angeles, for respondent.

CURTIS, Justice.

[1] Action to quiet title to real property. Defendant answered setting forth that after the filing of the action it had acquired title in fee simple to said real property at public auction under foreclosure of a deed of trust executed by plaintiffs. The defendant in its answer also alleged that it was the owner of said real property and asked that its title be quieted as against the plaintiffs and for possession of said real property. The court found all the allegations of the answer to be true and that plaintiffs had no right, title, or interest in said real property, and entered its decree quieting defendant's title and granting defendant possession of said real property. The plaintiffs have appealed from said decree, and the only point made by them in their opening brief is that the court was without right or authority to award the defendant possession of said real property in the absence of any allegation or proof that the defendant had served upon plaintiffs a three days' notice to quit and surrender possession of said real property as required by sections 1161, 1161a, and 1162 of the Code of Civil Procedure. The defendant has moved to dismiss the appeal or affirm the judgment. The motion to affirm the judgment should be granted. The court found the defendant to be the owner of the property in controversy. It follows, therefore, as one of the incidents to ownership that defendant is entitled to the possession of said property. Keele v. Clouser, 92 Cal. App. 526, 530, 268 P. 682. The case is governed by section 380 of the Code of Civil Procedure. Section 1161 et seq., Code of Civil Procedure, have no application to actions brought to determine title to real property. They only apply to summary actions brought to recover possession.

[2] The contention of plaintiffs that the court may not award to the defendant the possession of said real property in the absence of any allegation or proof that defendant has served upon plaintiffs a three days' notice to quit and surrender possession of said property as provided by sections 1161, 1161a, and 1162 of the Code of Civil Procedure is based upon subdivision 3 of said section 1161a, enacted as a new section in 1929 (St. 1929, p. 719). By said subdivision 3, the summary proceeding for the recovery of real property provided in section 1161 and 1162 of the Code of Civil Procedure is extended to the purchaser of real property at a sale thereof under a deed of trust for the purpose of enabling said purchaser to recover possession of said real property from a person who holds over or continues in possession after said sale. In order for such purchaser to avail himself of this summary remedy, he must serve on the person in possession a three days' written notice to quit. Prior to the enactment of this new section of the Code, such a purchaser, in order to obtain possession of the property purchased as against a person holding over, was compelled to resort to one of the ordinary actions for the recovery of possession of real property, such as an action in ejectment or an action to quiet title. These actions were often long drawn out, and by such means the purchaser was often kept out of possession of his property an undue length of time. To remedy this defect in our procedure, section 1161a of the Code of Civil Procedure was undoubtedly enacted. It sim-

ply gave to the purchaser a remedy in addition to those already available to him, by resorting to which he could probably acquire possession of the property in a much shorter space of time. This section does not purport to take away from the purchaser any of the remedies which were open to him at the time of the enactment of said section. These are still available to such purchaser, and if he wishes to pursue them rather than the summary remedy given to him by the new section he may do so without any reference to the new remedy, or without compliance with any of its terms or provisions. In the present action, the defendant set up its title to the real property involved in this action, and asked that its title be quieted. The court found that defendant's claim to said real property was superior to that of the plaintiffs', and it properly gave judgment in its favor, and awarded possession of the said property to the defendant. Kitts. v. Austin, 83 Cal. 167, 23 P. 290.

The motion to dismiss the appeal is denied, and the judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; THOMPSON, J.



2 Cal.2d 333

BANK OF TEHAMA COUNTY v. FEDERAL REALTY CO. et al.

Sac. 4899.

Supreme Court of California.

Jan. 31, 1935.

Animals ⇐26(1)

In action by chattel mortgagee to recover sum placed in escrow to secure release of sheep held by bank under alleged agistor's lien, bank's agreement with sheep owner for pasturing of sheep by bank on bank's land at stated sum per head with owner to do own herding, and under which bank's agent controlled changes of pasture and routes to be taken in moving sheep *held* not a lease of land but a contract of agistment under which bank acquired valid agistor's lien (Civ. Code, § 3051).

"Agist" means to take to graze or pasture at a certain sum, and "agistment" means the taking and feeding of other men's cattle in the king's forest, or on one's own land, at a certain rate.

[Ed. Note.—For other definitions of "Agist" and "Agistment," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Glenn County; Ernest Weyand, Judge.

Action by the Bank of Tehama County against the Federal Realty Company and others, in which the named defendant filed a cross-complaint. Judgment for the named defendant, and plaintiff appeals.

Affirmed.

A. M. McCoy and Wetter & Rankin, all of Red Bluff, for appellant.

George R. Freeman, of Willows, for respondents.

THOMPSON, Justice.

This action was instituted by the Bank of Tehama County to recover $1,100 placed in escrow with the Bank of Willows for the purpose of securing the release of a band of sheep, held by the defendant Federal Realty Company, under claim of an agistor's lien, and upon which the plaintiff bank holds a chattel mortgage. It is expressly stated in the letter from the plaintiff to the Bank of Willows, which contains the agreement of the parties and the escrow instructions, and which is attached to the complaint as Exhibit B, that "the said deposit of $1,100 is to be held by your Bank as in lieu of the possession and claim of possession of said Federal Realty Company" until final determination of the controversy. The First National Bank of Willows, substituted as the escrow holder after the liquidation of the Bank of Willows, filed a waiver of its right to appear in the action and its consent to be bound, as to the impounded sum, by any judgment entered therein. The Federal Realty Company filed its answer and cross-complaint asking for the delivery to it of the escrowed money, and from a judgment in favor of the defendant, the Bank of Tehama County has taken this appeal. The validity of the appellant's chattel mortgage upon the sheep in question is admitted by the respondent in its brief, and, on page 5 of its opening brief, appellant makes the following concession: "We are willing to admit, and do hereby admit that if Defendant Federal Realty Company indeed had a valid Agistor's lien at and during the time these Sheep were pastured upon its lands, then such and said

Lien did take precedence over the said Chattel Mortgage of Plaintiff."

The sheep in question belonged to A. N. Fraga. The pasturage was arranged by agreement between Fraga and the defendant Moutrey, who was the agent for the defendant Federal Realty Company, the Central Savings Bank, and the Central National Bank, as to various tracts of land owned severally by these corporations in Butte and Glenn counties. With regard to the pasturing of the sheep, the trial court found that, on or about November 1, 1931, Fraga and Moutrey entered into an agreement whereby Moutrey "agreed to pasture said sheep and other sheep owned by said A. N. Fraga on the lands in Butte and Glenn Counties belonging to said above named corporations at a price or pasturage charge of fifteen (.15) cents per head per month, said A. N. Fraga to provide the necessary herders and said agreement to continue in force as long as any feed remained on any of the lands of the said respective corporations; that on the 1st day of November, 1931, in accordance therewith, said A. N. Fraga delivered 1000 head of sheep into the possession of said defendant, A. E. Moutrey at the Chico Ranch in the County of Butte, and on the 10th day of November, delivered an additional 1000 head of sheep into the possession of said A. E. Moutrey for pasturage purposes; that said sheep were continuously in the possession of and pastured by A. E. Moutrey on the respective lands of said named corporations and for their respective benefit, and on the 13th day of December, 1931, said sheep were removed to the lands of the Federal Realty Company, in the County of Glenn, and delivered into the possession of said Federal Realty Company, a corporation, for pasturage purposes in accordance with said agreement; that said sheep remained continuously in the possession of said Federal Realty Company on its lands in the County of Glenn until the 14th day of May, 1932, when said sheep were delivered to said A. N. Fraga in pursuance to the agreement set out in Plaintiff's complaint and marked 'Exhibit B' (the agreement already referred to); that at all times from December 13, 1931, to May 14, 1932, said sheep were held by said Cross-complainant Federal Realty Company on its claim of lien for pasturage thereon." It was also found that the pasturage charge due and unpaid was the sum of $1,165.

It is the contention of appellant that this finding as to the possession of Moutrey for the defendant Federal Realty Company is not supported by the evidence, and that, lacking the element of exclusive possession, direction, and control, respondent cannot maintain its claim of lien under section 3051 of the Civil Code, which provides: "Persons pasturing horses or stock, have a lien, dependent on possession, for their compensation in caring for, boarding, feeding or pasturing such horses or stock." More specifically, appellant claims that there has not been shown any act of delivering possession by Fraga or any act of taking possession by Moutrey.

The testimony of Moutrey, Fraga, and one Z. P. Dyer, outside man for the bank, shows, without substantial contradiction, that Fraga and Moutrey made this arrangement with respect to all the lands under Moutrey's supervision; that, when the sheep were first moved onto the lands near Chico, Moutrey asked Fraga whether he wanted to rent the land by the acre or pasture by the head and Fraga chose the latter; that when this feed gave out, Fraga asked Moutrey whether he had any more; moved his sheep to other land in Glenn county on December 5, and, on December 13, moved onto the Federal Realty Company land in Glenn county; that the sheep were always herded and cared for by Fraga himself or herders employed by him; that this was in accordance with the pasturage agreement; that Moutrey always told Fraga where to pasture or to move the sheep, although he never counted them or cared for them himself or through his own employees. Fraga testified that he never moved the sheep without first getting Moutrey's permission, although on one occasion he had sold twenty-six lambs without informing him, but that he paid no pasturage charge for lambs; that payments were made for the pasturage he received as he left the lands, although he still owed some money on the first piece of defendant's land at the time he moved to the second, but that pasturage he paid as soon as he sold some wethers, taking his sheep to a public corral for the purpose, all with the consent of Moutrey. Fraga testified, with respect to the pasturage, the claim for which is now under examination, that he notified Moutrey he was going to move to summer pasture and they figured up the pasturage to the day he was going to leave and Fraga wrote him a check which was dishonored; that he, Fraga, got his camp and the sheep ready to move because he thought the bank was going to take care of the pasturage; that the bank kept urging him to start, but he consulted Moutrey and Moutrey put a man out to guard the

sheep to prevent the bank from taking possession. Moutrey does not deny that Fraga took his herd to a public corral with his permission while en route from one pasture to another for the purpose of cutting out some sheep to sell, nor that it is quite possible that he may have moved the sheep across a public highway while moving them from one pasture to another, nor does he deny that Fraga started to leave but was stopped before he had left the lands of the defendant.

Appellant quotes in its brief many definitions of "agistment" and "agistor." In Williams v. Miller, 68 Cal. 290, 293, 9 P. 166, 168, this court said: "Webster defines the word 'agist' to mean 'to take to graze or pasture, at a certain sum;' and 'agistment' as 'the taking and feeding other men's cattle in the king's forest, or on one's own land, at a certain rate.'" The provision that Fraga was to do his own herding does not prevent this from being a contract of agistment. Williams v. Miller, supra. That it was such a contract rather than a lease of land seems clear from the fact that Moutrey could have pastured other sheep there too; that he directed the route to be taken in moving the sheep and always indicated the places they should be pastured, and that Fraga never moved the sheep or changed their pasture without getting Moutrey's consent. The trial judge was justified in concluding from the evidence that the possession and control was in the defendant, through its agent Moutrey, despite the fact that under the contract of agistment, the owner of the sheep was obligated to take upon himself their actual care, such as herding, watering, and salting. Appellant places great reliance upon the case of Howard v. Throckmorton, 59 Cal. 79, where it was held that the contract was a lease rather than an agistment, although pasture was paid for by the head and the defendant undertook some duties with respect to the stock and maintenance of fences. The owners of herds, which were dairy cattle, rented small houses, corrals, and portions of the lands, which they used as dairies. That the two cases are distinguishable on their facts appears from the following finding of the court in the Howard Case: "The defendant keeps a superintendent or manager, whose duty it is to keep these herds separate, and sometimes rodeos are held to divide the stock. The cows, however, would naturally not wander much from where they are milked, and the main duty of herding would inevitably fall upon the owners who are using them; in fact, they as exclusively occupy their respective portions of the land as though they owned them." It should further be noted that the court was there considering, not the rights and obligations of the owner of the land as to the owner of the cattle, but was concerned solely with the question of whether the rents were received by the defendant as rents, issues, and profits of the land or were "moneys made by him, as fruits of his own industry" for the purpose of determining the right of his cotenants to an accounting.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.



2 Cal.2d 190

ADOLPH RAMISH, Inc., v. WOODRUFF.

L. A. 14273.

Supreme Court of California.

Dec. 29, 1934.

1. Alteration of Instruments ⇐12

Payee's written extension of time written on note, if material alteration, did not defeat recovery against maker, where note provided that maker and others thereby consented to extension of time and extension was made in maker's presence (Civ. Code, § 3205).

2. Bills and notes ⇐160

Provision of note for attorney's fees which might be incurred in collection did not make note nonnegotiable because not specifically limiting attorney's fees to event that payment was not made at maturity (Civ. Code, § 3083, subd. 5).

Provision in note that maker promised to pay all costs of collection, including attorney's fees, which might be incurred in collection of note or any portion thereof, and that, in case suit was instituted for such purpose, amount of attorney's fees should be such amount as court should adjudge reasonable, did not render note nonnegotiable on ground such provision was not authorized by Civ. Code, § 3083, subd. 5, because such provision did not limit payment of costs of collection and attorney's fees to event that payment was not made at maturity, since, if note were paid

promptly at maturity, no attorney's fee could accrue, and provision meant only that, if note was collected by attorney after maturity, maker agreed to pay reasonable attorney's fee.

3. Bills and notes ⇐211, 288

Blank indorsement on note by implication of law passes title to transferee, and is also promise to pay instrument on default of maker on condition that proper steps are taken to charge him.

4. Bills and notes ⇐330

Finding that note had been indorsed in blank so as to cut off defenses of maker against original payee *held* warranted, though indorsement recited that indorser guaranteed payment.

Indorsement recited in substance that for value received indorser thereby waived presentation of note to maker, demand of payment, protest, and notice of nonpayment, and guaranteed payment of same and of all expenses of collection including attorney's fees incurred in enforcing guaranty, and did thereby without notice expressly consent to delay or indulgence of enforcing payment and to express extension of time of payment, followed by indorser's signature.

5. Bills and notes ⇐523

In action on note, note *held* properly admitted against objection that no transfer had been shown, where indorsement, which in legal effect was blank indorsement, was admitted (Civ. Code, § 3140).

6. Bills and notes ⇐211, 524

Note payable to order may be negotiated by mere delivery when indorsed in blank by payee, and presumption of ownership arises from mere fact of possession of such instrument (Civ. Code, § 3140).

7. Bills and notes ⇐357, 525

In action on note, evidence justified trial court's finding that plaintiff took note as collateral security, and hence for value.

8. Bills and notes ⇐358

Antecedent debt constitutes valuable consideration for transfer of note as security, and holder of security is "purchaser for value" as to third persons.

[Ed. Note.—For other definitions of "Purchaser for Value," see Words & Phrases.]

9. Bills and notes ⇐509

In pledgee's action on note held as collateral security, evidence that, although face value of pledgor's note to pledgee was $13,500, pledgee had in fact only advanced sum of $6,820, which was amount of actual indebtedness which note sued on was given to secure, *held* improperly excluded.

10. Bills and notes ⇐357
Pledges ⇐58(6)

Pledgee of note may recover full amount thereof from maker and hold any surplus over debt for benefit of pledgor, when there are no equities between maker and pledgor, but, if there is defense available to maker against pledgor, pledgee is only "holder in due course" to amount of his debt, and can recover only amount for which note was pledged (Civ. Code, § 3108).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words & Phrases.]

11. Bills and notes ⇐523

Evidence *held* sufficient to sustain finding of defendant's ownership of note sued on.

12. Bills and notes ⇐92(1)

Note given for amount largely in excess of sum advanced thereon by payee *held* nevertheless supported by consideration as to entire amount of note, where payee, as further consideration for note, agreed to and did execute and deliver, for custody in escrow until due date of note, an assignment to third person of judgment on which there was due amount by which note exceeded payee's advance.

13. Bills and notes ⇐92(1)

Payee's delivery in escrow of assignment of judgment owned by payee constituted consideration for another's promise of payment, though payee had theretofore been unable to secure satisfaction of judgment by execution.

14. Pledges ⇐58(6)

Pledgee of note asigned as collateral security for another note for a greater amount could recover entire amount of pledged note where other note was supported by consideration.

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by Adolph Ramish, Inc., against Leonard J. Woodruff. From a judgment for plaintiff, defendant appeals, and plaintiff moves to dismiss the appeal or affirm the judgment, and defendant also presents a petition to take additional evidence in the Supreme Court.

Motion to dismiss appeal denied, and judgment affirmed.

For prior opinion, see 28 P.(2d) 360, 91 A. L. R. 684.

Francis B. Cobb, of Los Angeles, Earl J. Opsahl, of Hollywood, and Edward J. Fitzpatrick, Burnett Wolfson and Earl I. Swetow, all of Los Angeles (Louis M. Brown, of Los Angeles, of counsel), for appellant.

Harris & Field, of Los Angeles, for respondent.

CURTIS, Justice.

When this cause was first presented to us for our consideration, an opinion was rendered reversing the judgment of the trial court. After the rendition of said opinion, a rehearing was granted for the express purpose of permitting the taking of additional evidence, offered by both the appellant and respondent, in order that final judgment might thereafter be rendered by this court, and the litigation thus terminated. We are satisfied with the conclusions reached by us in said opinion upon many of the questions involved in this appeal, and we adopt that portion of said opinion dealing with these questions. The part so adopted is as follows:

This is an appeal from a judgment rendered in a suit upon a promissory note for $10,000 executed by the defendant, Leonard J. Woodruff, payable to Gavin W. Craig and delivered by Murrey M. Sommerfield as Craig's agent to Adolph Ramish, president of Adolph Ramish, Inc., the plaintiff herein. There is also before us a motion to dismiss the appeal or affirm the judgment as well as a motion to take further evidence.

Simultaneously with the execution and delivery of the note sued upon, Gavin W. Craig executed and delivered to Woodruff his promissory note for $10,000. Both notes were dated February 19, 1932, and matured ninety days after date, bearing interest at 7 per cent. per annum. It was stipulated at the trial that nothing had been paid on the note from Craig to Woodruff. At the time of the execution of these notes, the plaintiff held the promissory note of Gavin W. Craig for $13,500. This note was not put in evidence, but testimony was given showing that it matured in February, 1932, and that a thirty-day extension had been given in that month. Craig indorsed the Woodruff note, and extended the time of payment thereon, and on May 7, 1932, it was delivered to the plaintiff as stated above, but whether as collateral security for the indebtedness of Craig to the plaintiff was one of the issues in the case. The facts will appear with more particularity in connection with the discussion of the points raised by this appeal, but the note sued upon reads as follows:

"$10,000.00 Los Angeles, California,
"February 19, 1932.

"Ninety days after date, for value received I promise to pay to Gavin W. Craig, ... or order at Los Angeles, California, the sum of Ten Thousand and 00/100 Dollars with interest from date until paid at the rate of seven per cent per annum, payable maturity.

"Should the interest not be so paid, it shall thereafter bear like interest as the principal. Should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. The undersigned (jointly and severally) further promise to pay all costs of collection, including attorney's fees, which may be incurred in the collection of this note, or any portion thereof, and in case suit is instituted for such purpose, the amount of attorney's fees, shall be such amount as the court shall adjudge reasonable. Principal and interest payable in gold coin of the United States of the present standard. The makers, sureties, guarantors and endorsers of this note hereby consent to extensions of time at or after the maturity hereof, and hereby waive diligence, protest, demand and notice of every kind. Should this note be signed by more than one person, firm or corporation, all of the obligations herein contained shall be considered joint and several obligations of each signer hereof.

"[Signed] Leonard J. Woodruff."

On the back of the note are two indorsements; the second is set out later on in this opinion; the first is as follows: "Interest paid to May 19–1932. Time for payment of principal extended to July 19th, 1932. Gavin W. Craig."

The defendant in his answer admitted the execution and delivery of the note to Craig, but denied the title of the plaintiff on the ground that the note was delivered to him for inspection and investigation only, and set up as defenses that the plaintiff's lien was, at most, for the sum of $6,820 only, that defendant had an offset as against Craig, and that plaintiff was not the holder in due course of the note sued upon.

[1, 2] We will first consider the arguments that the note was rendered nonnegotiable by the inclusion of the provision with regard to attorney's fees, and that it had been materially altered before its delivery to the plaintiff by the extension of time indorsed on the back. On the latter point it is sufficient to point out

that the note contained a stipulation that the "makers, sureties, guarantors and endorsers of this note hereby consent to extensions of time at or after the maturity hereof," and that Craig testified that the extension was in his handwriting and that he made it in the presence of Woodruff. So, if the extension did amount to a material alteration, it was consented to and authorized by the defendant. Cal. Civ. Code, § 3205. With respect to the provision for attorney's fees, the contention is made that it does not limit the payment of the costs of collection and attorney's fees to the event that payment is not made at maturity, but provides for their payment in any event, and since such a provision is not authorized by the Negotiable Instruments Law (Cal. Civ. Code, § 3083 [5]), the note is nonnegotiable. We are cited to no California cases directly in point, but we are satisfied the rule must be, as set forth in Hutson v. Rankin, 36 Idaho, 169, 213 P. 345, 347, 33 A. L. R. 91, that, "if a note is paid promptly at maturity no attorney fee or other costs of collection could accrue, and if the clause here under consideration is to be given its natural and ordinary construction, it means that if the note is collected by an attorney after maturity, the maker agrees to pay a reasonable attorney fee." See, also, Pugh v. Dawson, 95 Cal. App. 505, 273 P. 39, upholding, but without discussion of the point, a similar clause which was not in the exact words of the Code and did not contain the express limitation "after maturity."

[3, 4] Complaint is made of the finding in paragraph III of the findings of fact and conclusions of law that "said Gavin W. Craig, endorsed, said note in blank," and that plaintiff was "the holder of the note herein sued upon for value and in the usual course of business, as collateral security." The second indorsement on the back of the note is as follows: "* * * California. * * * For value received, I hereby waive presentation of the within note to the maker, demand of payment, protest and notice of non-payment, and do guarantee payment of the same, and of all expenses of collection thereof, including attorney's fees, incurred in enforcing this guaranty and do hereby without notice, expressly consent to the delay or indulgence of enforcing payment and to the express extension of the time of payment of the same. [Signed] Gavin W. Craig." The appellant takes the position that the quoted inscription does not amount to a commercial indorsement, but is a mere guaranty and does not operate as a transfer which cuts off the defenses of the maker.

The problem of whether a transfer by guaranty instead of by the usual form of indorsement operates as an ordinary commercial indorsement has two aspects: First, the passage of title to the transferee; and, second, the liability incurred by the transferor who has made the guaranty. We are here concerned with the first only, since this is a suit by the transferee against the maker, who has set up as a defense his right of offset against the original payee who is also the maker of the guaranty.

The cases throughout the country are in conflict upon this question, and this jurisdiction is not as yet definitely aligned with either group. The respondent cites in its brief Bank of Italy, etc., Ass'n v. Symmes, 118 Cal. App. 716, 5 P.(2d) 956, which recognizes the conflict but does not decide the point. The issue therein litigated was the release of the party secondarily liable; it being held that it was immaterial whether he was considered as a guarantor or as an indorser, although the case contains dictum to the effect that the engagement was intended as a guaranty and not as an indorsement. While the wording of the undertaking there involved was substantially the same as that here under consideration, it was placed upon the note as an accommodation and before delivery to the original payee: hence the problem of negotiation was not presented to the court. It should, perhaps, be noticed in passing that a recent Connecticut case, Jaronko v. Czerwinski, 117 Conn. 15, 166 A. 388, 90 A. L. R. 299, has held that accommodation indorsers who employ the form of a guaranty incur the successive liability of indorsers rather than the contributive liability of guarantors. In Thurber v. Fisher, 124 Cal. App. 312, 12 P.(2d) 481, the District Court of Appeal indicated its willingness to follow those cases which hold such a guarantor to be an indorser with enlarged liability. However, this court has held that an intention not to be bound as a general indorser might be shown where the indorsement contained the following expression: "I hereby sell, set over and assign the within note, * * * and hereby guarantee that this is a good, valid and subsisting promissory note," and that, where such intention existed, the indorsement was qualified. Cristina v. Mattenberger, 212 Cal. 670, 300 P. 450, citing Hammond Lumber Co. v. Kearsley, 36 Cal. App. 431, 172 P. 404; and see note, 19 Cal. Law Rev. 324. In all of these cases the action was instituted for the purpose of enforcing the liability of the indorser, so the aspect of indorsement with which we are primarily concerned was not immediately involved. Nevertheless, the two

cases last cited recognize and utilize, as the test of whether the undertaking constitutes a general indorsement, the intention of the transferor to assume the obligations of a general indorser. It would seem that this test could equally well be applied to an undertaking which operated to extend the liability of the transferor beyond that of the ordinary indorser in blank. Words of guaranty being words of enlargement rather than words of limitation, it may fairly be inferred that the transferor's intent was to assume the burdens of indorsement and, in addition, the unconditional liability of one who guarantees payment. This is the view of the majority and of the more recent cases. To recapitulate, the signature of the payee is a blank indorsement which, by implication of law, passes title to the transferee and is also a promise to pay the instrument on default of the maker on condition that the proper steps are taken to charge him. The signed guaranty is the same contract with one-half of the obligation (the promise to pay) expressed and made unconditional, and nothing therein restricts or negatives the implication of the blank indorsement created by the signature; that is, that portion of the contract relating to the transfer of the instrument rests in parol, as always; therefore title passes as by a blank indorsement free of the equities of the maker against the original payee. In Rawlins County State Bank v. Rummel, 114 Kan. 597, 220 P. 255, 256, where the indorsement was made in the form of a guaranty, the court quotes the Kansas enactment of the Uniform Negotiable Instruments Law, and says:

"Section 6557 of the General Statutes of 1915 reads:

"'An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery.'

"The note in controversy was transferred to the plaintiff in such a manner as to constitute it the owner and holder of the note. * * *

"There was nothing on the face of the note or in the indorsement to show that the plaintiff was not a holder in due course. So far as the note in controversy was concerned, the writing on the back of it transferred it to the plaintiff. If that writing contained matter unnecessary in an indorsement, the rights of the purchaser could not be affected thereby, unless the additional matter was such as to give him notice of a defect in the note as between the parties thereto. The guaranty of payment of the note and of others given in renewal of it did not give any notice of any defect in the note or in the title of the holder thereof.

"In Kellogg v. Douglas County Bank, 58 Kan. 43, 48 P. 587, 62 Am. St. Rep. 596, the following language was used:

"'An indorsement made on the back of promissory note in the following language: "For value received, we hereby guarantee payment of within note at maturity, waiving demand, protest, and notice of protest," signed by the payee of the note, is a commercial indorsement as well as a guarantee of payment; and the note, being negotiable in form, is sufficient to pass a valid title to the paper and protect an innocent purchaser thereof.'"

It has also been said: "There is a wide difference between writing on a separate piece of paper and a payee's writing something over his name on the back of a promissory note. If he should simply write his name on a separate sheet of blank paper, it would bind him to nothing; but if he writes his name on the back of a promissory note payable to his order, he becomes an indorser. So, if he should write an assignment, or a guaranty, or some other agreement, on a separate sheet of paper, and sign it, that would be a distinct contract; but when he writes his name upon the back of a note payable to his order, the addition of words which either limit or enlarge the usual liability on his part which would arise from a blank indorsement does not destroy the fact that the entry is an indorsement upon a negotiable paper, or prevent its efficacy as a method of passing the legal title upon negotiation, at least unless there is something in the indorsement to show an intention to destroy the negotiable character of the paper." Hendrix v. Bauhard Bros., 138 Ga. 473, 75 S. E. 588, 592, 43 L. R. A. (N. S.) 1028, Ann. Cas. 1913D, 688. Other cases which support this view are: First National Bank of Dalton, Ohio, v. Cummings, 69 Okl. 216, 171 P. 862, L. R. A. 1918D, 1099; Jones County Bank v. Kurt, 192 Iowa, 965, 182 N. W. 409; National Bank of the Republic v. Price, 65 Utah, 57, 234 P. 231; Cady v. Bay City Land Co., 102 Or. 5, 201 P. 179, 182, 21 A. L. R. 1367; First National Bank of Durand v. Shaw, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342; Hoosier Mutual Ins. Co. v. Citizens' Trust & Savings Bank, 89 Ind. App. 5, 165 N. E. 446; Hutson v. Rankin, 36 Idaho, 169, 213 P. 345, 33 A.

L. R. 91; Richmond Guano Co. v. Walston, 191 N. C. 797, 133 S. E. 196, 198, 46 A. L. R. 1512.

The minority rule, as exemplified by the case of Central Trust Co. v. First National Bank, 101 U. S. 68, 25 L. Ed. 876, is that a guaranty placed on a bill or note does not constitute a commercial negotiation thereof, that the guaranty is a separate contract, and that there is either no transfer or it operates as an assignment, the transferee taking subject to the equities of the maker, and this upon the theory that a blank indorsement admits of the implications of its terms only because of the fact that it is in blank and that where, as here, the contract is express, no other terms may be implied. For collections of cases and discussion of the opposing views see Notes 34 Yale L. J. 144; 72 U. of Pa. L. Rev. (Am. Law Reg.) 296; 21 A. L. R. 1375; 33 A. L. R. 97; 46 A. L. R. 1516.

The majority decisions are the better reasoned and are in accordance with the policy of free circulation of commercial paper as a substitute for money and with the spirit and purpose of the Negotiable Instruments Law. In Mangold & Glandt Bank v. Utterback, 54 Okl. 655, 160 P. 713, 715, L. R. A. 1917B, 364, after quoting section 4113 of the Oklahoma Revised Laws of 1910, which is identical with section 3144 of our Civil Code and with section 63 of the Negotiable Instruments Law, all of which provide: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity," the Oklahoma court said: "It will be observed from section 4113 that the tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases towards holding the same to be a commercial indorsement in due course. This rule is founded upon commercial necessity. The unshackled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions." In Richmond Guano Co. v. Walston, supra, similar language is used: "The decisions years ago on this important question were chaotic. In more recent years, and especially since the passage among the states over the nation of the Negotiable Instruments Laws to make the laws more uniform, the decisions are more in accord, and the great wealth hold that the indorsement, as in the present case, 'Demand, notice, and protest waived; payment guaranteed by the undersigned,' is an indorsement with an enlarged liability. The language makes the holder one in due course, and the instrument is taken free from equities and defenses which the maker has against the payee. The great importance in commerce and trade has forced uniform legislation in regard to negotiable instruments, and the courts have now, with few exceptions, held that the holder, under the facts in the present, is one in due course with enlarged liability." It is further to be borne in mind that the purpose of making the indorsement in this form must have been to make the instrument more attractive to the prospective purchaser. As said in Cady v. Bay City Land Co., supra: "It is not an instance where a stranger to the instrument guarantees its payment, which would be a collateral undertaking. It is a case of a payee, an actual party to the note, assuming a position in negotiating the same whereby he waives all further action on the part of the holder in fixing the liability of him who includes a guaranty in his indorsement." For these reasons we agree with the majority, and we are of the opinion that the finding of the trial court that the note had been indorsed in blank was correct and in accordance with the law.

[5, 6] The defendant objected to the introduction of the note in evidence on the ground that no transfer had been shown. In accordance with the views expressed above, the indorsement having been admitted, the notes were properly received in evidence. Section 3140 of the Civil Code provides that "every holder is deemed prima facie to be a holder in due course."

"Where the genuineness of the indorsement is not legally challenged, or is established by proof, then the rule applies, and for the reason that, like an instrument made payable to bearer on its face, one payable to order may be negotiated by mere delivery when indorsed in blank by the payee. Hence the presumption of ownership from the mere fact of the possession of such an instrument.

"This is illustrated by some of the cases cited and quoted from in counsels' brief. Among them is the case of Dawson Town & Gas Co. v. Woodhull, 14 C. C. A. 464 [32 U. S. App. 134], 67 F. 451, wherein Circuit Judge Thayer, in the opinion of the court, said:

'The legal presumption of ownership which exists in favor of one who is ostensibly in possession of negotiable notes indorsed in blank by the payee, as these notes were, and who brings a suit thereon, is not overcome by a mere denial of the fact of ownership contained in the answer. When these notes were offered, they were in the hands of the plaintiff's attorneys. The legal presumption was that they had received them from the hands of their client, * * * and that they were the client's property. There was no occasion, therefore, for offering testimony to confirm the presumption before the notes were admitted in evidence.'" Capitol Hill State Bank v. Rawlins Nat. Bank, 24 Wyo. 423, 160 P. 1171, 1176, 11 A. L. R. 937, 944.

[7, 8] It is insisted by the appellant that there was no delivery of the note other than for the purpose of inspection and investigation, that there was no meeting of the minds of Craig and the plaintiff corporation and that the agent, Sommerfield, was never directed or authorized to deliver the note as collateral security. The evidence with reference to this transaction is sharply conflicting. Ramish, the president of the plaintiff corporation, testified that Craig's note to plaintiff was due in February of 1932; that a thirty-day extension was given, and that in April the plaintiff threatened suit; that Sommerfield made several calls on Ramish for the purpose of securing an extension which was refused because no security was offered other than an interest in an apartment house which he refused to accept; that, after that Sommerfield offered the Woodruff note as security; that he (Ramish) said he would accept it as collateral security "providing the note was any good"; that he received the note on May 7, 1932; that Sommerfield promised to get a report on the maker which he gave to Ramish on May 9th; that Ramish then himself investigated Woodruff's affairs, and, on May 11th told Sommerfield he would accept the note as collateral security, giving Craig an extension on his note until July 19th, when the Woodruff note was payable, but that no written extension had been given; that it was never intended that he should credit the Woodruff note on the Craig note, but only that he was to credit thereon whatever he collected on the Woodruff note at maturity. He also testified that, after May 7, 1932, Sommerfield never asked for the return of the Woodruff note.

The record contains a receipt dated May 7, 1932, and signed by Ramish, in which he acknowledges the receipt of the Woodruff note from Sommerfield, and that it was "to be held for a reasonable time for the purpose of investigation as to the responsibility of the maker." This is not inconsistent with Ramish's story of the transaction. There is also in evidence a carbon copy of a letter from Ramish's attorney to Craig dated July 16, 1932, inclosing a carbon copy of a letter to Woodruff "concerning note which Adolph Ramish Inc. hold as collateral for payment of your note dated November 3, 1931." Ramish's attorney testified that he was present on the occasion when Sommerfield offered the note as collateral security, and that the understanding was that the Craig note should be allowed to run until the maturity of the Woodruff note which was given to secure it; that the whole purpose of the transaction was to give security to gain time. One Weinblatt, who was involved in the transaction in connection with which Craig had given his note to Ramish, testified that Craig had told him prior to May 7th that he was having Sommerfield negotiate with Ramish with the purpose of giving the Woodruff note as collateral security for his own note.

Murrey Sommerfield testified that he carried on the negotiations with Ramish with regard to Craig's note; that on May 7th he delivered the Woodruff note to Ramish for purposes of inspection and received the receipt; that he told Ramish the only way he could use the note was to return the Craig note; that, when he asked for its return, after having delivered the financial report on Woodruff, Ramish said, "Not yet"; that he wanted to try to collect the note; that nothing was said about holding it for security; that three or four weeks later Ramish still refused to return the Craig note, saying that he was not "ready to give it up" or to say what he was going to do with the notes; that he knew of no extension agreement. Craig testified that he told Sommerfield he believed it might be possible that the Woodruff note might be used in some way to satisfy Mr. Ramish as to his (Craig's) indebtedness, and that he wished Sommerfield to take the matter up with him "along those lines"; that he had no communication with Ramish thereafter; that Sommerfield reported that Ramish was not inclined to take the note, but would negotiate further; that he wanted the note to inspect it, and, if it were satisfactory, that he might use it to extinguish the obligation Craig owed him, though not Weinblatt's. He also testified that Sommerfield later reported that he had left the note; that he saw the receipt about the date it bears; that later Sommerfield told him Ramish was satisfied

to take the note, but would not return the Craig note until he had collected on the other one. Further on in his testimony he said that he was never notified that Ramish would actually accept the note, although he had found it to be good and satisfactory paper. He also said that in his instructions to Sommerfield the manner in which the note was to be used was left quite indefinite, "because it would be a matter of conversation and discussion between Mr. Sommerfield and Mr. Ramish"; that his understanding was that Ramish was considering holding the note "until it became due and collect from Mr. Woodruff"; that "it would be accepted, if at all, in the cancelation of my obligation, but I was never informed by Mr. Sommerfield that Mr. Ramish had said definitely that he would do that"; that no definite extension was ever given, the note was just allowed to run; that he could not remember whether he had ever previously requested Weinblatt to negotiate with Ramish for an extension.

On this state of the evidence and especially since the testimony of both the principal and his agent was extremely vague and evasive, the trial court was amply justified in concluding that the plaintiff took the note in controversy as collateral security, and hence for value. In our view of the case, it is immaterial that no formal extension agreement was ever entered into. "It is the law that an antecedent debt constitutes a valuable consideration for a transfer as security, and the holder of the security is a purchaser for value as to third persons. Smitton v. McCullough, 182 Cal. 530, 537, 189 P. 686; Fowles v. National Bank of California, 167 Cal. 653, 664, 140 P. 271; Chapman v. Hughes, 134 Cal. 641, 659, 58 P. 298, 60 P. 974, 66 P. 982; 17 Cal. Jur. 955." Ekmann v. Plumas County Bank, 215 Cal. 671, 12 P.(2d) 433, 434.

[9, 10] The appellant offered to show that, although the face value of the Craig note was $13,500, the plaintiff had in fact only advanced the sum of $6,820, and that this amount was the actual indebtedness which the Woodruff note was given to secure, and such proof was refused by the trial court. This was error. We have already pointed out that, simultaneously with the execution and delivery of the Woodruff note, Craig executed and delivered to Woodruff his promissory note in the same amount, $10,000. The pledgee of notes can recover the full amount thereof from the maker, holding any surplus over the debt for the benefit of the payee-pledgor, when there are no equities between the maker and the pledgor, but, if there is any defense available to the maker against the indorser, the pledgee, although he is a holder in due course, is only a holder in due course to the amount of his debt, and can only recover on the note the amount for which it was pledged. "Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien." Cal. Civ. Code, § 3108 (N. I. L. § 27); Brannan's Negotiable Instruments Law (5th Ed.) 362; Bell v. Bean, 75 Cal. 86, 16 P. 521; Kelly v. Universal Oil Co., 65 Cal. App. 493, 498, 224 P. 261; Note 69 A. L. R. 898. It is obvious that, in order to determine the actual amount of the indebtedness secured, such evidence was both proper and necessary. To hold otherwise would be to allow a pledgee to recover from the maker of the collateral note, who has a defense against the pledgor, a greater amount than he could recover in a suit against the pledgor himself.

[11] It follows from the above conclusion that, because of the failure of the trial court to permit appellant to prove the consideration paid for the $13,500 Craig note, the judgment would necessarily have had to be reversed and the cause remanded to the trial court in order that such evidence might be taken, unless additional evidence be taken by this court as provided in section 956a of the Code of Civil Procedure and rule 38 of the Rules of the Supreme Court (204 Cal. lxvi). As above noted, upon the presentation of a petition for a rehearing, it was deemed advisable to grant to respondent the right to present evidence upon this issue to this court, and at the same time, the privilege was extended to appellant to present further evidence with reference to the issue of whether or not plaintiff was a holder in due course of the $10,000 Woodruff note, which it is seeking to collect in this action. It seemed expedient to this court, instead of having the evidence presented to it, to have it taken before a referee and transmitted to this court. Pursuant to this plan, an order was made by this court appointing as referee a judge of the superior court of Los Angeles county, where the controversy originated, to take said additional evidence. Said evidence was taken, and is now before us upon a properly authenticated transcript. From a reading of the transcript, we are satisfied that the original finding of the trial court with reference to the issue of whether or not the plaintiff was the holder in due course of the $10,000 Woodruff note, executed by Woodruff to Gavin Craig, as payee, and by the latter transferred to plaintiff as collateral security for Craig's note for $13,500 is

correct. We adopt it as the finding of this court. Said finding is as follows: "That plaintiff is now and at all times since the 11th day of May, 1932, has been, the holder of the note herein sued upon for value and in the usual course of business, as collateral security for the payment of said $13,500 note of the said Gavin W. Craig." In opposition to respondent's claim that it was the owner of said note on the 11th day of May, 1932, appellant offered evidence to the effect that on June 23, 1932, which was over a month after the date on which respondent claimed to have acquired said note, one Weinblatt offered to one Ernest Smith a note executed by Woodruff to Gavin W. Craig, as payee, in the sum of $10,000. Appellant failed to show with any degree of conclusiveness that the note claimed to have been offered to Smith by Weinblatt was the identical note sued on by respondent as the basis of this suit. In fact, from the evidence of Weinblatt, the inference is deducible that the $10,000 Woodruff note which Weinblatt offered to Smith was only one of a series of similar notes exchanged between Craig and Woodruff. On the other hand, in corroboration of the fact that it was a holder in due course of this identical note, respondent offered the affidavit of the vice president of the Bank of Italy and a photostatic copy of the receipt given for the note by the collection department of said bank which demonstrated that said note had been turned over by respondent and was in the possession of the collection department of said bank from May 11, 1932, to June 13, 1932. Mr. Ramish testified that he withdrew said note on the latter date and retained the same in his possession until he turned it over to his attorney to commence suit thereon for its collection.

[12-14] We are likewise satisfied, with reference to the issue of whether or not the Craig note for $13,500 executed and delivered by Craig, as payor, to respondent was supported by consideration, that the evidence does show consideration, and this being so, respondent is entitled to recover from appellant Woodruff in this suit upon Woodruff's $10,000 note transferred by Craig to respondent as collateral security for his $13,500 note, the entire amount of said $10,000 note. Respondent offered in evidence a written agreement, dated November 3, 1931, the date of the Craig $13,500 note, signed by respondent, by Craig, and by H. H. Harris, attorney for respondent, to prove that there was further consideration for the $13,500 Craig note, in addition to the sum of $6,820 paid by check to Craig by respondent. In said agreement is set forth the fact that respondent had paid to Craig the sum of $6,820, and that as a further consideration for the $13,500 promissory note executed by Craig, respondent agreed to assign to Weinblatt all of his right, title and interest in and to a certain judgment in favor of respondent and against Weinblatt and one Lindsey, which with attorneys' fees amounted to $6,680. By said agreement, said assignment was to be delivered to said Weinblatt upon the payment in full of said $13,500 note, and said judgment was to be held as security for the payment of said note. The record does not indicate the reason why Craig was willing to give his note for $6,680 in excess of the money actually paid to him by respondent in order that a judgment against Weinblatt should be assigned to Weinblatt, but the fact remains that he was willing to do so, and did give his note for the sum of $13,500. The evidence shows that in pursuance of said agreement respondent executed said assignment and turned said assignment over to H. H. Harris, its attorney, to be held by him in escrow until the due date of the Craig note, due ninety days from the date of said agreement. The evidence also shows that subsequent to the securing of the judgment against Weinblatt and Lindsey by respondent, many attempts had been made to execute on said judgment, but that such efforts were uniformly unsuccessful. It is apparent that since the assignment was to be delivered to Weinblatt only upon the payment of the Craig note, respondent did not permanently relinquish his judgment against Weinblatt nor accept Craig's note as satisfaction of said judgment. The question, therefore, is presented whether the agreement which had the effect of placing said assignment in escrow and of postponing any attempt to execute thereon for a period of ninety days was consideration for the balance of Craig's note in excess of the $6,820 paid in cash to Craig by respondent. It has been repeatedly held that the extension of time in which to pay money due confers upon the debtor an advantage or benefit which in itself constitutes a sufficient consideration for the execution of an instrument by him, and that where the instrument is executed by a third person in consideration of an extension given to the debtor, the detriment to the creditor is a sufficient consideration to support the promise of the third person. 19 Cal. Jur. pp. 841, 842, § 37; Westphal v. Nevills, 92 Cal. 545, 28 P. 678; Guy v. Bibend, 41 Cal. 322. "Any suspension or forbearance of a legal right constitutes a sufficient consideration. Thus an agreement to forbear to sue upon an obligation presently due is a suffi-

cient consideration for the giving of a note. Even though the forbearance is for one day only, there is a sufficient consideration as the law does not weigh the quantum." 19 Cal. Jur. p. 842, § 37. Nor do we think the fact that respondent had theretofore been unable to execute upon said judgment changes the legal rule. It does not necessarily follow that because theretofore plaintiff had been unable to secure satisfaction of his judgment, that on the date of the agreement he was not in a position to do so, or that at some time within the ninety days, he might not be in a more advantageous position. The mere right of the respondent to attempt to execute on said judgment, uncertain and contingent though it was, was a right which he need not voluntarily forego. When he gave up this right, he gave up something which might be of value to him, and which therefore was consideration for a promise made in exchange for the relinquishment of said right.

This court therefore finds that: "Said promissory note made and executed by said Gavin W. Craig, payable to the order of the plaintiff, in the principal sum of Thirteen Thousand Five Hundred and no/100 dollars ($13,500) is supported by a sufficient consideration."

The conclusions of law made and entered by the trial court are hereby adopted by this court. They are as follows: "That plaintiff is entitled to judgment against defendant in the sum of Ten Thousand and no/100 dollars ($10,000) principal; interest thereon at seven per cent (7%) per annum from May 19th, 1932; Five hundred and no/100 dollars ($500) attorneys' fees, and its costs incurred herein."

The fact should perhaps be mentioned that subsequent to the taking of additional evidence, appellant sought and secured the permission of this court to file a supplemental brief. In this brief, for the first time, the contention was made that the entire proceedings of the original trial and the judgment rendered therein were invalid by reason of the fact that the clerk's minutes showed that the demurrer to the original complaint had been sustained; that thereafter no amended complaint was filed, but instead plaintiff served upon defendant a notice that the demurrer was overruled with leave to answer, and as a result of this false notice, defendant answered and the case proceeded to trial. It is sufficient to say that respondent has filed in this court a certified copy of an order of the judge who heard the argument on the demurrer, correcting the clerk's minutes which were in error so as to speak the truth and show that the court's order with reference to the demurrer in fact overruled it. This, we think, is a complete answer to appellant's belated contention.

It follows from this discussion that appellant has failed by its proffered evidence to prove that respondent was not a holder in due course of the note herein sued upon, and that respondent has established that the Craig note for $13,500 is supported by a consideration of $6,820 in cash paid to Craig by check, and the further consideration of an assignment of a judgment to a third person on which there was due at the time of the delivery of the Craig note, $6,680, and the postponement for ninety days of any attempt to execute on said judgment. It follows that the judgment of the trial court against appellant, which is less than the amount due on the Craig note, should be affirmed.

The motion heretofore made by respondent to dismiss the appeal is denied. The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.



2 Cal.2d 304

JOHNSON et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14863.

Supreme Court of California.

Jan. 28, 1935.

Master and servant ⇐393½

That insurer mistakenly overpaid injured employee under compromise agreement, approved by Industrial Accident Commission, whereby insurer agreed to pay employee a lump sum and acknowledged its liability for medical and hospitalization benefits *held* not to relieve insurer from liability for such benefits to doctor and hospital which rendered them (St. 1917, p. 831, as amended).

In Bank.

Proceeding under the Workmen's Compensation Act by Jimmie Johnston, employee, opposed by R. S. Black, employer, and the Constitution Indemnity Company and another,

insurance carriers. To review an order of the Industrial Accident Commission setting aside an award made against named insurance carrier for the payment of hospital and medical bills, Dr. James L. Johnson and others bring certiorari.

Order annulled.

Ben B. Mathews, Mathews & De Wolf, of Phoenix, Ariz., for petitioners.

Everett A. Corten, of San Francisco, for respondents.

THOMPSON, Justice.

This is a proceeding to review an order of the Industrial Accident Commission setting aside and vacating an award made against an insurance carrier for the payment of hospital and medical bills. The facts disclose that one, Jimmie Johnston, was seriously injured by a powder explosion at the Ballarat mine in Inyo county on June 30, 1930, he being employed at the time by R. S. Black to do road and assessment work. Black was insured by the Constitution Indemnity Company of Philadelphia, the liability of which concern as the primary insurer was established by this court in the case of Black v. Industrial Acc. Commission, 215 Cal. 639, 12 P.(2d) 640. Subsequently, the Lloyds Insurance Company of America, having assumed the liability of the former company, was made a joint defendant, by order of the respondent commission. Both companies are now in the hands of a receiver with the insurance commissioner of the state as liquidator. As a result of the injury to the employee, Johnston, medical bills were incurred in the effort to restore his health, among which are the unpaid bills of these petitioners: Dr. James L. Johnson, Pathological Laboratory, Good Samaritan Hospital, and certain others, paid by the Industrial Commission of the state of Arizona, the total of which is $965.55.

On November 29, 1932, a compromise agreement between the Constitution Indemnity Company and the injured employee was filed with the commission and was approved by it on December 12, 1932. In its material parts, it recites: "[T]hat the amount agreed upon by the said parties to be paid said applicant in full satisfaction and release of his claim arising under the Workmen's Compensation Insurance and Safety Act of California [St. 1917, p. 831, as amended] is the sum of $3650.00, in addition to the $100.00 heretofore paid, in one lump sum, *together with acknowledgment of liability for all medical and hospitalization benefits heretofore furnished the applicant*, Jimmie Johnston, to relieve and cure him from said injury and in such amounts as are reasonable and proper under said Act and the practice of this Commission, and which are to be fixed by this Commission should the claimants furnishing said medical not be able to agree with or be paid by the undersigned insurance company, in the usual and customary manner of this Commission; and out of which said $3650.00 all liens thereon of applicant's attorney and others, if any, is to be fixed by this Commission and paid; the undersigned corporation shall be liable for no medical or hospital or other treatment of any sort rendered the applicant by anyone hereafter." Italics ours. Then follows a subrogation clause and a paragraph releasing the employer and his insurer.

In order for us to have clearly in mind the point to be hereafter discussed, it is well to note that the insurance carrier assumed to pay the hospital and medical bills incurred in addition to the lump sum settlement, from which latter sum there was to be deducted only liens for attorney's fees and similar items and perhaps medical bills incurred subsequently.

After the approval of the agreement already mentioned, the petitioners here filed with the respondent commission their claims for medical aid furnished the employee, which claims were allowed and approved, and, on March 7, 1933, a supplemental award for medical expenses in the sum of $965.55, and covering the items here in question, was made. The commission also established liens against the compensation in the sum of $497 and ordered the insurance carrier, after satisfying the liens, to pay the remainder of the compensation agreed upon to the employee. Upon grounds entirely unconnected with those upon which the order under review was made, the Constitution Indemnity Company, on March 24, 1933, sought a rehearing in so far as the supplemental award was concerned, in order that it might contest the reasonableness of the claims and by proper evidence determine whether R. S. Black, the employer, had paid items thereof amounting to $680.55. A rehearing was granted and, on February 5, 1934, it was found that the medical bills of these petitioners amounted to the sum of $965.55, which is the same as previously approved, but the respondent commission found that the insurance companies had actually paid the employee the sum of $4,453, or more than the lump sum settlement, although having prior thereto been served with notice of

the unpaid liens in the sum of $497. While recognizing and reciting that the insurer had "agreed to pay the incurred medical expenses" with all the claims for which the companies were thoroughly familiar, of which they had had full notice and which they had, in fact, been contesting, the commission made its order denying the supplemental award for medical expense on the sole ground of "payment to the said Jimmie Johnston, the employee * * * who is the party primarily liable therefor."

The answer of the respondent commission seeks to justify the order upon the ground that it would be unfair and unjust to again assess the insurance companies with the amount of the claims—they having already overpaid the employee. First of all, it may be said that the insurers will not again be assessed because they were never required to pay the amount of these medical bills to the employee. By its agreement the Constitution Indemnity Company undertook to pay the claims to those who had furnished medical services. By the supplemental award, made on March 7, 1933, it was required to do just that. The overpayment of the employee was the result of mistake, negligence, or perhaps, as suggested by these petitioners, a deliberate effort to avoid payment of the claims to the petitioners. In either event, the petitioners here, who furnished the services and whom the insurance company agreed to compensate, are in no way responsible for what we shall term the mistake of the insurance carrier. Nor do we think the fact of overpayment furnishes a sufficient ground for the commission to abrogate the plain written undertaking and agreement made for the benefit of these petitioners (in so far as their claims are concerned). The remedy of the insurance company, assuming that it has a remedy, is to collect from the employee the amount of the overpayment, but it should not be permitted to transfer, by its own mistake, the responsibility of collecting from Johnston to those whom it has agreed to pay. The primary responsibility was upon the employer to furnish medical assistance to the injured employee, and, even though we assume that the circumstances of the employment of the petitioners herein were sufficient to create a liability on the part of the employee, that liability was assumed and acknowledged to be that of the insurer by its own solemn agreement and it cannot now be avoided. The respondent commission had no authority, after the approval of the compromise agreement, to relieve the insurer of its responsibility to these petitioners thereunder.

The order of February 5, 1934, is annulled.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; SCHENK, J.



4 Cal.App.2d 224

MISAO YOSHIMURA KURATA v. LOS ANGELES NEWS PUB. CO. et al.

Civ. 8761.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1935.

Hearing Denied by Supreme Court March 29, 1935.

1. Libel and slander ⇐42(1)

Newspaper's publication without malice of truthful report that charge had been made in complaint filed in action is within protection afforded "privileged communications" by statute, since lawsuit from beginning to end is in nature of a "judicial proceeding" and filing of complaint is the first step (Code Civ. Proc. §§ 22, 405; Civ. Code, §§ 45, 47, subd. 4).

[Ed. Note.—For other definitions of "Judicial Proceeding" and "Privileged Communication," see Words & Phrases.]

2. Libel and slander ⇐94(1)

In libel action, defendant pleading justification need not justify every word of alleged defamatory matter, it being sufficient if substance of libelous charge be justified.

3. Libel and slander ⇐42(1)

In determining whether newspaper's publication of report respecting filing of complaint constituted libel, question is not whether difference exists between published report of what complaint charged, and actual allegations, but whether difference of substantial character exists, producing different effect.

4. Libel and slander ⇐42(1)

In libel action, published article *held* fair and substantial account of complaint filed in superior court by husband of plaintiff in which he denied paternity of plaintiff's child born four months after marriage.

News of filing of such complaint was in the following language, "It is said that the child who was born was a souvenir. A law suit to deny the child. It is too soon

for a premature birth. Birth in four months after the marriage," and it was also stated that under certain date a very unusual suit was filed in superior court against child to deny parental relation.

5. Libel and slander ⇐5

In libel action, malice is not presumed from privileged publication (Civ. Code, §§ 45, 47, subd. 4).

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Misao Yoshimura Kurata against the Los Angeles News Publishing Company and another. Judgment for plaintiff, and defendants appeal.

Reversed and remanded with directions.

Newlin & Ashburn and Paul Sandmeyer, all of Los Angeles, for appellants.

J. Marion Wright, of Los Angeles, for respondent.

WHITE, Justice pro tem.

Plaintiff brought this action to recover damages for certain alleged libelous matters published of and concerning her in "Los Angeles Japanese Daily News," also known as Rafu Shimpo, a newspaper published in the Japanese language and owned by the corporate defendant Los Angeles News Publishing Company. The defendant Komai is the publisher of the paper.

The case proceeded to trial before a jury and the verdict awarded plaintiff compensatory damages in the sum of $6,000 and exemplary damages in the sum of $1,500 against both defendants. The judgment followed the verdict.

On motion for a new trial, the court below made its order granting a new trial unless plaintiff would consent to and accept a judgment for $3,500 compensatory damages and no exemplary damages. Plaintiff filed her consent to the remission of damages in accordance with the court's order. From the judgment as finally entered, defendants prosecute this appeal.

The record discloses that on November 13, 1928, there was filed in the superior court of Los Angeles county, by the husband of respondent herein, a verified complaint against the minor son of respondent, which complaint alleges that the plaintiff was not the father of a son born to his wife four months after their marriage. The complaint alleges facts in legal phraseology practically what was printed in the paper except the comment regarding the complication of circumstances. The prayer for relief is as follows: "Wherefore, plaintiff prays that by decree of this Honorable Court it be declared and adjudged and decreed: First: That the relation of parent and child does not exist between this plaintiff and the said defendant Frederick Kurata, and that this plaintiff is not the father of said Frederick Kurata, is not the child of this plaintiff. Second: That said decree provides that upon the filing of a certified copy thereof in the office or offices where the certificate of birth of said Frederick Kurata is filed, that said certificate of birth of said Frederick Kurata be corrected by striking therefrom the name of this plaintiff as the father of said child. Third: For such other and further relief and order and declaration in the premises as the court may deem meet and just. Fourth: For costs of this action."

The news of the filing of such complaint in the "Los Angeles Japanese Daily News," also known as Rafu Shimpo, being a newspaper published in the city of Los Angeles, on or about the 16th day of November, 1928, was in the following language: "It is Said that the Child Who Was Born Was a Souvenir. A Lawsuit to Deny the Child. It is too soon for a Premature Birth. Birth in Four Months after the Marriage. Under the date of 13th, Mr. Choichi Kurata filed a very unusual suit in the superior court of this county against Frederick Kurata, the child, to deny the parental relations.

"According to the complaint said party was married on November 20, 1923, to Misao Shimura, [also known as Misao Yoshimura] at Long Beach, and that on the 15th day of March of the following year said Frederick was born at Stockton and at present is regarded as his child. It is claimed, nevertheless, that since he had no relation with Misao prior to the marriage, it is a matter of course that the child is someone else's and certainly that he has nothing to do with the child. However, the indications are the inside dope seems to be quite complicated (the circumstances surrounding the case seem to be quite complicated)."

The complaint herein charges the falsity of the facts of said publication, that the falsity thereof was known to defendants, and that the publication was maliciously made with intent to and did injure respondent in her good name and reputation, exposed her to ridicule and shame as well as bring-

ing degradation upon her as an unchaste woman, etc.

By their answers defendants, while denying the correctness of the translation of the alleged libelous article as set forth in plaintiff's complaint, admitted that an article was published in the newspaper of and concerning plaintiff, which said article was interpreted at the trial to be as hereinabove set forth. Defendants denied the falsity of such article as well as malice, and for a further defense defendants set up in their answers that the article printed by them was a fair and true report of the allegations contained in the superior court action above referred to; that said publication was an item of current public news, published by them without malice and in the belief of its truth.

[1] Two sections of the Civil Code are involved in this proceeding, section 45 thereof specifying that libel is a false and untruthful publication which has a tendency to expose any one to hatred, contempt, ridicule, etc., and subdivision 4 of section 47 relative to privileged communications. This subdivision eliminates from the law of libel a fair and true report, without malice, of a judicial, legislative, or other public official proceeding.

Respondent contends that a mere pleading, such as a complaint placed on file by a single party, unanswered and not having been placed within the scrutiny of any court or judge, is not a "judicial proceeding" within the meaning of subdivision 4 of section 47 of the Civil Code.

An action is defined by section 22 of the Code of Civil Procedure as an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

We hold that a lawsuit from beginning to end is in the nature of a judicial proceeding, the filing of a complaint being the first step therein, and that the subsequent pleadings are successive steps therein. Section 405, Code Civ. Proc.

Publication without malice of a truthful report that a charge has been made in the complaint filed in an action is clearly within the protection afforded by subdivision 4 of section 47 of the Civil Code, because the filing of a pleading is a public and official act in the court of judicial proceedings. Mortensen v. Los Angeles Examiner, 112 Cal. App. 194, 201, 296 P. 927; Reid v. Thomas, 99 Cal. App. 719, 279 P. 226; Irwin v. Newby, 102 Cal. App. 110, 282 P. 810, 283 P. 370.

[2-5] It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence, the defendant has made his case. "A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would." Sutherland on Damages, vol. 3, p. 2626. It is not the mere fact that a difference exists between the published report of what the complaint in the proceeding charged and what was actually alleged in the complaint, but rather is the difference of a substantial character and does it produce a different effect. It seems clear that the published article was a fair and substantial account of the complaint written by a reporter and finally published without any unusual circumstances obtaining. The lower court was right in striking the item allowed for exemplary damages as there was no evidence whatever to sustain malice, and malice is not presumed from privileged publications. Davis v. Hearst, 160 Cal. 143, 116 P. 530; White v. Nicholls, 3 How. 266, 11 L. Ed. 591.

By reason of the foregoing, we are of the opinion from the nature of the controversy herein that the plaintiff cannot prevail in a suit for libel growing out of the publication in question (Oakland Paving Co. v. Bagge, 79 Cal. 439, 21 P. 855), and it is therefore ordered that the judgment appealed from be reversed and the cause remanded with directions to the court below to enter judgment for the defendants.

We concur: STEPHENS, P. J.; CRAIL, J.

3 Cal.App.2d 570

ELSINORE OIL CO. v. SIGNAL OIL & GAS CO.

Civ. 9114.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1935.

Mines and minerals ⇐74

Lessee's execution of quitclaim deed to lessor of property covered by oil and gas lease did not relieve lessee of liability under provision of lease by which lessee agreed to pay lessor bonus out of proceeds of oil produced on another tract leased to lessee, notwithstanding provision for reduction in rental on lessee's execution of quitclaim deed, since "bonus" named in lease was not a "rental" therefor, but was consideration for execution of lease.

[Ed. Note.—For other definitions of "Bonus," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Elsinore Oil Company against the Signal Oil & Gas Company. From the judgment, the defendant appeals.

Affirmed.

H. J. March, of Sacramento, and Robert H. Harms, Floyd E. Webster, and Harold F. Clary, all of Los Angeles, for appellant.

Henry Hawson, of Fresno, and Simpson & Simpson, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff, as lessor, about September 8, 1930, entered into a gas and oil lease with defendant, as lessee, relating to a certain "parcel No. 1" consisting of forty acres. Another lease to an adjoining property known as "parcel No. 2" had theretofore been entered into by the same parties. On July 11, 1932, defendant executed and delivered to plaintiff a quitclaim deed to the property, and admits that there was then due plaintiff under the lease to parcel No. 1 the sum of $1,854.99. Plaintiff brought this action under said lease to parcel No. 1 and recovered judgment for $6,000 plus interest, from which judgment defendant appeals.

The question here presented involves the construction of the lease to parcel No. 1. Lessee therein agreed "to pay to lessor as a bonus One Hundred Fifty Dollars per acre for the premises above described * * * payable only out of twenty-five per cent of the proceeds derived from the sale of the oil produced, saved and sold" from parcel No. 2, and further to pay "the equal of one-sixth part of the proceeds derived from the sale of all oil removed from the leased premises" (parcel No. 1). Certain other payments were provided, contingent upon oil or gas being produced on parcel No. 1, which are not material to this consideration, since it is conceded that no well was drilled and there was no production on that parcel. Said lease further provided that "the lessee may at any time quitclaim to the lessor this lease in its entirety or as to part of the acreage covered hereby, and thereupon lessee shall be released from all further obligations as to the part of the land so quitclaimed, and all rentals and drilling operations shall be reduced pro rata according to the acreage quitclaimed."

Prior to July 11, 1932, the date of the quitclaim deed, a quantity of oil was produced on parcel No. 2 and sold for an amount sufficient so that 25 per cent. of it equalled the sum of $1,854.99, which is all that lessee admits is due under the lease. Further, oil was produced during July, 1932, and sold for an amount sufficient so that 25 per cent. of it equalled more than the additional $4,145.01 and interest, which the lessor claimed and which was included in the judgment for $6,000 plus interest recovered.

Appellant contends that when it quitclaimed the property it was liable, under the language above quoted, only to the extent of 25 per cent. of the proceeds from parcel No. 2 up to the date of the quitclaim deed, July 11, 1932, arguing that the "bonus" was in fact "rental" and that no rental was due after the property had been deeded back to respondent.

The conclusion of the trial court was correct. Appellant had entered into the contract which rendered it liable for the entire $6,000 regardless of the length of time it held parcel No. 1, conditioned only upon the production of sufficient oil from parcel No. 2 so that 25 per cent. of it would equal the said amount due. It had kept the premises twenty-two months under the lease, and the consideration, at least in part, for its right to so hold parcel No. 1 was the obligation it had incurred to pay the "bonus" of $6,000. It was the evident intention of the parties that the real inducement to respondent to permit appellant to have the property under the lease was not the nominal sum of $10 recited as consideration in the lease, but the other more

substantial "bonus" for which judgment was recovered. Appellant could not avoid the obligation already incurred to pay the "bonus" by the expedient of giving respondent a quitclaim deed to the land, since the language above quoted cannot reasonably be thus construed. "The term 'bonus' as applied to an oil lease has come to have a definite meaning, to-wit: a sum of money paid by a lessee to the lessor in consideration for the execution of a lease, as distinguished from the return or royalty reserved by the lessor to be paid by the lessee through the term of the lease." Geller v. Smith, 130 Cal. App. 485, 20 P.(2d) 102, 104.

It is apparent that the "rentals" which were to be reduced upon quitclaiming of the land were not the "bonus" but the "royalty," for here, as in the case of a mining lease, the amounts stipulated to be thus paid as royalties are not the purchase price of the oil and gas in place, but are " 'the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows.' * * * In mining leases, these words 'rent' and 'royalty' are used interchangeably to convey the same meaning." Nelson v. Republic Iron & Steel Co. (C. C. A.) 240 F. 285, 290. " 'Royalty' is 'perhaps the most appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from the mine.' " Payne v. Neuval, 155 Cal. 46, 49, 99 P. 476, 478. The same definition applies here.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 746

PEOPLE v. CARPENTER.

Cr. 2632.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1935.

1. Witnesses ⇐40(1), 45(2)

That, on preliminary examination, six year old child misstated her age, did not know her birthday, did not know what happens to girls who do not tell the truth, and did not know where she lived *held* not to show that child lacked proper qualifications as a witness in prosecution of accused for committing a lewd act upon her (Pen. Code, § 288).

2. Criminal law ⇐829(1)

Refusal of instruction containing principle of law adequately covered by other given instructions *held* not error.

3. Criminal law ⇐959

Summary denial of motion for new trial without giving opportunity for argument *held* not error, where no request was made for leave to argue.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Carl W. Carpenter was convicted for committing a lewd and lascivious act with respect to a female child, and from the judgment of conviction and from an order denying his motion for a new trial, he appeals.

Affirmed.

Joseph A. Ball, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment that followed his conviction of a violation of the provisions of section 288 of the Penal Code, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court. The particular offense of which defendant was convicted was that of the commission by him of an alleged lewd and lascivious act with respect to a female child of the age of six years.

Appellant's first point is that "the evidence does not justify the verdict." Although the evidence showed that the alleged offense was committed in broad daylight at a place and in circumstances such as might indicate the improbability of the fact that a crime of the character of that here involved actually had been committed, nevertheless, since the jury that heard the evidence determined the fact adversely to the evidence adduced by defendant with relation to his conduct on the occasion in question; and since, all the evidence considered, this court cannot say that the testimony given by an eyewitness (to say nothing of the testimony given by the alleged victim) to the acts and conduct of defendant

was so extraordinary in character as to be absolutely unbelievable; it necessarily follows that the point made by appellant in that behalf cannot be sustained.

[1] Appellant next predicates prejudicial error upon the fact that, although the child who was the subject of the alleged vicious attentions of defendant was shown to lack proper qualifications as a witness, nevertheless she was permitted to give her testimony.

It appears that preliminarily to the giving of her testimony, the child was questioned by the judge of the trial court, as well as by the respective attorneys in the case, and that following such examination the court ruled that the child was qualified to give her testimony. Because the child misstated her age; did not know "her birthday"; did not know "what happens to little girls when they don't tell the truth" (except that when she didn't tell the truth, her mother spanked her); and did not know where she lived; it is contended that the ruling made by the trial court was palpable error. But considering the age of the child, even in the absence of other conditions that may have affected her several answers, it was only natural that she might be confused with reference to each of the answers which she gave. It is common knowledge that not only little children, but as well some intelligent grown people, know neither their respective ages nor their "birthdays." As a certainty, neither a child of six years nor any other person "knows what happens" to any one who does not tell the truth. The fact that the child knew that for such conduct ordinarily she suffered corporal punishment was a sufficient knowledge of consequences that would result to her from such misconduct in that regard. Her answer to a question in regard to whether she knew where she lived, was, "No, * * * not now, I don't know"; which answer might indicate either that she was too confused to remember the place where she lived, or that her place of residence had been so recently changed (which fact later appeared in the evidence) that she had not been told either the name or the house number of the street to which she had removed. From an examination of the record herein, which includes sixteen pages of the preliminary examination and the subsequent testimony given by the child, it manifestly appears that she was a very bright and capable little girl. Her replies to the questions that were asked of her would do credit to any person of whatever age. We think it very clear that no error was made by the trial court in making the ruling of which complaint is here made.

Appellant further contends that "the court erred in refusing to strike prejudicial testimony."

Without herein setting forth the comparatively long history of facts from which ensued the criticised order, it may suffice to state that, the pertinent facts and circumstances considered, this court is of the opinion that the prejudice (if any) which resulted therefrom to defendant's cause was slight, and that such evidence could not reasonably be presumed to have affected, or in anywise to have induced, the verdict that was returned against defendant.

[2] Although appellant complains that the trial court "erred in refusing an instruction requested by the defense," it affirmatively appears that the principle of law contained in such refused instruction was adequately covered by other instructions which were given to the jury; and consequently that appellant has no just ground for complaint in that regard.

[3] Finally, appellant suggests that "the court erred in summarily denying defendant's motion for a new trial without giving an opportunity for argument." In that connection, all that appears in the record with reference to the proceedings that took place at the time when the motion for a new trial was presented to the court is as follows:

"The Court: I will deny the application (for probation) because it is not a case for probation. Are you ready, Mr. Carpenter, for sentence?

"Mr. Ball (attorney for defendant): At this time, your honor, we move for a new trial on all the statutory grounds of the code.

"The Court: Motion denied."

Although a consideration of the provisions of section 661 of the Code of Civil Procedure (Stats. 1933, p. 1881, § 119) might lead to the conclusion that by statutory provision it is impliedly intended that on the hearing of a motion for a new trial the aggrieved party is entitled to be heard in "oral argument"; and although even prior to the enactment of such statute it had been ruled that on such a hearing the parties should be "afforded an opportunity to be heard if desired" (Morris v. De Celis, 41 Cal. 331; De Gaze v. Lynch, 42 Cal. 362), nevertheless, in the case of Morel v. Simonian, 103 Cal. App. 490, 495, 284 P. 694, 696, it was held that "the privilege of arguing the motion for a new trial * * * is also a matter of discretion resting with the trial court." However, without placing particular reliance upon the correctness of the decision last referred to, from a considera-

tion of the record herein, it is clear that no request for leave to argue the points set forth within the motion was made either by defendant or by his counsel. No indication appears therein regarding the time which elapsed between the time when counsel for defendant announced that he moved "for a new trial on all the statutory grounds," and the time when such motion was denied. It is possible, and even probable, that the conditions and circumstances then and there present were such as reasonably should have conveyed to the mind of the trial judge the appropriate conclusion that defendant did not wish to present any argument in behalf of his motion. It well may be that if such a request had been made, the trial judge gladly would have listened to any argument which defendant's counsel might have seen fit to make. Defendant voiced no objection to the procedure adopted by the trial court; but apparently acquiesced in it. Moreover, it must be assumed that had defendant argued his motion for a new trial, the reasons which he might then have given for favorable action thereon by the trial court would have been no different from, or that they would have been more ably presented by him than is the argument with reference thereto which counsel for appellant makes to this court at this time. In other words, in no event was defendant harmed by reason of the conduct of the trial judge of which complaint is now made.

It is ordered that the judgment and the order by which defendant's motion for a new trial was denied be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

4 Cal.App.2d 245

LOOCK v. PIONEER TITLE INS. & TRUST CO. (LOOCK et al., Interveners).

Civ. 1541.

District Court of Appeal, Fourth District, California.

Jan. 29, 1935.

Rehearing Denied Feb. 26, 1935.

Hearing Denied by Supreme Court March 29, 1935.

1. Appeal and error ⇐95, 102, 105, 113(1)

Orders, appointing guardian ad litem of minor trust beneficiary in his general guardian's action to dissolve trust, sustaining demurrers to plaintiff's and interveners' complaints, denying motions to vacate order to make minor a party defendant and dismissing action, *held* not appealable (Code Civ. Proc. § 963).

2. Appeal and error ⇐597(1)

Typewritten "Clerk's Transcript," containing many documents not properly part of such transcript, including typewritten copy of purported bill of exceptions, does not conform to court rules or Code requirements for preparing record on appeal.

3. Guardian and ward ⇐126

Action on behalf of minor having general guardian must be brought in minor's name by such guardian, and action brought by guardian, simply describing herself as guardian and not naming ward as plaintiff, is that of guardian, not ward.

4. Guardian and ward ⇐126

Minor beneficiary under trust for his education *held* necessary party to action by his mother as his guardian and both of his parents individually to dissolve trust.

5. Infants ⇐78(1)

Guardian ad litem *held* properly appointed for minor beneficiary under trust for his education in action by his mother as his general guardian and both his parents individually to dissolve trust.

6. Parties ⇐53

Trial court may order, on its own motion, that parties necessary to determination of issue be brought in and that necessary amendments to pleadings be made to accomplish such purpose (Code Civ. Proc. § 389).

7. Dismissal and nonsuit ⇐56

Action by one refusing to conform to order to amend his pleadings so as to bring in parties necessary to determination of issue may be dismissed (Code Civ. Proc. § 389).

8. Appeal and error ⇐843(2)

Regularity of appointment of guardian ad litem for minor trust beneficiary before service of summons on latter becomes moot question on affirmance of judgment dismissing action by minor's general guardian and parents to dissolve trust.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Polly Loock, guardian of the estate of Henning Loock, Jr., a minor, against the Pioneer Title Insurance & Trust Company, in which Polly Loock, individually, and

another intervened. From a judgment of dismissal, plaintiff and interveners appeal.

Affirmed.

T. T. Clark, of Colton, for appellants.

Robert Mack Light, of San Bernardino, for respondent.

MARKS, Justice.

Polly Loock and Henning Loock, Sr., are the divorced parents of Henning Loock, Jr., who is a minor under the age of fourteen years. The parents entered into a property settlement agreement which was approved in the decree of divorce. The custody of the minor was given to the mother. The property settlement agreement contained the following provision: "In the event of the sale of the property described herein as Parcel 1, the second party is to place Five Thousand ($5,000.00) Dollars of the proceeds thereof in some reliable bank or Trust Company, in trust, for the education of said minor child. It is agreed that disbursements may be made from said trust fund by the legally appointed guardian of said minor child, under court order."

The sum of $5,000 was delivered to the Pioneer Title Insurance Company and a declaration of trust executed by it, as trustee, and Polly Loock as trustor with Henning Loock, Sr., joining therein. The minor was named as beneficiary. This instrument provided that the money be invested by the trustee; that the income and such part of the principal as might be necessary, when ordered by court, be paid to the guardian of the minor during his minority for his education; that, after majority, the payments be made at such times and for such purposes as ordered by court; and, further, that, after it shall have been determined by order of court that the education of Henning Loock, Jr., has been completed, the unexpended portion of the corpus of the trust be returned to Polly Loock.

Polly Loock was appointed guardian of the person and estate of the minor. She applied to the probate court and obtained an order permitting her to invest part of the guardianship funds in an apartment house. The order also authorized her to execute notes in part payment of the purchase price. She demanded payment of the corpus of the trust to her, and upon the refusal of the trustee to deliver the funds she instituted this action to cancel the declaration of trust.

Her action was entitled "Polly Loock, Guardian of the estate of Henning Loock, Jr." A complaint in intervention was filed by Polly Loock and Henning Loock, Sr., which closely followed the allegations of the amended complaint. A study of these pleadings, which are most inartistically drawn, shows that the principal ground upon which the cancellation of the declaration of trust is asked is that the parents of the minor did not understand its legal effect at the time it was executed. Both pleadings pray that the trust estate be paid to the guardian of the minor.

General and special demurrers were filed to both pleadings. Among the grounds of special demurrer is the following: "There is a defect of parties defendant in this that in said amended complaint plaintiff seeks to strip from the minor Henning Loock, Jr., the rights, remedies, and protections of a trust created directly and expressly for his benefit, but said minor is not before this court otherwise than in the person of plaintiff herself whose interest is openly hostile to such rights, remedies and protections." Other grounds of demurrer are well taken, but, as the foregoing controlled the trial court in its final disposition of the case, it will receive our attention.

The demurrers were argued and submitted on September 26, 1933. At that time a minute order was made appointing J. W. Bishop guardian ad litem of Henning Loock, Jr. On October 2, 1933, a formal order was signed which recited that Henning Loock, Jr., was a necessary party to the action, and that it was expedient that he have a guardian ad litem appointed to represent him; that J. W. Bishop be appointed as such guardian ad litem; that plaintiff and interveners amend their pleadings to make the minor a party defendant; and that summons be issued on the amended pleadings and served on J. W. Bishop within ten days. On October 7, 1933, plaintiff filed a "motion" to vacate the order appointing the guardian ad litem and the order requiring the amendment of the pleadings, and making the minor a party defendant. On October 14, 1933, the interveners filed a similar "motion." The two motions came on for hearing on October 16, 1933. Both motions were denied and both demurrers were sustained. The trial judge then asked counsel for plaintiff and interveners if their pleadings were to be amended in accordance with the prior order. The court was informed by counsel for these parties that he could not do this and protect the rights of his clients; that he must respectfully decline to amend the pleadings making Henning Loock, Jr., a party defendant; that for such reasons the amendments would not be made.

The trial judge thereupon dismissed the action both as to plaintiff and the interveners.

Plaintiff and interveners filed separate notices of appeal from (1) The order appointing the guardian ad litem; (2) the orders sustaining the demurrers; (3) the orders denying motions to vacate the order requiring plaintiff and interveners to make the minor a party defendant; (4) the order dismissing the action; (5) from the judgment.

[1] None of the orders appealed from were made after judgment. They are not appealable orders. Section 963, Code Civ. Proc. The attempted appeals therefrom are dismissed.

[2] Although two notices of appeal were given, the case comes before us on a single typewritten "Clerk's Transcript," and without any order permitting such procedure or stipulation waiving defects. It contains many documents not properly a part of such a transcript, including a typewritten copy of a purported bill of exceptions. This "Clerk's Transcript" does not conform to the rules of court nor to the requirements of the Code for preparing a record on appeal. No motion to dismiss the appeal has been made.

[3] It has been repeatedly held that an action brought on behalf of a minor who has a general guardian must be brought in the name of the minor by the guardian. 13 Cal. Jur. 187, and cases cited. Where the guardian sues, simply describing herself as guardian and the ward is not named as a plaintiff, it has been held that the action is that of the guardian and not the ward. Fox v. Minor, 32 Cal. 111, 91 Am. Dec. 566; Dixon v. Cardozo, 106 Cal. 506, 39 P. 857. Plaintiff seeks to escape the results of this rule under authority of Westphal v. Arnoux, 51 Cal. App. 532, 197 P. 395. In that case the action was brought in the name of the guardian. It was tried upon the theory that the minor was the plaintiff, and, as the question was not raised in the trial court, the District Court of Appeal did not permit it to be raised for the first time on appeal. Such is not the case here. The foundation of the court's ruling, in question here, was the fact that the minor was not a party to the action.

[4, 5] It is evident that the minor was a necessary party. He was the beneficiary under a trust which provided for his support and education. The purpose of the action was to dissolve the trust. It directly affected the interest of the minor. It is true that the plaintiff was his guardian. The interveners, parents of the minor, sought also to destroy the trust. The mother in her individual capacity was seeking to revoke the declaration of trust. In her position of general guardian she was in no position to oppose her individual suit and protect the minor. Under such circumstances, it was highly proper that a guardian ad litem be appointed to protect the interest of the minor. Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617; Justice v. Ott, 87 Cal. 530, 25 P. 691; In re Estate of Snowball, 156 Cal. 235, 104 P. 446.

[6, 7] The trial court may on its own motion order that parties necessary to the determination of an issue be brought in, and that necessary amendments to the pleadings be made to accomplish this purpose. Section 389, Code Civ. Proc.; Young v. New Pedrara Onyx Co., 48 Cal. App. 1, 192 P. 55. Where a plaintiff refuses to conform to an order directing him to amend, his action may be dismissed. King v. Montgomery, 50 Cal. 115.

[8] The right of the trial court to appoint a guardian ad litem before service of summons was made on the minor is in question here. Redmond v. Peterson, 102 Cal. 595, 36 P. 923, 41 Am. St. Rep. 204. As the judgment dismissing the action must be affirmed, the question of the regularity of the appointment of the guardian ad litem becomes moot, and it is not necessary for us to determine whether the Redmond Case is controlling in view of the recent amendments to sections 372 and 373 of the Code of Civil Procedure (St. 1933, p. 1837, §§ 1, 2) nor whether we could review the question on the imperfect record before us. Neilson v. Walker, 105 Cal. App. 23, 286 P. 1091.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

STEWART v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 10166.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1935.

Rehearing Denied Feb. 15, 1935.

Hearing Denied by Supreme Court March 18, 1935.

1. Mandamus ⇐51

Mandamus *held* appropriate remedy to compel entry of final divorce decree, where court's duty was plain and unmixed with exercise of discretionary power (Civ. Code, § 132).

2. Divorce ⇐162

Where facts are shown entitling movant to final divorce decree, trial court has duty to enter it, since, when such facts appear without dispute, entry by court is in nature of "ministerial act," but if there are matters requiring exercise of court's discretion, entry of final decree is "judicial act" and not merely a clerical act consequent upon a previous judicial act (Civ. Code, § 132).

[Ed. Note.—For other definitions of "Judicial Act" and "Ministerial Act," see Words & Phrases.]

3. Mandamus ⇐51

Mandamus *held* to lie to compel superior court to enter final divorce decree which had been withheld because of alleged contempt in failing to comply with court's orders, where ex parte order made after entry of interlocutory decree was a nullity, and petitioner complied with modified order which was made part of interlocutory decree (Civ. Code, § 132).

Petition for mandamus by Duncan Ernest Stewart, directed to the Superior Court of the State of California in and for the County of Los Angeles.

Writ of mandamus issued.

Hearing denied by Supreme Court: WASTE, C. J., and LANGDON and THOMPSON, JJ., dissenting.

S. S. Hahn and W. O. Graf, both of Los Angeles, for petitioner.

Everett W. Mattoon and D. De Coster, both of Los Angeles, for respondent.

SCOTT, Justice pro tem.

An interlocutory decree of divorce was granted in respondent court to the wife of petitioner, in an action entitled Stewart v. Stewart, D106-714, in January, 1933. Petitioner seeks a writ of mandate to compel the entering of a final decree, which has been withheld until back alimony, support for child, and attorney's fees have been paid.

About eleven months after entry of interlocutory decree the presiding judge of said court signed an ex parte order on application of the wife directing that the final decree should not be entered until the husband had paid up his arrears. On August 6, 1934, another judge of said court conducted a hearing on the questions of modification of the order and contempt. The order to show cause in re contempt was dismissed on stipulation, and it was found that petitioner was in arrears $1,500 on alimony and support, and $750 on attorney's fees. He was ordered to pay $25 per month on the former amount and a similar sum on the attorney's fees each month, commencing August 20, 1934; to pay $300 forthwith on attorney's fees and keep up the current support payments, which the court reduced somewhat in amount at the same time. On November 8, 1934, petitioner asked the court to enter the final decree, and it appeared that he complied with the terms of the order of August 6, 1934; the written order being dated September 4, 1934.

[1, 2] Either party is entitled to request entry of a final decree of divorce. Civ. Code, § 132. "Mandate is an appropriate remedy to compel the entry of such a final decree, where the court's duty is plain and unmixed with the exercise of discretionary powers." Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589; Claudius v. Melvin, 146 Cal. 257, 79 P. 897. Where facts are shown entitling movant to such final decree it is the duty of the trial court to enter it (Olson v. Superior Court, supra; Newell v. Superior Court, 27 Cal. App. 343, 149 P. 998); for when such facts appear without dispute "its entry by the court is in the nature of a ministerial act." McGuinness v. Superior Court, 196 Cal. 222, 229, 237 P. 42, 45, 40 A. L. R. 1110. However, if there are matters requiring the exercise of the court's discretion, it is obvious that the entry of a final decree is a judicial act and "not merely a clerical act consequent upon a previous judicial act." Gloyd v. Superior Court, 44 Cal. App. 39, 42, 185 P. 995, 996.

[3] It is urged that petitioner should not receive the assistance which he here seeks because he is in contempt of the trial court for noncompliance with orders included in the interlocutory decree and in the intervening ex parte order signed by the presiding judge. "No party to an action can, with right or reason, ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to its legal orders and

processes." Weeks v. Superior Court, 187 Cal. 620, 622, 203 P. 93, 94. We must conclude, however, that the ex parte order, made after the entry of the interlocutory decree, was a nullity and ineffectual for any purpose. Neither does it appear that when petitioner requested entry of the final decree in November of 1934 he was in contempt of court, since at the hearing the previous August the contempt citation had been dismissed and the order which had been made a part of the interlocutory decree was modified as above set forth, and petitioner thereafter had fully complied with the terms of the order as so modified.

No other reason has been advanced for denying the entry of the final decree and petitioner is entitled to the issuance of the writ as prayed.

It is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.

4 Cal.App.2d 114

JOHANSON v. RIVERSIDE COUNTY SELECT GROVES, Inc.

Civ. 1538.

District Court of Appeal, Fourth District, California.

Jan. 24, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. Contracts ⇐152

Words of contract are to be given their ordinary meaning and are not to be too technically or literally defined unless they are words whose very use implies that they are terms of technical significance.

2. Agriculture ⇐6

Fruit owner did not become member of co-operative marketing association, so as to entitle association to damages for owner's marketing of fruit through third party, because of letter received by owner's agent stating that association was glad that owner became affiliated with association, where word "affiliated" was merely used as courteous expression.

Literal meaning of "affiliated" signifies a condition of being united, being in close connection, allied, or attached as a member or branch.

[Ed. Note.—For other definitions of "Affiliate; Affiliation," see Words & Phrases.]

3. Agriculture ⇐6

That fruit owner's foreman signed membership card in co-operative marketing association *held* not to create membership relationship between owner and association, where card was signed by foreman as individual and foreman informed association's manager that foreman had no authority to contract for membership.

4. Agriculture ⇐6

Co-operative marketing association seeking to recover damages from fruit owner who marketed fruit through party other than association had burden to establish that owner agreed to become member of association.

5. Agriculture ⇐6

That fruit owner's general manager was informed that fruit was being mingled with fruit of other growers and that funds received were derived from proceeds of pools *held* not to give manager constructive notice that association which marketed fruit was strictly co-operative institution furnishing service only to its members, where such information was not received until month after alleged contract of membership was entered into.

6. Agriculture ⇐6

Co-operative marketing association could not claim that owner whose fruit association had marketed became member of association so as to entitle association to damages for owner's marketing of fruit through third party, because of information conveyed to owner's general manager that proceeds in payment of fruit were derived from certain pools where there was no proof that association's practice in pooling fruit marketed was different from method of marketing fruit employed by commercial concerns engaged in business for profit.

7. Appeal and error ⇐1012(1)

Where error relied on on appeal is insufficiency of evidence to sustain finding of court sitting without jury, reviewing court must weigh evidence.

8. Appeal and error ⇐931(1)

On appeal from judgment on ground that conflicting evidence did not support finding of court, sitting without jury, evidence must be considered in light most favorable to prevailing party, and all inferences from evidence which trial court may reasonably have drawn must be indulged to end that judgment shall, if possible, be sustained.

9. Agriculture ⇐6

Evidence *held* insufficient to sustain finding of trial court, sitting without jury, that

fruit owner became member of co-operative marketing association so as to entitle association to damages for owner's breach of membership contract by marketing fruit through third party.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Grace Scripps Johanson against the Riverside County Select Groves, Incorporated, wherein defendant filed a cross-complaint. From a judgment, plaintiff appeals.

Reversed.

Hahn & Hahn and Allyn H. Barber, all of Pasadena, for appellant.

Estudillo & Schwinn, of Riverside, for respondent.

JENNINGS, Justice.

Plaintiff brought this action to compel the defendant to account for the amount of refunds claimed to be due from defendant as overcharge for defendant's service in picking, packing, and selling lemons and grapefruit from plaintiff's ranch and for an unknown amount received by defendant for the sale by it of 863 field boxes of lemons. Plaintiff alleged that the amount of refund was likewise unknown to her. The prayer of the complaint was for an accounting and for a judgment in plaintiff's favor for such amount as should be found due upon such accounting. Defendant filed a joint answer and cross-complaint in which it was alleged that plaintiff had become a member of the defendant association, a nonprofit corporation; that the by-laws of the defendant provide that no member may withdraw from or cease to be a member of the association unless notice of intention to withdraw is given in writing to the secretary of the association between August 1st and 15th of each year, and if such notice is not given membership is deemed to be renewed from year to year, and in the event of a violation of such provision and the marketing of fruit by a member outside of the association, the association shall be entitled to collect and receive from such member 25 cents for each field box of fruit thus unlawfully packed or marketed outside of the association as liquidated damages for such breach; that plaintiff violated her agreement of membership with defendant and marketed about 11,363 boxes of lemons and 2,500 boxes of grapefruit outside of the association to defendant's damage in the amount of $3,465, for which amount defendant and cross-complainant prayed judgment against plaintiff and cross-defendant. Upon the conclusion of a trial of the issues raised by the aforesaid pleadings which was had without a jury the court found that the plaintiff and defendant entered into an agreement in January, 1931, by whose terms "to all intents and purposes" plaintiff became a member of the defendant corporation and agreed to deliver all citrus fruit from her ranch to defendant to be packed and marketed by defendant during the season of 1931 and from year to year thereafter until plaintiff withdrew from defendant corporation in accordance with the by-laws of the corporation; that in accordance with the agreement made by the parties and defendant's by-laws and articles of incorporation, defendant picked, packed, and marketed citrus fruit from plaintiff's ranch during the year 1931; that plaintiff, without cause or reason, violated her agreement with defendant and marketed fruit outside the defendant corporation to the damage of defendant in the amount of $2,492; that plaintiff, as a member of the defendant corporation, is entitled to a refund of $721.40 from the defendant to be subtracted from the above mentioned amount, leaving a balance due defendant from plaintiff of $1,770.60. Judgment was accordingly rendered in defendant's favor for the last-mentioned amount, and from the judgment thus rendered the plaintiff has prosecuted this appeal.

The principal point presented by this appeal is that the trial court's finding that appellant became a member of the respondent association is lacking in evidentiary support. Proper consideration of this contention necessitates a statement of the evidence bearing upon this feature of the case which was presented during the trial of the action. It may be remarked at the outset that the evidence which related to this matter was conflicting and that therefore the statement which is here included will be based upon the evidence which was produced by respondent viewed in the light most favorable to respondent.

The evidence showed that during the latter part of the year 1930 appellant was the owner and in possession of a ranch in Riverside county containing approximately 174 acres which was largely devoted to the production of citrus fruits and that for some time theretofore such fruits had been produced thereon in considerable quantities; that, at the same time, respondent was a nonprofit corporation engaged in the business of picking, packing, and marketing citrus fruits for the growers of such fruits; that N. J. Shupe was the manager of the ranch owned by appellant and was authorized by her to enter into agree-

ments for the disposal of the citrus fruit which was produced on the ranch; that F. H. Cloud was the foreman of the ranch; that during the latter part of the year 1930 Shupe decided he would make a change in the then prevailing arrangements for disposing of the citrus fruit grown on the ranch; that he accordingly directed Cloud to make an investigation of concerns which were engaged in the business of picking, packing, and marketing citrus fruit in Riverside county; that during the early part of January, 1931, Leo M. Cross, who was the secretary and manager of respondent, called upon Cloud at appellant's ranch with reference to the handling of the citrus fruit which might be produced on the ranch during the year 1931; that thereafter and during the month of January, 1931, Cloud called upon Cross at respondent's plant in Corona and inquired into respondent's facilities for packing and distributing citrus fruit; that Cloud also made inquiry regarding the charges that would be made for picking the fruit on appellant's ranch and hauling the same from the ranch to respondent's packing house at Corona and for packing the fruit, and was informed by Cross that respondent was a co-operative institution and that the handling of the fruit was done at cost; that the actual cost of handling fruit was not determined until the end of the year; that prior to a determination of the actual cost of handling fruit a charge of $1 per box for lemons and 65 cents per box for grapefruit was deducted from the proceeds of such fruit received by respondent and at the end of the year after the actual cost of handling the fruit had been determined a refund would be made to each grower or member, such refund consisting of the difference between the arbitrary charge assessed during the year and the actual cost as the same had then been determined; that Cloud then informed Cross that it would be necessary for the former to make a report of the investigation of respondent's plant to E. N. Shupe, who would thereafter call upon Cross and discuss the feasibility of having respondent handle the fruit that would be produced on appellant's ranch; that Cloud, unaccompanied by Shupe, again visited respondent's packing house at Corona during the month of January and was again informed by Cross that an arbitrary charge of $1 per box was made for handling lemons during the season and that at the end of the year after the actual cost of such handling had been determined each member would receive a refund as above described; that thereafter, during the month of January, 1931, and prior to the 23d of said month, Cross had a number of conversations with Shupe, the first of which took place at appellant's ranch and the remainder at respondent's packing house in Corona, in which conversations Cross explained to Shupe regarding the arbitrary charge that was imposed during the season for handling the fruit and that there would probably be a refund at the end of the season to the growers of fruit, such refund consisting of between 5 cents and 15 cents per box; that Shupe advised Cross that appellant was endeavoring to sell the ranch and that he (Shupe) did not know how long appellant would continue to be the owner of the ranch; that during a conversation which occurred at respondent's packing house on January 22, 1931, Shupe stated to Cross as follows: "All right. We will ship with you for a year." That on January 23, 1931, Shupe addressed a letter to Cross which was received by the latter in which he made the following statement: "In accordance with our conversation of the 22nd inst. you are hereafter to take charge of the fruit and forward all statements and remit all collections to Grace Scripps Clark, 808 Pacific Southwest Bldg., Pasadena, California." That in response to the above-mentioned letter Cross addressed a communication to Shupe on a letterhead which had the following heading: "Riverside County Select Groves, Inc. Cooperative Association. Shippers of All Citrus Fruits," and which communication contained the following statement: "We are very glad you are affiliated with the Mutual Orange Distributors, and more especially with the Riverside County Select Groves." That on January 26, 1931, Cloud signed a document, which is referred to as a membership card, in which he stated that he became a member of and agreed to deliver to respondent to be packed and marketed in its customary manner all citrus fruit produced on acreage designated as "110 acres—4 oranges—15 grapefruit, 90 acres lemons," during the season of 1931 and from year to year thereafter until he should withdraw in accordance with the by-laws of respondent, and that the by-laws of respondent and its rules and regulations are "hereby referred to and made a part hereof, and I agree to abide by the same." That the acreage referred to in such membership card was the acreage devoted to citriculture on appellant's ranch; that on or about January 28, 1931, respondent commenced to pick lemons which were produced on appellant's ranch and thereafter picked, packed, and marketed all lemons and grapefruit produced on said ranch until some time during the month of November, 1931;

that the said citrus fruit from said ranch was by respondent mingled with similar fruit produced by other persons who were members of the respondent association in "pools" and thus marketed; that from the proceeds received by respondent from such pools, appellant was paid for the citrus fruit produced by her and marketed by respondent; that in various letters accompanying checks which were remitted to her agent, Shupe, in payment for citrus fruit reference was made to various numbered "pools" as constituting the source of payment for such fruit and in various communications sent to respondent's manager by her agent, Shupe, reference was made to such "pools"; that appellant received a total of $5,647.18 from respondent for lemons and grapefruit produced by her and handled by respondent during the season of 1931; that respondent did not during the season of 1931 handle any citrus fruit for other persons who were not members of respondent association; that the by-laws of respondent provide that no member of the association shall have the right to withdraw or voluntarily to cease being a member unless notice of an intention to withdraw is given in writing to respondent's secretary between noon of the 1st and 15th days of August of each year, in which event termination of membership becomes effective on the 1st day of November next following, and that if such notice of withdrawal is not given as above stated, the membership shall be deemed to be renewed from year to year; that respondent's by-laws further provide that, if, in violation of the provision regarding withdrawal or of any other provision of the by-laws, a member of the respondent association packs or markets any part of the citrus fruit produced by him outside of the respondent association, the said association is entitled to collect and to receive from such member the sum of 25 cents for each field box of fruit thus marketed outside of the association, "it being understood that the damages resulting to the association from such breach are impracticable of definite estimation"; that appellant did not in the manner and during the period stated in such by-laws give notice of her withdrawal from the respondent association; that on December 10, 1931, appellant's agent, Shupe, addressed a communication to respondent in which he advised respondent that appellant had made other arrangements for the handling of fruit produced on appellant's ranch "for this season"; that this letter was received by respondent's manager, Cross, who replied thereto by a letter in which the writer stated that the respondent could not accept appellant's "resignation at this time" and called attention to the above-mentioned provisions of respondent's by-laws relative to voluntary withdrawal from the association and to the penalty provided for marketing fruit outside the association in violation of the by-laws; that the annual meeting of the respondent association was held on December 11, 1931, at which time membership certificates were issued to those persons who were members of said association who were there present; that a notice of such annual meeting was sent to Shupe as appellant's agent; that neither Shupe nor appellant was present at such meeting and no membership certificate was issued to appellant; that 7,468 field boxes of lemons and 2,500 field boxes of grapefruit produced on appellant's ranch were marketed outside of the respondent association through an agency other than respondent.

[1, 2] As above indicated, the principal problem presented by this appeal is to determine whether or not the above-stated evidence is sufficient to support the trial court's finding that appellant agreed to become a member of the respondent association. In considering this problem it is to be borne in mind that the trial court specifically found that appellant entered into an agreement with respondent in the month of January, 1931, "by the terms of which agreement to all intents and purposes the said plaintiff became a member of defendant's corporation and agreed to deliver to the said defendant, to be packed and marketed * * * all the citrus fruits produced on plaintiff's ranch." It is not clear just what the trial court had in mind by the use of the language "to all intents and purposes." It appears to be indicative of a reluctance on the part of the trier of fact to make an unqualified finding that appellant had agreed to become a member of the respondent association. This apparent reluctance is justified when the evidence with respect to the matter is carefully considered. The record discloses that it was evidently the theory of respondent that the letter of appellant's agent, Shupe, addressed to respondent's manager, Cross, dated January 23, 1931, and the reply of Cross thereto under date of January 26, 1931, constituted an agreement in writing by appellant to become a member of the respondent association. The only language in either of these communications which tends in the slightest degree to support such a theory is contained in the letter of Cross to Shupe wherein the writer states: "We are very glad you are affiliated with the Mutual Orange Distributors, and more especially with the Riverside County Select

Groves." It is contended that when Shupe received this communication which was written on a letterhead containing the title "Riverside County Select Groves, Inc., Cooperative Association," he was thereby apprised that he was obligating his principal, the appellant, to become a member of a co-operative fruit marketing association and his subsequent action in permitting respondent to pick, pack, and market appellant's fruit completed the contract of membership and bound appellant to conform to the various provisions of respondent's by-laws. It is obvious that the word "affiliated" constitutes the cornerstone of this line of reasoning. The literal definition of the word lends some support to the argument. In People v. Horiuchi, 114 Cal. App. 415, 300 P. 457, 460, it is said that the word " 'affiliated' signifies a condition of being united, being in close connection, allied, or attached as a member or branch." This is undoubtedly a correct literal definition of the term as given by the lexicographers. But it must be borne in mind that we are here endeavoring to ascertain the intention of the parties. In this task it is a cardinal rule of interpretation that words are to be given their ordinary meaning and are not to be too technically or literally defined unless they are words whose very use implies that they are terms of technical significance. Bearing this rule in mind and bearing in mind also the surrounding circumstances, we entertain the opinion that, when Shupe was advised of respondent's pleasure in appellant's affiliation with respondent, it was entirely reasonable for him to conclude, as he testified he did, that the communication was merely the ordinary courteous expression of satisfaction in the conclusion of a most ordinary business transaction involving nothing more than the employment of respondent to pick, pack, and market appellant's fruit.

In this connection, it must be observed that Shupe's letter refers directly to a conversation which took place between Shupe and Cross on the preceding day and states that "in accordance with our conversation of the 22nd inst. you are hereafter to take charge of the fruit." It is, however, significant to observe that no witness testified that, at this conversation, Cross informed Shupe that in order to engage respondent to market appellant's fruit it would be necessary for appellant to become a member of the respondent association or that the refund which was admittedly discussed would be available only to growers who were members of the association. It is also significant that no witness testified that any such information was disclosed to Shupe at any conversation which occurred between him and Cross at any time prior to the time when respondent commenced to pick appellant's fruit.

It is true that Cross testified that at one of the conversations which he had with Cloud, the foreman of appellant's ranch, prior to the time he had any discussion with Shupe, he stated that respondent was a co-operative institution, that the fruit was handled at cost, that the actual cost of handling fruit was not determined until the end of the year, that prior to such determination an arbitrary specified charge was made and at the end of the year after determination of actual cost a refund would be made to each grower "or member" consisting of the difference between the fixed charge and actual cost as the same had then been determined. It was also shown that Cloud had been directed by Shupe to make an investigation of packing houses in the neighborhood of appellant's ranch. It is, however, significant that no evidence was produced which tended to show that Cloud ever conveyed to Shupe the information that respondent could only be employed to market fruit of growers who should become members of respondent association if indeed it can be fairly declared that such information was conveyed to Cloud himself. It is made clear by the testimony of Cross that Cloud informed him that he had no authority to make a contract for the marketing of the fruit and that Shupe alone possessed such authority. It is quite significant that Cross did not at any time testify that, in any conversation which he had with Shupe, he used the word "member."

[3] The trial court admitted in evidence, over appellant's objection, a membership card in the respondent association which was admittedly signed by Cloud on January 26, 1931. The admission of this card constitutes one of the specifications of error relied on by appellant on this appeal. It is at least doubtful whether, under the circumstances disclosed by the record, this evidence was properly admitted. Assuming, however, for the purposes of this opinion that it was, it is apparent, first, that the trial court did not consider that it had any tendency to establish the fact that appellant thereby agreed to become a member of the respondent association, and, second, that it could not properly have had such an effect. The card is signed by Cloud as an individual, and at no place therein does it purport to show that Cloud signed it as appellant's agent or representative. Since the evidence showed that Cloud possessed no authority to make any contract for the marketing

of appellant's fruit and was careful to inform respondent's manager that he had no such authority, the signing of a membership card whereby he individually agreed to become a member of the respondent association could not possibly achieve the result of creating the relationship of membership by appellant in the respondent association. The circumstances surrounding the signing of this card as disclosed by the record are, however, illuminating and strongly indicate that respondent's manager entertained doubt as to whether the letters which had theretofore passed between Shupe and himself were sufficient to constitute appellant a member of the respondent association.

[4, 5] It appears to be contended by respondent that since the evidence disclosed that Shupe was informed, as the season progressed, that appellant's citrus fruit was being mingled with the fruit of other growers and that the funds which were from time to time remitted to him in payment for such fruit were derived from the proceeds of certain numbered "pools," this fact was sufficient to give constructive notice to Shupe that respondent was strictly a co-operative institution furnishing service at cost only to its members. From this it is argued that, although the conversations which occurred and the letters which were written in January may not, of themselves, have been sufficient to establish the relationship of membership, nevertheless the action of appellant in continuing to permit respondent to pick and market her fruit after her agent Shupe had been thus informed of the co-operative character of respondent constituted an agreement by appellant to become a member of the respondent association. This contention is untenable. It is not consistent with the trial court's findings upon the feature of the case which is essential to respondent's cause of action on its cross-complaint. It is obvious that in order to succeed in the cause of action for damages alleged to have been sustained by respondent by reason of appellant marketing her citrus fruit outside of the respondent association in violation of a certain provision of respondent's by-laws, the burden rested on respondent to show that appellant had agreed to become a member of the respondent association. As hereinabove noted, the trial court found that appellant made such an agreement, but it went further than this and expressly limited its finding in this regard by declaring that the agreement was made "in January, 1931." So far as appears from the record, the knowledge respecting the mingling of appellant's fruit with the fruit of other persons and of the fact that payments for her fruit were derived from the proceeds of certain numbered pools was not conveyed to her until some time subsequent to the month of January, 1931. It is difficult to understand how it can be successfully urged that this information subsequently acquired could relate back to a prior time and constitute proof of an agreement by appellant to become a member of the respondent association, which agreement the trial court expressly found was made in January, 1931.

[6] Furthermore, not a scintilla of evidence was presented to the trial court which tended to show that respondent's practice in pooling the fruit which it marketed was in any respect different from the method of marketing citrus fruit employed by commercial concerns engaged in the business of marketing citrus fruit for profit. The only information which the record shows was conveyed to appellant's agent was that her fruit was being mingled with the fruit of other growers for marketing purposes and that the money which she received in payment for her fruit was derived from the proceeds of such "pooled" fruit. In the absence of any further showing, the trial court was not justified in concluding that appellant was thereby notified that she had become a member of a co-operative marketing association whose by-laws required her to give definite notice of withdrawal in a specified manner at a definite time in default of which she would become subject to an action for damages if she should market fruit produced by her outside of such association.

[7-9] Appellant complains that the trial court's finding "that under its by-laws and articles of incorporation, the purchasing or marketing of fruit under special contracts was and is not permitted" to the respondent is lacking in evidentiary support. It is suggested that this finding contributed to some extent to the court's erroneous finding that appellant agreed to become a member of the respondent association. Whether or not this latter suggestion is correct, appellant's objection appears to be well founded, at least so far as the articles of incorporation are concerned. Among the purposes and powers for which the corporation was formed as set out in the articles of incorporation, it is declared that the corporation shall be empowered "to handle similar products of non-members to an amount equal in value to the products handled for its members." The elaborate by-laws of the corporation, however, do not appear to contemplate that the corporation shall

handle any citrus fruit produced by nonmembers. In the final analysis it is not important, in our opinion, to give further consideration to the accuracy of the court's finding in this regard. The chief problem presented on this appeal and the problem which must be solved consists in a determination of whether or not the trial court's finding that appellant agreed in January, 1931, to become a member of the respondent association is supported by the evidence produced during the trial of the action. The solution of this problem requires that a reviewing court shall weigh the evidence, which is always true when such a contention is presented on appeal. In the performance of this task the evidence submitted to the trial court must be considered in the light most favorable to the prevailing party and all inferences from the evidence which the trial court may reasonably have drawn must be indulged to the end that the judgment of the trier of facts shall, if possible, be sustained. This course has here been followed, and it is our conclusion that appellant's contention that the evidence is insufficient to sustain the criticized finding respecting the making of an agreement of membership in the respondent association must prevail.

For the reasons stated herein the judgment from which this appeal is presented is reversed.

We concur: BARNARD, P. J.; MARKS, J.

3 Cal.App.2d 676

BAXTER v. BAXTER.

Civ. 5111.

District Court of Appeal, Third District, California.

Jan. 17, 1935.

1. Husband and wife ⇐278(1)

Husband and wife, after separating, may make valid contract for division of their property.

2. Divorce ⇐249(2)

Contract between separated husband and wife for division of their property should be submitted to court when followed by divorce suit, and becomes binding when approved by court with knowledge of facts.

3. Divorce ⇐245(1)

Court, awarding alimony under statute to innocent wife by divorce decree, retains power to change amount on showing of change in conditions.

4. Divorce ⇐245(1)

Amount of monthly alimony payments, directed by court order based on property settlement by parties to divorce suit, cannot be subsequently increased or reduced.

5. Divorce ⇐254

Court may reserve jurisdiction to settle property rights of parties to divorce suit, but on disposing thereof by interlocutory decree loses jurisdiction to change them later.

6. Divorce ⇐249(2)

Court order that spouses' settlement agreement, providing that it should not be effective until approved by court, will be implied from incorporation thereof in divorce decree, either bodily or by reference, where complaint in divorce action contains proper allegations and prayer for settlement of property rights.

7. Divorce ⇐249(2)

Court does not order performance of spouses' property settlement agreement, complete in itself, by merely approving it or incorporating it in divorce decree, where plaintiff in divorce action does not ask for property settlement.

8. Divorce ⇐261

Court's process *held* not available to divorced wife for enforcement of interlocutory divorce decree, incorporating property settlement agreement, complete in itself and not stipulating for approval by court, where wife raised no issue involving property; order to pay alimony not being inferable from terms of court's orders approving settlement.

9. Divorce ⇐261

Amended interlocutory divorce decree, substituting provisions of new property settlement contract between parties to divorce suit for that originally executed, approved and incorporated in original decree without ordering payment of any sums of money to wife by husband, *held* not enforceable by court's process.

10. Divorce ⇐254

Court having lost jurisdiction to change its order approving parties' property settlement agreement, incorporated in interlocutory divorce decree, when parties' second agreement was filed after entry of decree, jurisdiction could not be conferred on court even by parties' consent.

11. Divorce ⇐254

Court's ex parte order amending interlocutory divorce decree for wife by requiring

husband to pay her monthly sums provided for by property settlement contract, incorporated in decree, *held* void as correction of decree, in absence of order for payment of alimony in decree or original memorandum of decision.

12. Divorce ⇐254

Error, if any, in omission of order for payment of alimony from court memorandum of decision or interlocutory divorce decree incorporating parties' property settlement agreement, was not misprision of clerk in entering decree, but judicial error remediable only by appeal or motion for new trial, not amendment of decree.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Frances E. Baxter against Donald E. Baxter. From an order, granting plaintiff's motion for appointment of a receiver of defendant's property in aid of execution and denying defendant's motion to expunge an order amending an interlocutory decree granting plaintiff a divorce, defendant appeals.

Reversed.

John L. McGonigle, of Los Angeles, for appellant.

Pottle & Pottle, of Hollywood, and Benjamin M. Stansbury, of Los Angeles, for respondent.

DEIRUP, Justice pro tem., delivered the opinion of the court.

Plaintiff filed an action for divorce against defendant on November 25, 1925, on grounds of cruelty. She alleged in her complaint "that there is community property owned by the parties hereto" and minor children, and prayed for a divorce, "custody of said minor children, and for all other and proper relief in the premises." On the same day the defendant filed an appearance, but permitted his default to be entered.

The action came on for hearing on December 1, 1925, and on the 14th day of that month the court entered a memorandum decision: "Interlocutory decree of divorce granted plaintiff. Property settlement approved; decree is made in accordance therewith. Minor children granted to the plaintiff until the further order of the court."

On December 30th the interlocutory decree was filed. The court found therein that the allegations of the complaint were true, and adjudged that the plaintiff was entitled to a divorce; and provided, further: "The property settlement heretofore entered into between the parties hereto, and introduced as an exhibit in this case, is hereby approved and made a part of this order and decree."

The property settlement agreement referred to was dated November 25th, the day the complaint was filed, and was filed as an exhibit in the case on the day the interlocutory decree was signed. It recited that there were disagreements between the parties. In it defendant agreed to convey certain real property to Security Trust & Savings Bank for the benefit of plaintiff, and to pay, "for and on account of taxes, insurance, repairs, maintenance and support of the party of the second part and the children of the parties hereto * * * the sum of $400 per month," with the proviso that if a divorce should be granted, and if the plaintiff should remarry, the monthly payments should be reduced to $100 for each of the three children under majority and unmarried. The parties also quitclaimed to each other certain properties, and each relinquished any and all claims of every kind against the other. Specifically, the plaintiff "releases and discharges any and all right of maintenance, support, alimony, attorneys' fees, counsel fees, court costs and all other property rights." There was no suggestion in the agreement that it was to be approved by the court.

On December 18, 1926, the parties made another contract which was designated as a "community property settlement agreement." It recited that an interlocutory decree of divorce had been entered; that a property settlement agreement had been "included in the above mentioned judgment of divorce," and approved by the judge, "and made a part of the interlocutory judgment"; that the terms of the agreement had not been complied with: and that "it is the wish and desire of the parties hereto, subject to the approval of a judge of the Superior Court of the County of Los Angeles, State of California, to set aside entirely the above mentioned property settlement agreement"; and that it was the wish and desire of the plaintiff "that this new agreement be substituted for the agreement dated November 25, 1925, and entered in its place and stead at the time a final decree of divorce is granted to her." The new agreement provided for the transfer of certain real property to the plaintiff herself instead of to the bank, subject to an incumbrance which she agreed to pay. Defendant agreed to pay $400 a month for the purpose of supporting the plaintiff and the children, and for the

purpose of paying the "encumbrances, taxes, etc.," on the property; and "further agrees that, if it is necessary to furnish an amount over and above said sum of $400 a month for the necessary support of the party of the second part and the said children, he will, upon a reasonable request, do so"; and also that he would carry a policy of life insurance for the benefit of plaintiff. The agreement contained the same mutual releases as were set forth in the first agreement.

On January 7, 1927, the court made an ex parte order to the effect that the second agreement "is hereby approved and introduced as an exhibit for the purpose of substituting and taking the place of said agreement dated November 25, 1925, and is hereby made a part of the interlocutory judgment of divorce." A final decree of divorce was signed on the same day, in which it was "further ordered and decreed that wherein said interlocutory decree makes any provision for alimony or the custody or support of children, said provision be, and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be, and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto."

On February 6, 1931, more than four years after the filing of the final decree of divorce, the court made an ex parte order by which it required the defendant, in accordance with the provisions of said second agreement, to "pay to the plaintiff * * * on the first day of each calendar month, after the execution of said agreement, to-wit, after December 18, 1926, the sum of $400 until such time as plaintiff shall remarry," and thereafter $100 a month for each minor child. It was further ordered that "this amendment to the interlocutory judgment shall be filed and entered nunc pro tunc as of the date of the order previously amending said interlocutory judgment, which was made and entered on * * * January 7, 1927." The order contained no finding or statement that it was made for the purpose of correcting the records, or that any previous order failed for any reason to state truthfully the actual judgment of the court.

On March 12, 1931, plaintiff applied to the court for a writ of execution to collect payments that had accrued after July 1, 1930, at the rate of $400 a month. The writ was issued, but was returned unsatisfied. On October 23, plaintiff filed an application for the appointment of a receiver to take charge of defendant's property in aid of execution, and on October 31 defendant filed a notice of motion to vacate and declare void the amendatory order of January 7, 1931. The court granted the motion for the appointment of a receiver, and denied the motion to expunge from the records the order amending the interlocutory decree. Defendant has appealed from the order granting plaintiff's motion and from the order denying defendant's motion.

Plaintiff contends that all of the orders that were made by the court are valid, and that by virtue of those orders she is entitled to the process of the court, in the divorce action, for the collection of the monthly payments. Defendant takes the position that all of the orders in reference to property rights, other than those contained in the memorandum of decision or the interlocutory decree, were invalid; that the orders that were first entered were not orders for the payment of money and cannot be enforced as such; and that therefore any rights that plaintiff may have under the property settlement agreements must be enforced under a separate civil action.

[1, 2] A husband and wife, after separation, may (as was done in this case) make a valid contract for the division of their property. Cookinham v. Cookinham, 219 Cal. 723, 28 P. (2d) 1045. Such contracts, however, are always subject to question because of the confidential relations that subsist between married persons, and, when followed by a suit for divorce, should be submitted to the court. When so submitted and approved by the court, with knowledge of the facts, they become binding agreements. Moog v. Moog, 203 Cal. 406, 264 P. 490; Loveren v. Loveren, 106 Cal. 509, 39 P. 801; Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715.

[3] The court has statutory power to award alimony to an innocent wife, regardless of a property settlement, and whenever alimony is awarded by virtue of the statute, the court retains the power to change the amount, upon a showing being made that there has been a change in conditions. Soule v. Soule, 4 Cal. App. 97, 87 P. 205.

[4] But if an order for monthly payments is based upon a property settlement the amount cannot be subsequently increased or reduced. Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902; Hogarty v. Hogarty, 188 Cal. 625, 206 P. 79; Wallace v. Wallace, 136 Cal. App. 488, 29 P.(2d) 314.

[5] The court may reserve jurisdiction to settle property rights (Ex parte Ambrose, 72 Cal. 398, 14 P. 33; Hogarty v. Hogarty, su-

pra), but if it disposes of them in the interlocutory decree, it loses jurisdiction to change them later (De Haven v. Superior Court, 114 Cal. App. 253, 300 P. 95).

[6, 7] Where a property settlement agreement contains a provision that it shall not go into effect until it is approved by the court, and is therefore rather in the nature of a stipulation of the parties than a final agreement, and the complaint in a divorce action contains the proper allegations and prayer looking toward the settlement of the property rights of the parties, an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily or by reference. Tripp v. Superior Court, 61 Cal. App. 64, 214 P. 252, 253; Ex parte Weiler, 106 Cal. App. 485, 289 P. 645, 646. But if the agreement is complete in itself, without reference to action by the court, and the plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement or even by incorporating it in the decree, order the performance of the contract. Andrews v. Superior Court, 103 Cal. App. 360, 284 P. 494, 495; Schnerr v. Schnerr, 128 Cal. App. 363, 17 P.(2d) 749; De Haven v. Superior Court, supra.

The case of Tripp v. Superior Court, supra, has to do with a property settlement that was by its terms held in abeyance until approved by the court, and embodied in the divorce decree. It was held that a provision for the payment of money to the wife could be enforced by contempt proceedings; the reason given being in part as follows: "It is contended that the decrees in the divorce action did not order petitioner to pay the $900 mentioned in the property agreement. It is true that neither of the decrees contained such an order in express terms, but we are nevertheless of the opinion that petitioner's contention cannot be upheld. The agreement recited the fact that a divorce action was pending between the parties, and contained a formal stipulation that it should be subject to the approval of the court and that, when so approved, it should be embodied in the decree, in the divorce action. This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant."

The case of Ex parte Weiler, supra, also involved the question whether the terms of a property settlement that had been approved by the court could be enforced by contempt proceedings. There, the parties had entered into an agreement which contained a covenant that "the provisions of this agreement shall be referred to in any judgment of divorce between the parties hereto and made a part thereof." The wife, applying for a divorce, alleged the execution of the instrument, and requested the court to approve and confirm it. The interlocutory decree contained the following clause: "It is further ordered, adjudged and decreed that this court does hereby approve and confirm and make a part of this decree the provisions of that certain property settlement agreement made and entered into between the parties hereto and executed by them on the 15th day of May, 1928." It was held that the agreement could be enforced in the divorce action. The court follows the decision in Tripp v. Superior Court, supra, and says: "The case entitled Andrews v. Superior Court, 103 Cal. App. 360, 284 P. 494, was based on a different set of facts and is not controlling in the instant case."

In Andrews v. Superior Court, supra, the holding was that a covenant in a property settlement to make monthly payments could not be enforced by contempt proceedings, notwithstanding the following provision in the interlocutory decree of divorce: "It is further adjudged that that certain property settlement heretofore entered into between plaintiff and defendant, and providing for payments to the plaintiff in the sum of two hundred ($200.00) dollars per month and on file in this case, be, and the same is hereby, made a part and portion of this interlocutory judgment." The complaint contained no allegation concerning property, earning ability, or other facts as a basis for an award of alimony, other than the allegation "that there is no community property," and the prayer was for a divorce, for custody of a minor child, and for general relief. It is stated in the opinion that the quoted portion of the decree merely identifies the property settlement and in nowise states "any order for the payment of any sum. The interlocutory judgment contains no order, decree, or judgment for the payment of any sum. This determination makes it unnecessary to discuss at length the contentions and citations by petitioner that the judgment is void in so far as it attempts to require the payment of alimony, for the alleged reason that the matter of alimony is without the issues of the case and beyond the prayer of plaintiff's complaint."

It appears from the opinion in the case of Schnerr v. Schnerr, supra (in which case a hearing was denied by the Supreme Court), that the complaint alleged that the property rights of the plaintiff and defendant had been

settled, and that no relief was sought, other than a divorce and general relief. The court decreed: "That the agreement between the parties hereto made and entered into under date of October 21, 1924, settling the respective property rights of said parties be and the same is hereby confirmed, ratified and approved, and the property rights of the said parties established as in said agreement set forth." Holding that contempt proceedings were void, the court said: "In other words, as pointed out in Schouler on Marriage, Divorce, etc. (vol. 2, 6th Ed., p. 1998), a judgment for alimony differs from an ordinary judgment at law in this, that the latter does not order the defendant to pay anything, it simply adjudicates the amount owing; while the former, though partaking of the nature of a judgment, goes further and is a direct command to the defendant to pay the sums therein mentioned. The case of Andrews v. Superior Court, 103 Cal. App. 360, 284 P. 494, restates the same doctrine. In the present case, as will be seen, the interlocutory and final decrees do not mention the subject of alimony; they simply ratify, confirm, and approve a property settlement agreement entered into on a certain date; therefore, in the form in which they were rendered, said decrees are not only legally insufficient to warrant the docketing of any money judgment against defendant, but they are wholly insufficient to support contempt proceedings because no duty whatever is imposed thereby upon the defendant."

[8] It is obvious that the situation involved in the appeals now before this court is identical with that involved in Andrews v. Superior Court, supra, and Schnerr v. Schnerr, supra. As in each of those cases, the property settlement was complete in itself, and did not stipulate for approval by the court, and the plaintiff did not raise any issue involving property. Neither the parties nor the court contemplated any action on the part of the court other than the validation of the contract. Under such conditions an order to pay alimony cannot be inferred from the terms of either of the orders that were entered at the time when the divorce was granted. It is true that in Schnerr v. Schnerr the court did not purport to make the agreement a part of the decree by reference, as it did in the action now pending. But it did state that the agreement was binding upon the parties; and, as was said in Andrews v. Superior Court, the incorporation of the agreement was merely by way of identification of the instrument. It follows that the process of the court is not available to plaintiff to enforce the terms of the interlocutory decree.

[9] As hereinabove stated, a new contract between the parties was executed on December 18, 1926, and in it the parties requested the court to approve that contract as a substitute for the one that was originally executed. The court thereupon made an order which purported to amend the interlocutory decree by substituting the provisions of the later contract, and entered a final decree of divorce in which it incorporated the second agreement by reference and declared its provisions to be binding. The court did not, however, order the payment of any sums of money, and in view of the pleadings and all the circumstances of the case the amended interlocutory decree, if valid, could not be enforced by the process of the court.

[10] Furthermore, at the time when the second agreement was filed the court had lost jurisdiction to change its original order in relation to property, and such jurisdiction could not be conferred upon it even by the consent of the parties. Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 238 P. 93; Gillespie v. Andrews, 78 Cal. App. 595, 248 P. 715.

[11, 12] The order made on February 6, 1931, which purported to amend the interlocutory decree by requiring the defendant to pay to the plaintiff $400 a month was void as a correction of the decree. Neither the original memorandum of decision nor the interlocutory decree contained an order for the payment of alimony. The omission of such an order could not have been an error of misprision of the clerk in entering the decree of the court. If "error was committed in rendering the judgment, it was a judicial error, which could be remedied only by appeal or motion for a new trial." O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225, 226; McConville v. Superior Court, 78 Cal. App. 203, 248 P. 553; Egan v. Egan, 90 Cal. 15, 27 P. 22; Gury v. Gury, 114 Cal. App. 460, 300 P. 81.

It is ordered that the order denying defendant's motion to expunge from the record the amendment to the interlocutory decree and to quash execution, and the order appointing a receiver be, and they are hereby, reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

DOWNS v. MUNICIPAL COURT OF CITY OF LOS ANGELES.

Civ. 10112.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1935.

Rehearing Denied Feb. 20, 1935.

1. Prohibition ⊜5(2)

Where complaint attempted to charge misdemeanor which was within municipal court's jurisdiction, writ to prohibit court from proceeding thereon was denied, notwithstanding facts stated were insufficient to constitute public offense, since court had jurisdiction, even though deciding erroneously, and prohibition does not lie to correct mere errors (Pen. Code, §§ 1426, 1429).

2. Prohibition ⊜3(1)

Ordinarily, prohibition will not issue where petitioner has plain, speedy, and adequate remedy in ordinary course of law, or remedy by habeas corpus.

3. Prohibition ⊜4

Issuance of writ of prohibition is largely discretionary, and will be refused if against good public policy.

Petition by E. W. Downs for a writ of prohibition against the Municipal Court of the City of Los Angeles, etc., to prohibit the court from proceeding with a misdemeanor prosecution against petitioner.

Writ denied, and alternative writ annulled.

R. Lee Heath, of Los Angeles, and Simeon E. Sheffey, of San Francisco, for petitioner.

Ray L. Chesebro, City Atty., and Newton J. Kendall, Bourke Jones, and John L. Bland, Deputy City Attys., all of Los Angeles, for respondent.

CRAIL, Justice.

[1, 2] This is a petition for a writ against the municipal court of Los Angeles to prohibit it from proceeding with case No. 58303, in which the petitioner is defendant charged with a misdemeanor. The complaint in said action a copy of which is attached to the petition, does not state facts sufficient to constitute a public offense, and it does not conform to the provisions of Penal Code, § 1426, in that it does not set forth the offense charged with sufficient particulars as to enable the defendant to understand distinctly the character of the offense complained of. However, it purports and attempts to state a public offense of a kind over which the municipal court has jurisdiction. Ordinarily, under such circumstances the question whether the facts charged are sufficient to constitute an offense will not be examined into on prohibition. The rule being that, where the court is vested with jurisdiction of the person and of the offense, it has jurisdiction, even though it decide erroneously, and the writ of prohibition will not lie to correct mere errors, and ordinarily also the writ of prohibition will not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law, and it will not issue when he has a remedy by habeas corpus. Leach v. Superior Court, 215 Cal. 531, 12 P.(2d) 1.

But petitioner contends that, since section 1429 of the Penal Code does not provide for the testing of the sufficiency of a complaint in a municipal court by demurrer where such a complaint does not state a public offense, such courts under such circumstance may be restrained by prohibition. To support this contention petitioner relies mainly upon the case of Treppa v. Justice's Court (Cal. App.) 36 P.(2d) 819. The case furnishes some ground for this contention. However, an examination of the cases will show that this case runs counter to the greater weight of authority. Keith v. Recorder's Court, 9 Cal. App. 380, 99 P. 416; Cassidy v. Cannon, 18 Cal. App. 426, 123 P. 358, 359; Leach v. Superior Court, 215 Cal. 531, 12 P.(2d) 1; Whitney v. Superior Court, 182 Cal. 114, 187 P. 12; Ex parte Greenall, 153 Cal. 767, 96 P. 804; In re Stambaugh, 117 Cal. App. 659, 4 P.(2d) 270; Hogan v. Superior Court, 16 Cal. App. 783, 117 P. 947. The Treppa Case entirely overlooks the right of petitioner therein to move in arrest of judgment at any time before judgment is entered and his right to a writ of habeas corpus after judgment. It decides the case upon the theory that petitioner's only remedy in the ordinary course of law is by appeal.

[3] Furthermore, to adopt the rule of the Treppa Case, supra, would be against good public policy. If the rule were adopted as contended for by petitioner, it would result in providing a procedure whereby in effect demurrers in criminal cases in municipal courts would be transferred to, and heard by, the District Court of Appeal. This would be impracticable, for in that event the time and energy of the District Court of Appeal would be largely taken up in acting as a law and motion department of the municipal courts.

The issuance of the writ of prohibition is largely a discretionary matter, and we would not issue the writ where to do so would be against good public policy.

Writ denied and alternative writ annulled.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 86

PEOPLE v. COLLINS.

Cr. 2607.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1935.

1. Abortion ⇨11

Evidence *held* sufficient to sustain conviction for crime of abortion (Pen. Code, § 274; Gen. Laws 1931, Act 4807, § 22, and Act 4811, § 16).

2. Criminal law ⇨511(7)

Defendant's conduct and statement that he had nothing to say when confronted by the patient and accused of committing an abortion *held* sufficient corroboration of testimony of patient and her husband, who were accomplices (Pen. Code, § 1111).

3. Criminal law ⇨1166½(12)

Conviction will not be reversed for misconduct of trial judge unless record discloses conduct so definite and apparent as to leave little doubt that accused had been deprived of a fair and impartial trial.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Samuel D. Collins was convicted of the crime of abortion, and he appeals.

Affirmed.

Lewis A. Schaffer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

SCOTT, Justice pro tem.

Defendant, a chiropractor, was convicted of the crime of abortion. Pen. Code, § 274. He appeals from the judgment and order denying motion for new trial on two grounds: (1) Insufficiency of evidence, especially lack of corroboration of the patient and her husband, who were accomplices; and (2) misconduct of the trial court.

[1] Mrs. Brant testified that when she went to defendant's office she told him she was pregnant, that she paid defendant $35, and that he performed certains acts which constituted an abortion. Both she and her husband testified that was the purpose of the visit. Defendant testified that the parties called and informed him that the woman was pregnant and that she had taken drugs to induce a miscarriage. He said that he examined her, did nothing except advise her how to properly care for herself, charged her $3, and sent her home. The evidence shows that hemorrhage ensued and a miscarriage occurred ten days later. About five days after the latter event defendant was called at 3 o'clock in the morning and went to the Brant home. He then traveled six or eight blocks back to his office, secured some instruments, and returned to the patient. He then removed some internal tissue with his fingers and by means of some sponge-holding forceps. This latter operation was clearly illegal, unless performed in a case of emergency. Deering's Gen. Laws 1931, Act 4811, § 16, p. 2378; Act 4807, § 22, p. 2369. In a large city, with hundreds of duly licensed physicians and surgeons available at all hours, the jury might properly have considered appellant's acts at that time an attempt by a guilty man to cover up the results of his own previous misdeed, rather than an emergency as he claimed it to be.

[2] When appellant was confronted with the patient, who had been removed to the general hospital, and was accused of committing the abortion, he declared he had nothing to say. His conduct and his silence in the face of accusatory statements (People v. Bisbines, 132 Cal. App. 239, 22 P.(2d) 762) sufficiently corroborates the charge of the accomplices (People v. Watson, 21 Cal. App. 692, 132 P. 836; Pen. Code § 1111).

[3] Appellant further complains of certain questions asked and comments made by the trial court. No assignment of misconduct was made during the trial, nor was the request made that the jury be instructed to disregard them. Nevertheless the court at the conclusion of the trial did instruct the jury to disregard any expression he might have uttered intimating an opinion as to the facts. As the court said in People v. Brown-

ing, 132 Cal. App. 136, at page 153, 22 P.(2d) 784, 792: "The misconduct of a trial judge which will warrant a reversal of the judgment should be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial." The record in this case discloses no such conduct.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 158

GERSON v. KELSEY et al. *

Civ. 5176.

District Court of Appeal, Third District, California.

Jan. 25, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. Usury ⇐47

Interest provided for in note at rate of 12 per cent. per annum payable monthly was usurious and void (Gen. Laws 1931, Act 3757).

2. Chattel mortgages ⇐287

In action on note secured by chattel mortgage, evidence supported finding that plaintiff made oral agreement to waive deficiency judgment in consideration of defendants' immediate delivery to plaintiff of possession of real and personal property, where pursuant to agreement plaintiff secured possession and title to all personal property referred to, including property not covered by chattel mortgage.

3. Chattel mortgages ⇐287

Surrender of personal property to which mortgagors had, at least, legitimate claim, in addition to other property not included in chattel mortgage, *held* sufficient consideration to support mortgagee's agreement to waive right to deficiency judgment.

4. Chattel mortgages ⇐287

Any benefit conferred on promisor to which he is not lawfully entitled, or any prejudice suffered by promisee, is sufficient consideration to support agreement between parties to mortgage to waive deficiency judgment, and law does not weigh quantum of such consideration (Civ. Code, § 1605).

5. Appeal and error ⇐1046(5)

In action on note secured by chattel mortgage, judge's impartial examination of witnesses to clarify evidence respecting chief issue regarding alleged waiver of deficiency judgment *held* not prejudicial error.

6. Witnesses ⇐225

Judge has duty to see that necessary facts within knowledge of witness are elicited from which issues of case may be fairly and correctly determined, especially when judge is sitting without a jury, and for that purpose may examine witnesses to clarify facts not elicited by counsel.

Appeal from Superior Court, Merced County; H. S. Schaffer, Judge.

Action by Rosa Gerson against Horace G. Kelsey, also known as H. G. Kelsey, and another. From an adverse judgment, plaintiff appeals.

Affirmed.

Oscar Samuels and A. Dal Thomson, both of San Francisco (Louis Ferrari, of San Francisco, of counsel), for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

This is a suit on a $46,000 promissory note secured by a trust deed and a chattel mortgage on an apartment house and the furniture contained therein. The property was sold under the power of sale contained in the respective instruments for the net sum of $14,570, which was credited on the note. Judgment for the unpaid balance of the note, amounting to $31,430, was demanded. In reply to this demand, the answer alleged that an oral agreement was made waiving judgment for the deficiency which remained unpaid on the promissory note.

The defendants owned Kenilworth apartments situated on Bush street in San Francisco, subject to a first mortgage held by strangers to this action, in the sum of $52,000. October 17, 1930, the defendants executed a promissory note payable to the plaintiff and three other payees in one year for the principal sum of $46,000 with interest at the rate of 12 per cent. per annum payable monthly. This note was secured by a trust deed containing the usual provision for the sale of the property in the event of a failure to pay either the principal or interest as provided by the terms of the instrument. The note was further secured by a chattel mortgage on the household furniture and kitchen utensils con-

*Hearing denied by Supreme Court 43 P.2d 266.

tained in the various apartments of the building. Attached to this chattel mortgage there was an itemized list of all of the furniture and personal property mortgaged. This list did not contain bedding, linen, crockery, dishes, kitchen utensils, or frigidaire equipment in any of the apartments. The frigidaire equipment was added to the apartments after the note and mortgages were executed. The interests of the other payees of the note were subsequently assigned to the plaintiff. After the expiration of one year from the execution of this note and the mortgages, the defendants were in default with respect to the payment of the principal sum. The husband of the plaintiff, Samuel Gerson, called on the defendants for the payment of the note. The defendants testified positively that the plaintiff's husband then told them he considered the property worth $150,000, which was more than $50,000 in excess of the entire indebtedness against the property. The defendants also testified that they told Mr. Gerson they were financially embarrassed and were unable to pay the note; that there was a disagreement regarding the right of the plaintiff to immediate possession of the property on account of the lien of the first mortgage, and a dispute occurred regarding the personal property which was covered by the chattel mortgage; that the defendants then claimed the bedding, linen, crockery, dishes, kitchen utensils, and frigidaire equipment were not included in the chattel mortgage, and that Mr. Gerson, as the agent for his wife, then orally agreed that if the defendants would abandon all claim to the last-mentioned personal property and would deliver possession thereof, together with immediate conveyance of the real property, the plaintiff would waive her claim to any deficiency judgment which she might secure on account of the unpaid portion of the promissory note; that the plaintiff agreed to prepare and present defendants with the proposed deed of conveyance to the property, but failed to do so. Subsequently, on notice and demand, the real property was sold and conveyed to the plaintiff under the provisions of the trust deed on her bid of $10,000 therefor, and the personal property, including the frigidaire equipment and all other property in dispute as above related, was sold to the plaintiff under the provisions of the chattel mortgage for the sum of $5,000. There were no other bidders for any of the property. The defendants immediately surrendered possession of the real and personal property claiming that they did so pursuant to the oral agreement on the part of the plaintiff to waive her right to a deficiency judgment under the terms of the promissory note. No suit was commenced nor judgment rendered under the provisions of section 726 of the Code of Civil Procedure. The sum of $15,000, which was bid by the plaintiff for the real and personal property, less the costs of sales and counsel fees, was credited on the note, leaving an unpaid balance of $31,430, together with interest thereon. For the last-mentioned sum and interest this suit was commenced on the promissory note. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the defendants, in which it was determined that the deficiency judgment was expressly waived by the plaintiff in consideration of the immediate delivery to the plaintiff of the possession of the real and personal property heretofore mentioned. A judgment was accordingly rendered that the plaintiff take nothing by this suit. From that judgment the plaintiff has appealed.

The appellant contends that the judgment is not supported by the evidence; that there is no consideration for the alleged waiver of a deficiency judgment; and that the judge was guilty of prejudicial error in personally examining certain witnesses, thereby depriving the plaintiff of a fair and an impartial trial.

[1-4] There is no substantial merit in this appeal. The plaintiff gained title and possession of the real and personal property, subject to the first mortgage of $52,000, for only the additional sum of $15,000, in spite of the fact that there is substantial evidence to show that she considered the Kenilworth apartments to be worth approximately $150,000 shortly before she acquired the title thereto. Pursuant to the agreement to waive a deficiency judgment, the plaintiff secured possession and title to all of the personal property, including the bedding, linen, dishes, kitchen utensils, and frigidaire equipment, which it is contended by the respondents was not covered by the chattel mortgage. At least the frigidaire equipment, having a value of a considerable sum, and which was placed in the various apartments after the chattel mortgage was executed, may not be held to have been included therein. The item of interest "at the rate of twelve (12) per cent per annum *payable monthly*," which was provided for by the terms of the note, is usurious and void. Curtis v. Thaxter, 204 Cal. 439, 268 P. 630; 2 Deering's Gen. Laws of Cal. 1931, p. 1908, Act 3757. There is a conflict of evi-

dence regarding the oral agreement on the part of the plaintiff to waive a deficiency judgment, but there is substantial proof to support the finding of the court that the promise was made. The very value of the property which was asserted by the plaintiff's husband supports that finding. Pursuant to the alleged agreement, the immediate possession of the real property and the title to the personal property, the mortgaging of which was in dispute, were transferred to the plaintiff. The surrender of this personal property to which the defendants had, at least, a legitimate claim, in addition to an apparent certainty that the frigidaire equipment was not included in the chattel mortgage, furnishes sufficient consideration to support the agreement of the plaintiff to waive her right to a deficiency judgment. Any benefit conferred upon the promisor, to which he is not lawfully entitled, or any prejudice suffered by the promisee, slight as the value thereof may be, is sufficient consideration to support an agreement to waive a deficiency judgment. The law does not weigh the quantum of such consideration. Section 1605, Civ. Code; 6 Cal. Jur. p. 168, § 117; 13 C. J. p. 342, § 193; Whelan v. Swain, 132 Cal. 389, 64 P. 560; Rusconi v. Cal. Fruit Exchange, 100 Cal. App. 750, 281 P. 84.

[5, 6] The appellant was not prejudiced by the judge's examination of certain witnesses in the course of the trial. A careful reading of the record shows that the judge was fair and impartial in the questions which he propounded, and that he merely sought to clarify the evidence with respect to the chief issue in the case regarding the alleged waiver of a deficiency judgment. It is not only the province of the judge, but it is also his duty to see that necessary facts within the knowledge of a witness are elicited from which the issues of a case may be fairly and correctly determined. This is especially true when a judge is sitting in a trial without a jury. For that purpose it frequently becomes necessary for a judge to further examine a witness to bring out facts that have not been elicited by counsel in their examinations or to clarify the evidence which may otherwise remain uncertain or obscure. In the present case there was an absolute conflict regarding the question of the alleged waiver of the deficiency judgment. It was this important issue upon which the judge personally examined the witnesses, after they had been questioned by respective counsel. In doing so, the court appears to have been perfectly fair and impartial. His only motive seems to have been to clarify the evidence and satisfy himself regarding that controversy with the sole object of correctly determining the question of that issue. There was no prejudicial error on the part of the trial judge in that regard. Hart v. Farris, 218 Cal. 69, 75, 21 P.(2d) 432.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 592

HUALDE RANCH CO. v. BEEBE et al.

Civ. 1464.

District Court of Appeal, Fourth District, California.

Jan. 15, 1935.

1. Bills and notes ⇐489(1)
Pleading ⇐35

In action upon negotiable instrument, plaintiff need not allege or prove a consideration, and allegations thereon in complaint are surplusage.

2. Pleading ⇐165

Allegations of answer are deemed denied as matter of law.

3. Trial ⇐62(2)

Plaintiff has wide latitude in meeting defendant's evidence, and any rebuttal thereof is not limited by strict allegations of complaint.

4. Trial ⇐59(1), 139(1)

Court may exercise wide discretion in permitting evidence to be received out of order, but cannot grant nonsuit on ground that evidence thus received is not sufficient to prove fact which is at that time immaterial, and especially where important evidence has been excluded which would have been available to plaintiff if regular order of taking proof had been observed.

5. Trial ⇐139(1)

In action on note wherein complaint contained surplusage allegations reciting the consideration and performance by plaintiff, and answer alleged partial failure of consideration, granting nonsuit at close of plaintiff's case on ground that evidence did not prove performance by plaintiff *held* error, where evidence thereon was excluded which would have been proper as rebuttal in regular order of proof.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by the Hualde Ranch Company against J. L. Beebe and others. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Launer & Thompson, of Fullerton, and Forgy, Reinhaus & Forgy and A. M. Bradley, all of Santa Ana, for appellant.

Orbison & Irwin, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action on a promissory note to recover judgment for the deficiency remaining after a sale of certain real property under a trust deed given to secure the note. The complaint set forth a copy of the note and all necessary averments in relation thereto and, in apparent anticipation of certain defenses, alleged that the note and the trust deed securing the same were given in connection with a transaction whereby the plaintiff sold the real property in question to the defendants under a contract of sale followed by the closing of an escrow and the deeding of the property. Among other things, the complaint alleged that the plaintiff had fully complied with all of the terms of the contract which initiated the sale referred to. The answer admitted the execution of the note, but as a defense thereto alleged a partial failure of consideration.

At the trial, after introducing the note and making out a prima facie case with respect thereto, the plaintiff introduced certain evidence in an attempt to show that there was no failure of consideration and that it had fully performed all of the terms of the original contract which were by it to be performed. An objection to the introduction into evidence of the deed by which the plaintiff had conveyed the property in question to the defendants was sustained on the ground that there was a variance between the deed actually given and the deed called for by the original contract. At the close of the plaintiff's case a motion for a nonsuit was made on the grounds that the evidence disclosed a partial failure of consideration, that it failed to show that the plaintiff had fully complied with all of the requirements of the original contract, and that there was nothing before the court to show that the land had been conveyed by the plaintiff to the defendants. This motion was granted, and judgment of dismissal was entered, from which this appeal was taken.

[1] It is well settled that in an action upon a negotiable instrument it is not necessary to allege or prove a consideration and that allegations in the complaint in relation thereto are surplusage. Kenison v. Campbell, 21 Cal. App. 193, 131 P. 89; Poirier v. Gravel, 88 Cal. 79, 25 P. 962; Cordes v. Harding, 27 Cal. App. 474, 150 P. 650, 653. In the last-named case, the court said: "The execution of a written instrument is presumptive evidence of the existence of a consideration (Civ. Code, § 1614), and therefore the averment of the plaintiff's complaint as to the existence and character of the consideration was mere surplusage. The burden of pleading and proving the lack of a consideration sufficient to support a written instrument is upon the party seeking to avoid it upon that ground (Civ. Code, § 1615)."

In Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 959, 104 Am. St. Rep. 61, the court said: "Defendants claim that plaintiff must prove that defendants had notice, because it is one of the facts alleged in her complaint and denied in the answer. This, however, is not the test. The plaintiff was obliged to prove only those facts which were necessary to constitute her cause of action. If she has alleged some fact not necessary to her case, but which is, in effect, a traverse of some fact which might have been alleged in defense to her action, and the defendant denies such allegation, this does not change the burden of proof, nor require the plaintiff to introduce any evidence upon that subject until the defendant has produced evidence thereon which makes rebuttal evidence on her part necessary. She is not obliged thus to anticipate a possible defense."

[2-5] This nonsuit was granted on the ground that the appellant had failed to prove certain averments in the complaint which were surplusage and which it was not required to prove. And the court excluded certain evidence which, in the regular order of proof, would have been entirely proper as rebuttal, excluding the same only because it did not fully conform to certain allegations of the complaint which were then immaterial. Under our system of pleading, the allegations of an answer are deemed denied as a matter of law and, in the regular course of procedure, a plaintiff has a wide latitude in meeting a defendant's evidence, and any rebuttal thereof is not limited by the strict allegations of the complaint. The appellant here was deprived of this substantial right. While a court may exercise a wide discretion in permitting evidence to be received out of order, it

may not grant a nonsuit on the ground that evidence thus received is not sufficient to prove a fact which is at that time immaterial, and especially is this true where important evidence has been excluded which would have been available to the plaintiff if the regular order of taking proof had been observed. In the state of the record at the time this motion for a nonsuit was granted the appellant's prima facie case was complete, and the only failure of proof on its part was as to a matter which was then immaterial.

Whether or not there was any partial failure of performance of the original contract on the part of the appellant and whether or not full performance thereof was waived by the respondents are questions which should be decided only after hearing the respondents' evidence and after giving the appellant the opportunity of rebuttal to which he is entitled under our rules of pleading and practice.

The judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.



4 Cal.App.2d 292

ELLIOTT v. MARKET ST. RY. CO.

Civ. 9164.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1935.

1. Appeal and error ⇐1002

Reviewing court will not disturb verdict where there is conflicting evidence on material points and when there is evidence supporting verdict, but such conflict must be real and substantial.

2. Appeal and error ⇐1002

Verdict is conclusive if conflict in evidence exists, but conflict must be substantial and real and not fanciful or fictitious nor mere pretense, mere conclusions not serving to meet definition of substantial or any evidence as against positive direct evidence of a fact.

3. Appeal and error ⇐1002

Before verdict is conclusive on appeal, conflict in evidence must be real and substantial and of such character that reasonable minds viewing it dispassionately might fairly entertain a difference of opinion on it.

4. Evidence ⇐568(5, 6)

In action for injuries to pedestrian struck by street car, plaintiff's evidence as to speed of car and manner of approach was without weight in view of her acknowledgment on cross-examination that she was poor judge of time and distance.

5. Carriers ⇐318(8)

In action for injuries to pedestrian when struck by street car while standing between tracks waiting for car, evidence *held* not to show that lateral swaying of approaching street car constituted negligence where swaying was an inherent and unavoidable characteristic of any moving car.

6. Carriers ⇐318(8)

Evidence *held* not to show that swaying of street car on trucks was proximate cause of collision with pedestrian standing between tracks waiting for other car.

7. Carriers ⇐327

Pedestrian, standing between car tracks waiting for street car, who was familiar with scene of accident, had boarded cars at that place numerous times and who failed to step out of path of approaching car after having had opportunity to notice that car was swaying *held* contributorily negligent when struck by car as it passed.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Kathleen Elliott against the Market Street Railway Company. Judgment for plaintiff, and defendant appeals.

Reversed.

Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellant.

Frank B. Thompson, of San Francisco, for respondent.

GRAY, Justice pro tem.

The complaint charged that while respondent was standing on Market street at its intersection with Montgomery street, in San Francisco, appellant so negligently operated its street car westerly on Market street as to cause it to collide with respondent, thereby inflicting upon her personal injuries. The answer denied such negligence and affirmatively alleged her negligence. The jury returned its verdict awarding damages to her. From the judgment entered thereon, appellant appeals upon the ground of the insufficiency of the evidence to justify the verdict.

In support thereof it argues (1) that the evidence is insufficient to establish its negligence; (2) that the evidence shows that her negligence was the sole cause of her injuries; and (3) that the evidence discloses her contributory negligence. If either argument is correct, the judgment, of course, must be reversed.

[1-3] The disposition of this appeal, then, requires a review of the evidence. The result of such review is governed by the following rules: This court will not disturb a verdict where there is a conflict of evidence on material points and when there is evidence to support the verdict; but such conflict and such evidence must be real and substantial. Driscoll v. Cable Railway Co., 97 Cal. 553, 32 P. 591, 33 Am. St. Rep. 203. Since an appellate court may not invade the province of the jury, its verdict is conclusive if a conflict in the evidence exists, but such conflict must be substantial and real and not fanciful or fictitious, nor a mere pretense; mere conclusions will not serve to meet the definition of substantial or any evidence as against the positive, direct evidence of a fact. Thoreau v. Industrial Acc. Comm., 120 Cal. App. 67, 7 P.(2d) 767. Before the verdict is conclusive on appeal, the conflict must be substantial and real and not merely fanciful; it must be of such a character that reasonable minds, viewing it dispassionately, might fairly entertain a difference of opinion upon it. Hughes v. Atchison, etc., Ry. Co., 121 Cal. App. 271, 8 P.(2d) 853.

Respondent testified that, intending to board appellant's west-bound McAllister street car, she crossed the intersection of Market and Montgomery streets, southerly from the northerly curb to a raised concrete safety station, located northerly of the west-bound tracks of the Municipal Street Railway; that as she waited upon this station, she saw the street car she intended to take and a Municipal street car stopped at the next easterly intersecting street; that when she saw her car leave this stop, she walked southerly over the Municipal tracks to a yellow line, painted parallel and midway between the tracks of the two railways, and stood there still with her back to the Municipal tracks, unconscious of the approach of any street car thereon, and facing her approaching car, with a small cake box held flat against the front of her body; that, after passing several persons to her left, some part of the side of the car struck some part of her body; and that when the car stopped she was lying under the forward platform in front of the foremost wheels. On direct examination she stated the speed of the car was fifteen to twenty miles per hour; that the car was swaying sideways as it approached; and that her body was dragged ten feet. On cross-examination she admitted that she was a poor judge of either time or distance; that she was dragged three to five feet and that she did not know how much the car swayed, what part of it swayed, or where it was when it swayed. The only witness called by respondent stated that she was standing immediately to respondent's left and nearest to the approaching street car; that some part of the side of the car, about five feet back from its front, struck respondent and knocked her under its platform near the wheels; that the car stopped five feet from the point of impact; that it was swaying four or five inches; and that it was half a car's length ahead of the on-coming Municipal street car.

Appellant's witnesses testified as follows: Its motorman stated that the last stop before the accident was made at Second street, which is one block easterly of Montgomery street; that the tracks between these streets were smooth and slightly upgrade and the street car did not sway; that the highest speed he attained between these streets was approximately ten miles an hour and that its speed at the time of the accident was about four miles per hour; that he saw people standing between the Municipal and appellant's tracks but not in the path of his on-coming car; that the front of his car passed them without contact; that he did not see the collision; and that his first notice of an accident was when he heard a scream. Its conductor and two passengers each denied the car swayed laterally. Its inspector said that he was walking backwards, signaling the motorman to advance; that he saw people between the tracks of the two railways and clear of the path of the street car; that its front passed them in safety; that he saw respondent standing on the yellow line, holding a box immediately in front of her; that after the front of the car had passed her he noticed her move and saw her knee come in contact with the front step of the car; that the car's speed was four miles an hour; that it did not sway; and that after the accident respondent lay immediately under the front step probably a foot and a half from the wheels. An employee of the Municipal Railway testified that he was standing on the elevated safety station collecting fares and observed the approaching street car; that appellant's street car was a car's length ahead

of the Municipal street car; that the speed of the former was about four miles per hour; and that it was not swaying sideways.

From the foregoing review of the testimony, it is apparent that the specific acts of negligence upon which respondent relies for recovery were the excessive speed and the swaying of the street car. It is true that in her brief she requests affirmance of the judgment upon the authority of Pevonak v. City and County of San Francisco, 206 Cal. 648, 275 P. 785, which, because of a claimed similarity of facts, she argues is controlling, but neither her complaint nor her evidence bring this case within the facts or reasoning of that decision. In that case the accident occurred between the same pair of tracks but in the next westerly intersection. As here, space between cars on the two pairs of tracks barely permitted a person of ordinary physique to stand sideways. There also, the plaintiff, with a group of people, crossed the Municipal tracks from a safety station to a position between such tracks and those of the present appellant for the purpose of boarding such appellant's approaching street car. But with these facts, the similarity between the cases ends, and the following different facts form the real basis of that decision: This approaching street car, upon signal from the starter, proceeded without stopping. It was immediately followed, at a rapid rate of speed, by another car of appellant, traveling abreast of a car on the Municipal tracks. Observing that the two cars were going to try to pass simultaneously, the members of the group huddled together, side by side, their shoulders overlapping. When four feet of appellant's car had passed and the front end of the Municipal car was opposite her, the plaintiff was struck violently by the person immediately to her left and thereby hurled against the side of appellant's car. There was no testimony as to which of the group was hit first nor by which car. The Supreme Court, in reversing a directed verdict in favor of the two railways, stated the basis of the decision as follows (page 651 of 206 Cal., 275 P. 785, 786):

"In other words, it is our view that it was a question of fact for the jury whether or not these two cars should have simultaneously traversed their respective tracks when a group of ten or twelve persons were crouched together in such a narrow space, there being also ample evidence that the crowd had been placed in this position without fault upon their part, having crossed said municipal tracks for the purpose of boarding a car which the agent of respondent Market Street Company did not allow to stop and having been prevented from retracing their steps to a place of safety by the oncoming of the two other cars.

"The position of these tracks is at best a menace to life and limb, and, to our mind, it was certainly a question of fact whether or not the operating companies used ordinary care under the circumstances. The question of whether the front end of the car had or had not passed plaintiff is not controlling, nor is it of controlling importance that it cannot be said whether the injury resulted from a car striking some one of the group of persons or whether from fear or confusion."

[4-6] The conflict between respondent's estimate of the car's speed and that made by appellant's witnesses is fanciful, but not real, for her acknowledged inability to judge either time or distance makes her estimate worthless. Gackstetter v. Market Street Ry. Co., 104 Cal. App. 89, 285 P. 409; Gackstetter v. Market Street R. Co., 130 Cal. App. 316, 20 P.(2d) 93. As to the swaying of the car, the testimony is conflicting and therefore the jury was entitled to accept respondent's version that the car did sway. Respondent merely said the approaching car swayed laterally, but she was unable to fix the lateral distance of the sway of the side of the car, the part that swayed, or the relative position of the car and her body when it swayed. Her witness stated that the car swayed sideways four or five inches, but she likewise could not locate the swaying with reference to respondent or the body of the car. Since some swaying is an inherent and unavoidable characteristic of any moving car, such description of this car's swaying is too vague, indefinite, and uncertain to permit the jury to find that its operation with such swaying was negligent. The testimony of respondent's witness and appellant's inspector shows that respondent's knee came in contact with the side of the car, about five feet back from its front. As the side of the car had no projection and five feet of it had passed in safety, the contact of respondent and the car must have been due either to her movement towards the car or the swaying of the car towards her. The car was so constructed that its body, resting upon the trucks alone, could sway laterally and such swaying would increase with its height. The failure, directly or indirectly to fix the distance the side of the car swayed at its elevation, where it struck respondent's knee, made it impossible to say that such swaying was a proximate cause of the collision.

[7] Respondent was familiar with the scene of the accident and the operation of the cars, as she had daily, over a period of six months, boarded and alighted from similar cars at this place on her travel between her residence and place of employment. She was not confused or frightened by the presence of any Municipal car to her rear. She observed the car from its last previous stop to the position of collision and saw that as it approached, it was swaying. Several persons, including her witness, who stood between the approaching car and her, were not struck by it. Knowing that the car was swaying and having ample opportunity to avoid it by stepping backwards slightly, she was negligent in not removing from the path of the on-coming car and she cannot recover because such negligence proximately contributed to the accident.

The judgment is reversed.

I concur: TYLER, P. J.



4 Cal.App.2d 82

FARMERS' & MERCHANTS' NAT. BANK OF LOS ANGELES v. COHN-CHERNIS-GRUNSFELD, Inc.

Civ. 8525.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1935.

Appeal and error ⇐1064(1)

In action by bank on corporate note, where evidence upon special issues whether balance due on note had been offset by allegedly unauthorized charges made by bank against corporation's account for amount due on individual note of corporation's president was in favor of bank, error, if any, in instruction which corporation claimed erroneously placed burden of proof upon corporation in respect to special issues, *held* not to require reversal (Code Civ. Proc. § 1981; Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by the Farmers' & Merchants' National Bank of Los Angeles against Cohn-Chernis-Grunsfeld, Inc. Judgment for plaintiff, and defendant appeals.

Affirmed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

Lawler & Degnan, of Los Angeles, for respondent.

HOUSER, Justice.

From the evidence adduced on the trial of the action it appears that the plaintiff (hereinafter designated as the bank) brought an action against the defendant for an alleged unpaid balance due on a promissory note which the defendant had executed in favor of the bank. As a defense to the action, in substance the defendant claimed that it was entitled to a credit on the payment of said note for the reason that, without any authorization given by it to do so, the bank wrongfully had charged to a checking account that the defendant had with the bank certain items of interest and installments of principal that from time to time had accrued on another promissory note that theretofore had been given to the bank by the president of the defendant corporation in his own behalf and on account of a private and personal indebtedness that he owed to the bank. On the trial of the action, it was admitted that the bank had no direct authorization from the defendant to make the charges to which reference hereinbefore has been had; but, in order to conteract the effect of such alleged facts, the bank asserted that because, monthly, during a comparatively long period of time, it had rendered to the defendant a statement of its account with the bank, which statement invariably included a charge of an item of interest and installment of principal on the unpaid note of the president of the defendant company—to which charge the defendant interposed no objection—the defendant was bound first, as for an account stated; secondly, that by certain acts, conduct, and declarations of the defendant it had ratified such charges; thirdly, that by reason of such acts, declarations, and conduct, coupled with the fact that, in reliance upon them as a ratification of such charges, the bank had changed its position with reference to other financial debtors who were directly interested and concerned with such charges, which otherwise it would not have done, an estoppel had been created as to the defendant; and, fourthly, that for a valuable consideration moving from the bank to the defendant an accord

and a satisfaction as to the differences existing between the parties had been respectively reached and consummated.

The case was tried before the court sitting with a jury; and in the course of such trial it was stipulated by the respective parties that certain issues of fact only should be submitted to the jury for its determination, and that, based upon such findings as to the essential issues thus submitted in the case, a judgment should be rendered by the trial court. In accordance therewith, following the introduction of evidence, the argument by respective counsel, the instructions to the jury, and the return of its verdict, judgment was rendered in favor of the bank. It is from such judgment that the instant appeal is taken.

For the asserted reason that "the trial court erred in instructing the jury that the burden of proof was on the defendants," the appellant urges that the judgment should be reversed.

The language of the criticized instruction given by the court to the jury was as follows: "In this case the original case of the plaintiff, the bank, is made out by the admission that the note was originally executed and unpaid, unless it has been offset by the credits made by the application of these payments, as claimed by the defendant corporation; so that the burden of proof is upon the defendant corporation to establish the facts in connection with those claims—the claims made by them."

With reference to such instruction, the appellant insists that it was an incorrect declaration of the law, in that thereby the jury was informed that as to each of the several issues in the case, particularly those which related to whether an account had been stated, ratification, estoppel, or an accord and a satisfaction, the burden of proof was not placed on the plaintiff where it properly belonged, but was placed upon the defendant to establish the nonexistence of either or any of them. On the other hand, in its analysis of the language of the instruction, the respondent points to the phrase "the claims made by them" (the defendants), and thereupon argues that the plain construction that should be given to the instruction is that as to the credits to which the defendant claimed it was entitled, "the burden of proof is (was) upon the defendant corporation to establish the facts in connection with those claims"; and that, so construed, the instruction was not properly subject to criticism by the appellant. Section 1981, Code Civ. Proc. However, whatever may be the correct legal principle to be applied in that regard, in any event, both by the provisions of section 4½ of article 6 of the Constitution and many pertinent decisions, the rule is made effective that "no judgment shall be set aside * * * on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." So that, even assuming (without conceding) that the appellant is right in its contention with regard to the meaning that should be attributed to the language employed in the questioned instruction, unless this court may say that it "has resulted in a miscarriage of justice," the judgment rendered by the trial court should not be set aside. In that connection, a review of the record herein discloses the situation that the evidence adduced in behalf of the plaintiff with respect to the several issues that were submitted to the jury not only preponderated in favor of the answers made by the jury in response to such special issues, but that such evidence was overwhelming in that regard. In the absence of any successful attack upon the integrity of the several witnesses and the genuineness of the documentary evidence introduced on the trial of the action, no conclusions other than those made by the jury could reasonably have been reached. It follows that the judgment should not be reversed because of the giving of the instruction to the jury of which complaint has been made.

Appellant also complains generally that the instructions given by the court to the jury were argumentative in character, and that one instruction was given "after the special interrogatories had been submitted to the jury in advance of argument, and after the argument of counsel had been completed."

Neither of such points appears to be seriously presented. At any rate, after consideration given to them, including a careful review of all the instructions that were given to the jury, this court is unable to find anything therein which is legally objectionable with reference to the implied assertion that in such instructions the court indulged in "argument" that in any way could have affected the verdict or answers returned by the jury. The other point is clearly without merit.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

3 Cal.App.2d 576

In re FROWENFELD.

Civ. 8973.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1935.

1. Corporations ⇐619

Superior court, under its general equitable powers, is authorized to appoint trustees for benefit of creditors and stockholders of defunct corporation.

2. Constitutional law ⇐309(1)
Corporations ⇐619

Superior court *held* without power to appoint trustee for benefit of creditors and stockholders of defunct corporation, where statute relative to time for hearing and service of notice was not complied with, since stockholders and other trustees or their successors were denied due process of law (Civ. Code, § 402, as added by St. 1921, p. 92).

3. Judgment ⇐497(1)

Presumption of regularity of judgments of superior court is not good as against jurisdictional defects which appear in judgment roll itself.

4. Corporations ⇐619

Order of superior court confirming sale of real property by trustee for benefit of creditors and stockholders of defunct corporation *held* void for lack of jurisdiction appearing in judgment roll which disclosed that service was not had on any defendant nor sufficient time allowed for voluntary appearance.

5. Corporations ⇐619

Where superior court was without jurisdiction to make order appointing trustee for benefit of creditors and stockholders of defunct corporation, trustee cannot complain because two departments of court made conflicting orders on same date, granting motion to annul original order and denying it, and then an order setting aside order which denied motion.

6. Corporations ⇐619

Superior court was authorized, on its own motion, to annul order appointing trustee for benefit of creditors and stockholders of defunct corporation, and hence trustee cannot complain that amicus curiæ filed motion to set aside order of appointment.

Appeal from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Proceeding in the matter of the application of J. Frowenfeld for appointment of trustee for benefit of creditors and stockholders of the Inyo Marble Company of California, a defunct corporation, wherein Perry F. Backus appeared as amicus curiæ. From an order setting aside orders appointing trustee and confirming his sale of real property, and from an order setting aside an order denying a motion to annul the order of appointment, petitioner appeals.

Affirmed.

Frank C. Dunham, of Pasadena, for appellant.

Perry F. Backus, of Los Angeles, amicus curiæ.

CRAIL, Justice.

Appellant on July 31, 1931, filed his petition in the superior court of Los Angeles county praying for an order appointing him trustee of said corporation. Four days later the court granted the order and appointed appellant trustee as prayed. On August 24, 1931, the superior court confirmed his sale as such trustee of certain real property formerly belonging to the defunct corporation. More than a year later the court made an order setting aside the two original orders on the ground that the court was without jurisdiction to make them. Appeal is taken from said last-referred to order and one other order hereinafter referred to. Appellant contends that because the statutory periods within which to make a direct attack upon the orders had expired it was error to set them aside.

Although the application for appointment closely follows the provisions of section 402 of the Civil Code as it then existed (as added by St. 1921, p. 92), appellant now contends that the proceeding was not at all instituted under the provisions of said section. Said section required that "Upon the filing of such petition the clerk of said court shall fix a time and place for hearing said petition, not less than fifteen nor more than thirty days from the filing of said petition, and shall give notice thereof by posting notices in three public places in said county at least ten days before the date fixed for said hearing." It is apparent on the face of the judgment roll that these provisions were not complied with. The order recites that it was granted "upon the reading and filing of the application," and the record shows that the order was granted within five days after the petition was filed.

[1, 2] Appellant contends that the petition was instituted under the provisions of sec-

tion 400 of the Civil Code as it then existed (as amended by St. 1921, p. 574). But this section does not undertake to provide the procedure whereby the court may obtain jurisdiction to appoint receivers. The stockholders of the defunct corporation and the other trustees, if any, or their successors, if any, were entitled to their day in court. It is true that the superior court under its general equitable powers is authorized to appoint trustees; but we have had no authority cited to us which holds that the superior court may appoint a trustee without due process of law; and the judgment roll herein not only is devoid of any recital of service, but also shows on its face that there was not sufficient time to obtain due service and that it was signed upon reading and filing it.

[3, 4] Both the appellant and the amicus curiæ seem to assume in their briefs that if the original order falls the order approving the sale falls with it. If the order approving the sale is dependent upon the original order it falls with that order and there is an end of it. But if that order was obtained in a separate proceeding we must look to the judgment roll in that separate proceeding. Here we have a judgment roll consisting solely of the application to approve the sale and the order approving it which discloses on its face a complaint which sets forth none of the beneficiaries of the trust and designates no defendant against whom summons could issue or upon whom summons could be served, a proceeding in which the order was obtained on the same day the application was filed, obviously before sufficient time could have elapsed for due process and in which because of the nature of the action the proper defendants were so numerous, so unknown, so scattered and so long unheard of that it would have been physically impossible to get from them a voluntary appearance in the proceeding. The presumption of regularity with which we surround all judgments of the superior court is not good as against jurisdictional defects which appear in the judgment roll itself. And to indulge such presumption for the purpose of overcoming the disclosures which appear on the face of this judgment roll would do violence to the fundamental concepts of jurisprudence. The order is void for lack of jurisdiction.

[5, 6] Appellant complains also because two departments of the superior court made conflicting orders on the same date; one granting a motion to annul the original order and one denying it, and then an order setting aside the order which denied the motion. And he appeals from this latter order also. But when we recall that the court was without jurisdiction in the proceeding from the beginning it is apparent that the orders which tend to vacate the original orders should stand. Appellant also complains because Perry F. Backus, as amicus curiæ filed a motion to set aside the original order of appointment. Regardless of his right to file this motion, it was a convenient way, with the court's consent, to bring the matter to the attention of the court. The court was authorized to annul the order on its own motion.

The orders appealed from are affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 43

BIRKHOFER et al. v. KRUMM.

Civ. 1533.

District Court of Appeal, Fourth District, California.

Jan. 21, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Guaranty ⇐77(2)

Where third party for valuable consideration guarantees debt of another which is secured by mortgage or deed of trust, action may be brought against guarantor without exhausting security for debt which he guaranteed, since guaranty constitutes an obligation independent of secured debt.

2. Mortgages ⇐558

Where mortgagor's grantee assumes and agrees to pay mortgage debt, land furnishes principal or primary fund for payment of debt, and as between mortgagor and his grantee grantee becomes principal and grantor surety for deficiency remaining after applying money derived from sale of land on debt, while as to mortgagee mortgagor and his grantee stand in relation of sureties for payment of deficiency to mortgagee (Code Civ. Proc. § 726).

3. Principal and surety ⇐169

Surety may require his creditors to exhaust principal fund to lighten surety's burden before proceeding against surety personally (Civ. Code, § 2845).

4. Guaranty ⇐4

Extension agreement whereby mortgagors' grantee who had assumed payment of mortgage debt guaranteed to pay principal and interest on note secured by mortgage *held* not "guaranty" so as to authorize independent action thereon, where agreement contained no promise to answer for debt, default, or miscarriage of mortgagor or any other person (Code Civ. Proc. § 726; Civ. Code, § 2787).

[Ed. Note.—For other definitions of "Guaranty," see Words & Phrases.]

5. Guaranty ⇐4

Extension agreement whereby mortgagors' grantee who had assumed payment of mortgage debt guaranteed payment of principal and interest on note secured by mortgage *held* not "guaranty" so as to authorize independent action thereon, where agreement materially changed terms of note without makers' knowledge or consent which released makers from liability for deficiency judgment, and there could be no guaranty without any debt, default, or miscarriage of another to answer for (Code Civ. Proc. § 726; Civ. Code, § 2787).

6. Mortgages ⇐292(3)

Extension agreement whereby mortgagors' grantee who had assumed payment of mortgage debt guaranteed payment of principal and interest on note secured by deed of trust, *held* not independent contract so as to authorize action thereon without proceeding to foreclose deed of trust, where agreement was not sufficiently clear and definite to constitute a complete contract without reference to note and deed of trust (Code Civ. Proc. § 726).

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Otto Birkhofer and others against Theodore Krumm. From an order discharging an attachment and attached property from attachment lien, plaintiffs appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

U. F. Lewis, of Redlands, and Glensor, Clewe, Schofield & Van Dine, of San Francisco, for appellants.

Theodore G. Krumm, of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an order discharging an attachment and the attached property from the attachment lien.

The facts of the case are not in dispute and may be summarized as follows:

On March 27, 1928, W. E. Grigsby and Florence Gill Grigsby executed their promissory note in the sum of $48,000 to Y. J. Attwood, one of the appellants here. The note was payable in annual installments of $5,000 for a period of eight years, and of $8,000 thereafter. It carried interest at the rate of 7 per cent. per annum, payable semiannually. The note contained the usual acceleration clause.

On April 14, 1928, Mr. and Mrs. Grigsby conveyed the real property described in the deed of trust to respondent, Theodore Krumm, who has ever since been the owner of the property. The deed to Krumm recited that it was "Subject to a deed of trust of $48,000.00 now of record which the grantee hereby assumes and agrees to pay."

On July 8, 1929, Attwood assigned all his right, title, and interest in the note and deed of trust to appellant Leland S. Murphy to secure the payment of his note to Murphy upon which there remains an unpaid balance of about $40,000.

On June 9, 1933, Murphy assigned the note and deed of trust to appellants Otto and Laura Birkhofer to secure the payment of his note to them, on which there remains unpaid about $40,000.

Prior to January 23, 1933, Murphy assigned the note and deed of trust to the Sebastopol National Bank to secure his note to the bank. This note was subsequently paid.

Prior to January 23, 1933, interest on the note up to September 27, 1932, had been paid, but default had been made in the payment of $2,500 on the $5,000 principal falling due on March 27, 1932.

On January 23, 1933, Krumm requested of Attwood, Murphy, and the bank an extension of time within which to make payments of installments due, and to become due, and the following agreement was executed:

"Extension Agreement.

"The undersigned desires and hereby requests that the time for payment of the principal of $2500.00 due on March 27, 1932, on that certain note in favor of Y. J. Attwood for $48,000.00, subsequently assigned to Leland S. Murphy and subsequently assigned to the Sebastopol National Bank, Sebastopol, California, which note bears date of March 27, 1928, and upon which there remains an unpaid principal balance of $30,500.00, the same being secured by a Deed of Trust recorded May 11, 1928, in Book 367, page 155, Of-

ficial Records, San Bernardino County, California, be extended to March 27, 1934, and that $3000.00 which will become due on the same note March 27, 1933, be extended to March 27, 1934, and in consideration of such extension the undersigned guarantees the payment of the note or any renewal or extension thereof according to these amended terms and all expenses of collection thereof and waive demand, presentment for payment, protest and notice of protest and consent that the time for payment may be further extended without notice to me, and agrees to pay the balance of the principal sum owing on said note and the interest thereon from Sept. 27, 1932, at the rate of 7% per annum, payable semi-annually on March 27th and September 27th of each and every year, subject to all other conditions and covenants in said note and deed of trust expressed except that any privilege heretofore granted for the payment of the above note prior to maturity is hereby waived. This Extension Agreement is made upon the representation and is effective only upon the condition that the premises covered by said deed of trust are subject to no other lien or subsequent encumbrance except taxes for the present fiscal year and no one other than the undersigned has any interest therein except as herein noted.

"Dated at Sebastopol, California, this 23rd day of January, 1933.

"Theodore Krumm.

"Accepted:
"January 23, 1933.
"Y. J. Attwood, Leland S. Murphy
"Sebastopol National Bank
"P. J. B. Fuller, Vice-Pres. & Cashier."

Krumm paid the interest which fell due on March 27, 1933, but did not make the payment of the $2,500 and $3,000 installments of the principal which had been extended to March 27, 1934, nor the installment of $5,000 which became due on that date.

This action was commenced on April 26, 1934, to secure judgment against Krumm for $30,500 unpaid on the principal of the note secured by the deed of trust, accrued interest, and attorney's fees. An attachment was issued and levied on Krumm's property. The second amended affidavit for attachment recited that the guaranty by Krumm of the debt "had not been secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property."

Krumm moved to discharge the attachment on the ground that it was secured by a deed of trust on real property, and that the security had not been exhausted or become valueless. On the hearing of the motion the foregoing facts were developed, with the additional fact that on January 31, 1934, the Birkhofers had recorded a notice of default and election to sell the property under the terms of the deed of trust.

The motion to discharge the attachment was granted upon the ground that the debt sued upon was secured by a deed of trust on real property in San Bernardino county, Cal., and that the security had not become valueless.

[1] It is the theory of the plaintiffs that the quoted instrument which Krumm executed on January 23, 1933, was a guaranty of the Grigsby's indebtedness which constituted a contract independent of the secured debt, and that it was not necessary to exhaust the security before instituting this action against Krumm. The following cases support the rule that where a third party, for a valuable consideration, guarantees the debt of another which is secured by a mortgage or deed of trust an action may be brought against the guarantor without exhausting the security for the debt which he guaranteed as the guaranty constitutes an obligation independent of the secured debt: San Francisco Theological Seminary v. Monterey County Gas Co., 179 Cal. 166, 175 P. 693; Knowles v. Sandercock, 107 Cal. 629, 40 P. 1047; Carver v. Steele, 116 Cal. 116, 47 P. 1007, 58 Am. St. Rep. 156; Adams v. Wallace, 119 Cal. 67, 51 P. 14; Kinsel v. Ballou, 151 Cal. 754, 91 P. 620; Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171; Murphy v. Hellman, etc., Bank, 43 Cal. App. 579, 185 P. 485; and Fry v. Baltimore Hotel Co., 80 Cal. App. 415, 252 P. 752.

The single question presented on this appeal is whether the debt sued upon is secured. In arriving at our answer it is necessary for us to consider (1) the obligation assumed by Krumm when he accepted the deed to the real property in which was incorporated the clause, "Subject to a Trust Deed of $48,000.-00 now of record which the grantee hereby assumes and agrees to pay," and (2) the nature of the obligation created by the "Extension Agreement" which we have quoted.

The determination of the answers to both of these questions becomes necessary because respondent urges that upon accepting the deed containing the provision wherein he assumed and agreed to pay the secured indebtedness upon the real property he became the principal debtor and could neither become the guarantor nor surety for himself nor indem-

nify others against loss where he himself was the principal.

For the purpose of this decision there is no difference between a mortgage and a deed of trust in determining the rights of the parties. Hereafter we will refer to the maker of a note and signer of a deed of trust as a mortgagor, his grantee as the grantee of the mortgagor, and the mortgagee or the beneficiary under a deed of trust as the mortgagee. We will also refer to mortgages and deeds of trust as mortgages.

The decisions of this state are not entirely uniform in defining the status of the grantee of a mortgagor where the deed contains the proviso that the grantee assumes and agrees to pay the incumbrance on the property.

Some cases hold that the property is primarily chargeable with the mortgage debt and furnishes a primary fund for its payment (Crisman v. Lanterman, 149 Cal. 647, 87 P. 89, 117 Am. St. Rep. 167; Curtis v. Holee, 184 Cal. 726, 195 P. 395, 18 A. L. R. 1024); that on foreclosure the land becomes the principal debtor and the mortgagor the surety (Braun v. Crew, 183 Cal. 728, 192 P. 531); that it is against the contingency of a deficiency arising after the sale of the property that the grantee who assumes and agrees to pay must protect the mortgagor and mortgagee. Biddel v. Brizzolara, 64 Cal. 354, 30 P. 609, 612; Robson v. O'Toole, 45 Cal. App. 63, 187 P. 110.

Numerous cases hold that such grantee of the mortgagor becomes the principal debtor and the mortgagor his surety as between the two. The right to collect the deficiency from the grantee is given to the mortgagee under the rule of equity that a creditor is entitled to the benefit of all securities that his principal debtor may have given to his surety for the payment of the debt under the equitable doctrine of subrogation. Williams v. Naftzger, 103 Cal. 438, 37 P. 411; Davis v. Davis, 19 Cal. App. 797, 127 P. 1051; Shuey v. Mulcrevy, 34 Cal. App. 218, 166 P. 1019, 1020.

Still other cases hold that such grantee of the mortgagor becomes the principal debtor to both the mortgagor and the mortgagee. The rule is thus stated in Brichetto v. Raney, 76 Cal. App. 232, at page 247, 245 P. 235, 241: "There is a broad and obvious distinction, in the effect thereof upon the rights of the parties, between the taking of mortgaged property subject to a mortgage subsisting thereon at the time of such taking and the assumption or agreement by the grantee to pay the debt secured by such mortgage, in that, where the purchaser or grantee of the mortgaged property takes it subject to the mortgage only, there being no express or implied agreement to assume the mortgage debt, he is bound only to the extent of the property, but if the debt be assumed by the grantee, he becomes the principal debtor, while the mortgagor, as is the theory of the findings in this case, becomes the surety. Jones on Mortgages (7th Ed.) § 751; Roberts v. Fitzallen, 120 Cal. 482, 52 P. 818." See, also, Robson v. O'Toole, supra; Tompkins v. Powers, 106 Cal. App. 464, 289 P. 685; Essey v. Phillips, 136 Cal. App. 3, 28 P.(2d) 38.

In the case of Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959, 31 A. L. R. 1045, the Supreme Court considered these various rules and reached the conclusion that it made little difference in that case which one was regarded as correct, as they all lead to the same result, namely, the recovery of any deficiency against the grantee.

Strictly speaking it is difficult to see just how the grantee of the mortgagor can be regarded as the principal debtor of the mortgagee. There is no privity of contract between them. The grantee can relieve himself of all liability for a deficiency by reconveying to his grantor before foreclosure proceedings are instituted. In the old case of Biddel v. Brizzolara, supra, this rule was announced as follows: "The mortgagee, being the representative and standing in the place of the mortgagor, to enforce the rights of the latter against the purchaser, and having no greater or other equity in himself, is entitled only to such remedy as the mortgagor himself had when the bill was filed. 'In other words, being a stranger to the contract of the purchaser with the mortgagor, and to the consideration whereon it was founded, it will be competent for those who were parties to it to rescind and extinguish it at their pleasure; and, after such rescission and extinguishment, the contract becomes utterly incapable of enforcement.' Crowell v. Hospital [27 N. J. Eq. 650], supra." See Williams v. Naftzger, supra. The grantee may also change his status by granting the property to another who assumes and agrees to pay the indebtedness. Robson v. O'Toole, supra; Essey v. Phillips, supra. These acts may be done without the consent of the mortgagee if no foreclosure proceedings have been instituted. If the grantee became the principal debtor of the mortgagee upon his acquiring the property and agreeing to assume and pay the mortgage, and this without the consent of the mortgagee, it is

difficult to see how this relation could be changed by the act of the debtor without the consent of the creditor.

[2, 3] The more logical rule is formed by a consolidation of the first and second theories we have been considering. By so doing we arrive at the following: That the land furnishes the principal or primary fund for the payment of the mortgage debt; that as between the grantor and grantee, the grantee becomes the principal and the grantor the surety for the deficiency remaining after applying the money derived from the sale of the land on the debt; that from the point of view of the mortgagee both the grantor and the grantee stand in the relation of sureties for the payment of the deficiency to the mortgagee. A surety may require his creditor to exhaust the principal fund to lighten the surety's burden before proceeding against the surety personally. Section 2845, Civ. Code; Murphy v. Hellman, etc., Bank, 43 Cal. App. 579, 185 P. 485. This reasoning brings us to a point where the rules we have announced governing the relations of the mortgagor, his grantee and the mortgagee are in strict harmony with the provisions of section 726 of the Code of Civil Procedure and the multitude of decisions which hold that the mortgagee must exhaust the security before he can recover against his debtor and that this recovery must be limited to the deficiency remaining after applying the funds derived from the sale of the property on the debt.

We must next pass to a consideration of the legal effect of the document of January 23, 1933, signed by Krumm. Plaintiffs urge that it is an independent contract for the payment of the debt distinct and separable from the mortgage indebtedness. They also cite authorities which can only be controlling if the instrument be a guaranty, and they argue that it is such.

[4, 5] Section 2787 of the Civil Code provides that: "A guaranty is a promise to answer for the debt, default, or miscarriage of another person." A reading of the instrument is sufficient to demonstrate that it does not come within this definition. It contains no promise to answer for the debt, default, or miscarriage of the mortgagor or any other person. Lacking this important element it cannot be a guaranty. Another important reason exists why the instrument cannot be regarded as a guaranty. It materially changed the terms of the promissory note signed by Mr. and Mrs. Grigsby without their knowledge or consent as far as the present record discloses. This had the effect of releasing them from liability for any deficiency judgment. Braun v. Crew, supra, and cases cited. There can be no guaranty without any debt, default, or miscarriage of another to answer for. It follows that the cases which hold that an action independent of foreclosure proceedings may be instituted on the guaranty of a mortgage debt are not applicable here.

The promise of Krumm in the agreement under consideration may be paraphrased as follows: In consideration of the extensions of time requested by me I guarantee and promise that I will pay the principal and interest on the note as therein provided and as herein extended, this being subject to all the terms and conditions of such note and the deed of trust securing it except that I waive the option of paying the note prior to maturity. It is obvious that this agreement is supported by sufficient consideration. It is also equally obvious that its terms are not sufficiently clear and definite to constitute a complete contract without reference to the note and deed of trust. The reference to these instruments virtually make them a part of the extension agreement which cannot be intelligently interpreted without reference to both of them. The note and deed of trust contain the following paragraph: "If due (to) climatic conditions defined as excessive heat, wind or excessive cold, crop shall be less than 3,000 field boxes, the principal payment due for that particular year is to be automatically extended for a period of one year." We take it that should the crop have been reduced to less than 3,000 boxes by any of the causes specified no one would have the temerity to suggest that under the terms of the extension agreement the principal payment falling due that year would not be extended. This agreement became a part of and entirely dependent upon the note and deed of trust. It can neither be construed nor enforced as an independent agreement separate from the note and deed of trust.

A very similar situation is presented in the case of Shuey v. Mulcrevy, supra. The Oakland & Antioch Railway issued its coupon bonds secured by a mortgage or deed of trust on its properties. It subsequently leased its properties to the Oakland, Antioch & Eastern Railway. As one of its considerations the lease provided that the lessee would pay " 'interest on the bonded indebtedness hereinbefore referred to, and do, keep and perform each and all of the covenants, terms and conditions of the mortgage or deed of trust securing the bond issue hereinbefore referred to, including the payment of said bonded in-

debtedness as the same matures and is due and payable.'" The petitioner became the holder of some of the past-due interest coupons, and commenced action in the superior court against the lessee to collect their value, and applied to the county clerk for a writ of attachment against the property of the lessee. His request was refused, and he applied to the District Court of Appeal for a writ of mandate to compel the county clerk to issue the writ of attachment. In that case, as here, the contention was made that the new promise of the lessee "was an original independent contract, based upon an executed beneficial consideration, which promise is not in any way secured by said trust deed." The court refused the writ and disposed of this contention on the following grounds: "Whether or not this contention is correct depends entirely upon the nature of the contract under review. As before stated, the Oakland, Antioch & Eastern Railway took over the property of the Oakland & Antioch Railway subject to a mortgage, and as part of the same transaction agreed to 'pay the interest * * * on the bonded indebtedness * * * and * * * perform all the covenants * * * of the mortgage or deed of trust securing the bond issue.'

'By this clause of the agreement under the rule adopted in this and many other jurisdictions the Oakland, Antioch & Eastern Railway assumed the obligation of the Oakland & Antioch Railway so far as the payment of interest on the bonds was concerned, thereby becoming the principal debtor as between the two railway corporations, and the Oakland & Antioch Railway the surety; and if the mortgagee or a beneficiary under the mortgage seeks to enforce its right against the Oakland, Antioch & Eastern Railway, the lessee, it must sue to foreclose the mortgage, and should there be a deficiency it may pursue the lessee therefor. This rule is based on the ground that a creditor is entitled to enforce all collateral obligations for the payment of his debt which a person standing in the situation of a surety for others holds for his indemnity. The application of this principle is made possible by the aid of the doctrine of equitable subrogation, under which the lessee, by the assumption of the debt, has become, as to the lessor, the principal debtor, the lessor occupying thereafter the position of surety." A petition to have this case heard in the Supreme Court after decision in the District Court of Appeal was denied.

The case of Roberts v. Fitzallen, 120 Cal. 482, 52 P. 818, also involved the same contention that a separate instrument by which the grantee of a mortgagor assumed the mortgage indebtedness was an independent contract separate from the note and mortgage. It was urged that action on it was barred by the statute of limitations. The Supreme Court disposed of this contention as follows: "The liability of the grantee in such a case is the indebtedness secured to be paid by the mortgage. But it must be enforced by foreclosure; and a deficiency judgment may be entered against him only upon the security—the mortgaged premises—becoming exhausted. Code Civ. Proc. § 726; Biddel v. Brizzolara, 64 Cal. 362, 30 P. 609; De Costa v. Comfort, 80 Cal. 507, 22 P. 218; Thomson v. Bettens, 94 Cal. 82, 29 P. 336; Williams v. Naftzger, 103 Cal. 438, 37 P. 411, and cases there cited; Tulare County Bank v. Madden, 109 Cal. 314, 41 P. 1092. See, also, McKean v. German, etc., Sav. Bank, 118 Cal. 334, 50 P. 656. It necessarily results that the statute of limitations must run against the mortgage obligation, for that is the grantee's liability; and not against the promise to pay the mortgage as a new and independent agreement."

A somewhat similar situation was before the court in the case of Bogart v. George K. Porter Co., supra, where the court held that the grantee's promise to pay could not be disassociated or treated separately from the original debt.

[6] We are of the conclusion that the contract of January 23, 1933, cannot be independent and separate from the note secured by the deed of trust and that no action can be maintained on it alone. It must be regarded as a modification of the original obligation. Consequently the plaintiffs can only recover in appropriate proceedings to foreclose the deed of trust. Section 726, Code Civ. Proc.; Bank of Italy National Trust & Sav. Ass'n v. Bentley, 217 Cal. 644, 20 P.(2d) 940; Brink v. Benton, 131 Cal. App. 275, 21 P.(2d) 455.

The order appealed from is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

3 Cal.App.2d 562

VADNAIS v. DEPARTMENT OF MOTOR VEHICLES et al.

Civ. 9405.

District Court of Appeal, First District, Division 2, California.

Jan. 15, 1935.

1. Officers ⇐69

Complaint under Civil Service Act charging highway patrolman with failure of good behavior and acts incompatible with and inimical to public service, in that he solicited business for attorneys in violation of Runners and Cappers Act, *held* not insufficient because not alleging that patrolman had been convicted for violation of the act, where complaint without the allegation would still be sufficient (Pol. Code, § 360c (m–o); Gen. Laws 1931, Act 1400, § 14; St. 1931, pp. 2198, 2199, §§ 1, 5, 6).

2. Officers ⇐72(1)

Complaint charging highway patrolman with soliciting business for attorneys *held* to charge wrongful behavior within purview of Civil Service Act provision limiting tenure of appointee to good behavior and providing for removal or other punishment for failure of "good behavior," or any other "act incompatible with, or inimical to, public service" (Pol. Code, § 360c (m–o); Gen. Laws 1931, Act 1400, § 14; St. 1931, pp. 2198, 2199, §§ 1, 5, 6).

3. Statutes ⇐47

Civil Service Act provision limiting tenure of appointee to good behavior and providing for removal or other punishment for incompetency, inefficiency, immorality, and failure of good behavior or any other act incompatible with, or inimical to, public service, *held* not invalid because not sufficiently specific in its definition (Gen. Laws 1931, Act 1400, § 14).

4. Officers ⇐72(1)

Complaint under Civil Service Act charging highway patrolman with failure of good behavior *held* not violative of patrolman's constitutional rights because made on information and belief (Gen. Laws 1931, Act 1400, § 14; Pol. Code, § 360c (m–o); Code Civ. Proc. § 446; Civ. Code, § 2015; Const. art. 1, § 19).

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Petition for writ of review by Norman G. Vadnais against the Department of Motor Vehicles, Division of Enforcement, and another. From a judgment denying his petition, petitioner appeals.

Affirmed.

Frank E. Kilpatrick, of Oakland, William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and John A. McGilvray, of Sacramento, for repondents.

STURTEVANT, Justice.

Heretofore the petitioner was employed as a member of the California highway patrol. Proceedings were brought against him on October 26, 1932, under the provisions of section 14 of the State Civil Service Act (Deering's Gen. Laws 1931, Act No. 1400), and section 360c of the Political Code. The judgment in those proceedings was against this petitioner, and he applied to the trial court for a writ of review. His application was denied, and from that judgment he has appealed.

In several of his points he contends that the complaint filed before the department of motor vehicles of the state of California, division of enforcement, did not state a cause of action. The charging portion of that complaint is as follows:

"III. In accordance with section 14 of the State Civil Service Act (Deering's General Laws, Act No. 1400) and section 360c of the Political Code, Norman G. Vadnais, defendant above named, is hereby charged with failure of good behavior and acts incompatible with and inimical to the public service of the State of California, in that he did solicit business for attorneys at law in violation of the provisions of an act entitled, 'An Act defining runners and cappers and prohibiting the solicitation of business by runners and cappers for attorneys at law; providing that contracts secured by them shall be void, and providing penalties for any violation of this act,' approved June 19, 1931, Statutes of California, 1931, Chapter 1043, page 2198.

"IV. As further and particular specifications of said charges complainant is informed and believes and, therefore, alleges:

"That on or about the 15th day of December, 1931, at or near the City of Livermore, County of Alameda, State of California, said defendant, Norman G. Vadnais, did then and there solicit one Joseph Prioste who had been involved in an automobile accident near said City of Livermore, County of Alameda, State of California, to employ the firm of Kilpatrick & Goodman, attorneys at law with offices in the City of Oakland, County of Alameda, State of California, to represent said Joseph Prioste in connection with said accident and then and there stated that he, the said defendant, Norman G. Vadnais, would assist

said Prioste if the firm of Kilpatrick & Goodman were retained by the said Joseph Prioste;

"That on or about the 15th day of December, 1931, at or near the City of Livermore, County of Alameda, State of California, said defendant, Norman G. Vadnais, did then and there solicit one John Norbriga who had been involved in an automobile accident near said City of Livermore, County of Alameda, State of California, to employ the firm of Kilpatrick & Goodman, attorneys at law, with offices in the City of Oakland, County of Alameda, State of California to represent said John Norbriga in connection with said accident and then and there stated that he, the said defendant, Norman G. Vadnais, would assist said John Norbriga if the firm of Kilpatrick & Goodman were retained by the said John Norbriga.

"That on or about the first day of January, 193?, in the City of Hayward, County of Alameda, State of California, said defendant, Norman G. Vadnais, did then and there solicit one Rowena M. Swickard, who had been involved in an automobile accident in the City of Oakland, County of Alameda, State of California, to employ the firm of Kilpatrick & Goodman, attorneys at law, with offices in the City of Oakland, County of Alameda, State of California, to represent said Rowena M. Swickard in connection with said accident."

Section 360c of the Political Code, as enacted in 1931, provides:

"§ 360c. * * *

"(m) *Violations of civil service act.* Members of the California highway patrol guilty of any of the offenses or violations set forth in section 14 of the civil service act, or the rules and regulations of the division of enforcement, shall be subject to the penalties set forth in said section 14 of the civil service act, after trial and hearing by a trial board of three officers of equal or superior rank, who shall be designated as such by the chief of the division of enforcement.

"(n) *Trial. Venue.* Members of the California highway patrol shall not be subject to the penalties set forth in section 14 of the civil service act until after a fair and impartial trial before the trial board upon a verified complaint filed with such board setting forth specifically the acts complained of, and after such reasonable notice to them as to the time and place of hearing as such board may, by rule, prescribe. The hearing shall be held at a place to be designated by the chief of the division within the county in which the offense charged is alleged to have been committed. The accused shall be entitled, upon hearing, to appear personally or with counsel and to have a public trial.

"(o) *Decision by chief.* The findings of the trial board shall be submitted to the chief of the division of enforcement for his decision, and such decision, when approved by the civil service commission, shall be final."

The Civil Service Commission Act, section 14, as amended in 1929 (Deering's Gen. Laws 1931, Act 1400), provides: "*Tenure of office.* The tenure of every person holding a position under the provisions of this act shall be during good behavior, but any such person may be removed, demoted, suspended without pay or with reduced pay, transferred to another position in the same class, reprimanded, or restored to his position with such pay as may be equitable under a procedure in conformity with the provisions of this section which shall be set up by the commission in its rules and regulations, for any of the following causes: Incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, improper political activity, wilful disobedience, violation of the provisions of this act or of the rules and regulations of the commission, or for any other failure of good behavior or any other act or acts which are incompatible with or inimical to the public service."

By chapter 1043, Statutes of 1931 (page 2198), "An act defining runners and cappers * * *" was enacted.

Section 5 thereof provides: "Sec. 5. *Runner or capper defined.* A runner or capper is hereby defined as any person, firm or association or corporation acting in any manner or in any capacity as an agent for an attorney at law within this state in the solicitation or procurement of business for such attorney at law as provided in this act. An agent as hereby defined, is one who represents another in dealings with third person or persons."

Section 1 thereof provides: "Section 1. *Running and capping for attorneys by public officers unlawful.* It shall be unlawful for any person employed either as an officer, director, trustee, clerk, servant, or agent of this state or any county, city and county or other municipal corporation or subdivision thereof to act as a runner or capper or solicit any business for attorneys in and about the state prisons, county jails, city jails, city prisons or other places of detention of persons, city

receiving hospitals, city and county receiving hospitals, county hospitals, police courts, justice courts, municipal courts, superior courts or in any public institution or in any public place or upon any public street or highway, or in and about private hospitals, sanitariums or in and about any private institution or upon private property of any character whatsoever."

Section 6 thereof provides: "Sec. 6. *Penalties.* Any person, firm, partnership, association, or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not less than one month nor more than six months, or by both such fine and imprisonment. Any person mentioned in section 1 of this act, who shall be found guilty of violating any of the provisions of this act shall forfeit the right to his office and employment and in addition thereto shall be punishable by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment for not less than one month nor more than six months, or by both such fine and imprisonment. Any contract for professional services secured by any attorney at law in this state through the services of a runner or capper shall be void."

[1, 2] The petitioner contends that, because the complaint did not allege that he had been convicted under section 6 of the Runners and Cappers Act, it was insufficient. We think the contention may not be sustained. If we ignore as surplusage that portion of the charge "* * * in violation of the provisions of an act entitled 'An act defining runners and cappers and prohibiting the solicitation of business by runners and cappers for attorneys at law; providing that contracts secured by them shall be void, and providing penalties for any violation of this act,' approved June 19, 1931, Statutes of California, 1931, Chapter 1043, page 2198," the complaint would not be weakened. It would still be a complete statement of a wrongful act. Section 14 of the Civil Service Act was enacted in 1929 (Stats. 1929, p. 252). Section 360c of the Political Code was enacted later, but by its cross-reference it, in effect, adopts the provisions of the earlier act. The Runners and Cappers Act was enacted in 1931, but it contains no cross-reference to either of the other acts and is not necessarily a part of either or both. We have stated that the complaint as deleted stated wrongful acts. It remains for us to ascertain if such wrongful acts come within the provisions of section 14 of "The State Civil Service Act." It provides: "The tenure of every person holding a position under the provisions of this act shall be during good behavior, but any such person may be removed * * * for any of the following causes: * * * Violation of the provisions of this act * * * or for any other failure of good behavior or any other act or acts which are incompatible with or inimical to the public service." The petitioner contends the only possible claim that can be made is that he was charged under the last clause. Continuing, he claims that, if we bear in mind the rule ejusdem generis, then the clause last stated in the section applies only to persons and things of the same general nature or class as those enumerated. The charge alleges wrongful behavior as distinguished from good behavior. Such acts are specifically inhibited by the provisions of the section. Such acts were also "incompatible with" and "inimical to" the public service. The charges came within the calls of the statute.

[3] It is also contended that section 14 of the State Civil Service Act is invalid because not more specific in its definition. That attack is, we think, without merit. It is a civil service statute covering innumerable different positions of officers and employees. No statute could be written covering all of those positions and which was as specific in its provisions as contended for by the petitioner.

In his next point the petitioner contends the evidence was insufficient to sustain the findings. The evidence is before us. It is abundantly sufficient.

[4] As will be noted from the quoted portions thereof, the complaint was made on information and belief. The petitioner contends the allegations should have been positive. It is not claimed any statutory rule of procedure has been violated, but "constitutional rights" are said to have been violated. Const. art. 1, § 19; Ex parte Spears, 88 Cal. 640, 26 P. 608, 22 Am. St. Rep. 341. The petitioner was not charged with crime. He was charged with conduct which was not good behavior. The allegations of the complaint would have been good as to any employee in private employment. Code Civ. Proc. § 446; Civ. Code, § 2015. We see no reason why they were not good as to one in public employment.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

3 Cal.App.2d 612

CURTIS v. TITLE GUARANTEE & TRUST CO.*

Civ. 1132.

District Court of Appeal, Fourth District, California.

Jan. 15, 1935.

Hearing Denied by Supreme Court March 14, 1935.

1. **Vendor and purchaser** ⇨33

Representation that coeducational University would be constructed on site adjoining subdivision in which purchaser was induced to purchase lots and that construction would start immediately entitled purchaser to rescind and recover money paid where, actually, corporation to erect University had been organized and deed to site had been placed in escrow to be delivered only when corporation obtained sufficient funds by subscription to carry on project.

2. **Trusts** ⇨232

Trustee acting under unrecorded declaration of trust could not escape liability for fraud inducing purchase of lots where trustee dealt with lots as owner and in its contracts represented itself to be owner of lots.

3. **Vendor and purchaser** ⇨114

Provision of realty contract that neither vendor nor its agent had made representation or promise affecting property not expressly contained in contract *held* not to prevent purchaser from rescinding contract and recovering money paid with interest where execution of contract was induced by fraud.

4. **Equity** ⇨88

Laches is affirmative defense which must be pleaded.

5. **Appeal and error** ⇨1008(1)

Trial court's finding on issue of laches in purchaser's action to rescind for fraud is binding on appellate court in absence of abuse of discretion.

6. **Vendor and purchaser** ⇨119

Where vendor by promises or representations to vendee causes vendee to postpone efforts to rescind contract, vendor cannot urge failure of vendee to rescind within time during which vendee's fears of fraud have been lulled.

7. **Vendor and purchaser** ⇨43(1)

Purchaser's payment of installment after it became apparent that University was not being constructed as represented to induce purchase *held* not waiver of fraud where vendor's agent quieted purchaser's fears by representing that University officials were absent raising necessary money.

8. **Contracts** ⇨265

Party seeking to rescind contract must do equity and parties must be put in same position they occupied before execution of contract as far as it is possible to do so.

9. **Vendor and purchaser** ⇨116

Licensed realtor rescinding purchase of lots for fraud could not recover amount paid her as real estate commissions on sale of lots to her.

Appeal from Superior Court, Los Angeles County; Benjamin C. Jones, Judge.

Action by Mayme H. Curtis, formerly Mayme H. Hamilton, against the Title Guarantee & Trust Company. Judgment for plaintiff, and defendant appeals.

Judgment modified and, as so modified, affirmed.

Hearing denied by Supreme Court; LANGDON and THOMPSON, JJ., dissenting.

Keogh, Cate & Colver and William P. Mealey, all of Los Angeles, for appellant.

Dana R. Weller and C. F. Culver, both of Los Angeles, for respondent.

MARKS, Justice.

Respondent brought this action to enforce the rescission of two contracts for the purchase of two lots in the county of Los Angeles, and the recovery of the money which she had paid on the purchase price. She recovered the judgment from which this appeal is taken.

Respondent, a resident of Los Angeles, was a licensed realtor. Some time in November, 1927, she was interviewed by William C. Warfield, who wanted to take her to the Del Rey hills with a view of selling her some property there. Respondent did not go with Warfield but drove down to the subdivision and met him there. She found there a lecture and luncheon tent maintained by the Dickinson & Gillespie Holding Company. She attended the lecture and had lunch there. The lecturer said that the Los Angeles Lutheran University was to be established on the site; that construction was to start immediately; that the first units were to be ready for use by September 1, 1928; that it would be a coeducational institution accommodating 10,000 students who would come from all over the world and would require housing accommodations; that there would be great advantages to accrue to the owners of adjacent property from the University. After the lecture and luncheon, Warfield took respondent over the property. He repeated the lecturer's statements concerning the University and its advantages to the property owners. He pointed out the location of an apartment house

⇨For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Hearing denied by Supreme Court 42 P.(2d) 323.

which he said was to be constructed within four months. This was on a site within one-half a block of one of the lots purchased by respondent. He told her that a contract had been signed for the construction of ten residences on a designated street. Numerous other statements of buildings to be erected were made. A large drawing was exhibited showing the sites of the proposed University buildings, men's and women's dormitories, athletic fields and buildings, and other structures as well as the type of architecture to be used. The University site was covered with signs showing locations of the various buildings and other improvements. Respondent returned to the subdivision several times, heard several lectures describing the improvements to be made, including those we have mentioned, and others. On each occasion she saw the picture of the University buildings and the signs we have mentioned.

On February 7, 1928, respondent and appellant executed a written agreement whereby she agreed to buy from appellant one of the lots for $8,000, to be paid $2,000 in cash and the balance in five equal annual installments. Interest on deferred payments commenced on May 7, 1928, and was made payable quarterly. The second contract was dated February 11, 1928, and provided for the purchase of another lot for $6,000, to be paid $1,200 in cash and $480 on August 11, 1928, with like installments to be paid every sixth month thereafter. Interest was to be paid semiannually. Otherwise the two contracts were identical in form. Both contracts contained the following: "It is understood that this instrument contains the entire agreement between the parties hereto, and the Buyer agrees that the Seller has not, and that no agent of the Seller has made any representation or promise with respect to or affecting said property or this contract not expressly contained herein."

Respondent made the down payments and those due on August 11, 1928, and no others. In March, 1929, she discovered the falsity of the representations made to her and served notice of the rescission of the contracts on May 10, 1929. This action was commenced on July 21, 1930.

Appellant presents the following grounds for a reversal of the judgment:

"1. Where representations are made to a purchaser by a vendor that certain improvements will be made by third persons in the vicinity of the property sold, has actionable fraud been committed if such improvements are not in fact constructed?

"2. The evidence is insufficient to support the findings that the representations made were false and fraudulent.

"3. The evidence is insufficient to support the finding that the representations were made by the defendant through its agents.

"4. Where the vendor is a trustee under a subdivision trust, is it liable for the false representations of a sales agent of the actual owner, and in particular when the contract contains a provision limiting its liability?

"5. Where the trust agreement provides that the trustee shall convey the premises upon the order of the beneficiary, is such trustee liable for misrepresentation by the beneficiary?

"6. Did the plaintiff act promptly in rescinding her contract as required by section 1691, Civil Code?

"7. The plaintiff has waived the alleged fraud by making the semi-annual payment upon her contract after knowledge that the improvements were not being made in accordance with the representations.

"8. Can the respondent herein retain the benefit of the commissions which she received and which were applied upon the purchase price of the property, and thereafter rescind and recover the full amount paid by her, including said commissions?"

The first and second specifications of error are closely related and may be considered together. Under them appellant contends that the evidence does not support the findings and judgment because, (1) the representations were made concerning future events and improvements to be constructed by third persons over whom appellant had no control and therefore amounted to nothing more than "sales talk" insufficient in law to constitute fraud, and (2) the only evidence of the falsity of the representations was the fact that none of the buildings and improvements had been constructed except one, completed, and two partially completed dwellings.

In support of these propositions, appellant quotes the following from 26 Corpus Juris, page 1087: "An actionable representation must relate to past or existing facts and cannot consist of mere broken promises, unfulfilled predictions, or erroneous conjectures as to future events. Predictions as to future events are ordinarily regarded as nonactionable expressions of opinion upon which there is no right to rely, and obviously cannot constitute fraud where made in the honest belief that they will prove correct. Thus actionable fraud cannot be based upon erroneous predic-

tions as to the future conduct of third parties, the amount a purchaser would save by use of an article purchased, or the nature of young an animal will bear; statements by a vendor as to future improvements that would be made near the property purchased such as the future location of a railroad or depot." The following cases are cited, all holding that the failure of third parties to erect buildings or make improvements will not support an action for fraud where the party making the representations has no control over the third party, and they are made in good faith: Watkins v. West Wytheville, etc., Co., 92 Va. 1, 22 S. E. 554; Slothower v. Oak Ridge Land Co. (Va.) 27 S. E. 466; Max Meadows Land & Imp. Co. v. Brady, 92 Va. 71, 22 S. E. 845; Western Townsite Co. v. Novotny, 32 S. D. 565, 143 N. W. 895; Day v. Fort Scott Inv. Co., 153 Ill. 293, 38 N. E. 567; Stewart v. Larkin, 74 Wash. 681, 134 P. 186, L. R. A. 1916B, 1089; Ames v. Milam, 53 Okl. 739, 157 P. 941.

Section 1572 of the Civil Code provides in part as follows: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * *

"2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; * * *

"5. Any other act fitted to deceive."

In McMahon v. Grimes, 206 Cal. 526, 275 P. 440, 443, the Supreme Court said:

"Conceding that Mrs. Grimes honestly thought her statements as to the character of the land were true, she was not justified in making them to the plaintiffs, in order to induce the latter to purchase the land through her, for the reason that she did not have, and could not have had, any competent information that they were true. Had she made an examination of the land for the purpose of ascertaining the depth of its alluvial soil, and the presence or absence of hardpan and clay thereon, she would have discovered its true character, and as such an examination would have revealed the presence of hardpan and clay, and but a thin layer of alluvial soil, she could not have thereafter truthfully made said statements relative to the character of said soil. If she made such statements without this information, or some other of equal merit, then she was guilty of fraud even if she believed they were true.

"As was said in Muller v. Palmer [144 Cal. 305, 77 P. 954], supra, quoting from the early case of Alvarez v. Brannan, 7 Cal. 504, 68 Am. Dec. 274, 'But it is equally true that "whether a party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial." If a party asserts that as true which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form, so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge or at his peril, and must make good his assertion.'"

See, also, Hill v. Wilson, 88 Cal. 92, 25 P. 1105; Cooper v. Huntington, 178 Cal. 160, 172 P. 591; Long v. Los Altos Country Club, Inc., 122 Cal. App. 116, 9 P.(2d) 600; Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803; Mitchell v. Tuttle, 102 Cal. App. 16, 282 P. 534; Boulevard Land Co. v. King, 125 Cal. App. 224, 13 P.(2d) 864.

[1] The evidence before us most favorable to respondent supports the conclusion that she was told, as facts, that the Los Angeles Lutheran University would construct a coeducational University on a site adjoining the subdivision in which she had purchased her lots; that construction would start immediately; that the first unit would be ready to receive students on September 1, 1928; that the other structures we have mentioned would be constructed.

The evidence shows that the following situation existed at the time the representations were made: That the corporation to erect the University had been organized; that a 100-acre site had been selected; that a deed had been placed in escrow by the landowners to be delivered only upon the corporation having obtained sufficient funds with which to carry on its project; that a financial agent was employed to supervise the soliciting of funds from Lutherans over the United States; that it was proposed to raise for this purpose $5,000,000, of which $2,000,000 was to be subscribed in California and $3,000,000 in other states; that the fiscal agent caused various news articles to be published in various newspapers announcing the project.

The actual facts are so at variance with the representations made to respondent that the case falls well within the rule announced in McMahon v. Grimes, supra.

Appellant urges with apparent sincerity that the only evidence of the falsity of the representations made, and that they were knowingly falsely made, was the failure to construct the improvements. We do not so construe the evidence. This failure to construct the improvements was one of the circumstances to be weighed and considered by the trial judge in deciding the case.

Appellant's third assignment of error is not supported by the record. William P. Mealey, who had been associated as an attorney for appellant, admitted in open court that Warfield was appellant's agent. There is also circumstantial evidence supporting the conclusion that others making representations to respondent were also its agents.

Appellant's fourth and fifth assignments of error can be considered together as the fifth is included in the fourth.

[2] It is true that appellant was acting as trustee in this transaction under an unrecorded declaration of trust of which respondent is shown to have had no knowledge at the time she entered into the contracts. From these contracts, it would appear that appellant was acting in its individual capacity as owner of the fee in the property and not as a trustee in making the sales to respondent. Where it has thus acted as, and in its contracts represented itself to be, the owner of the properties, it should not be allowed to attempt to shift its responsibility by proving that it was not actually acting as owner but as trustee of an express trust under an unrecorded declaration of trust of which the purchaser had no notice.

Appellant calls our attention to two agreements delivered to respondent at the times she received her contracts and urges that these agreements disclosed to her that a trust existed. Each of these documents is entitled "Street Improvement Guarantee." Each provides that the cost of installing "Water Mains, Gas Mains, Concrete sidewalks, Concrete curbs, and rock and oil surfacing" will be paid "by Title Guarantee and Trust Company through its improvement fund of its trust No. 1136." There was nothing in either of these instruments indicating that the title to the real property was held by appellant as trustee. They related only to the improvements specified.

[3] Appellant urges that the clause in the contracts of sale and purchase, which we have quoted, reciting that neither the seller nor its agent had made any representation or promise affecting the property not expressly contained in the contracts, relieves it from liability for the misrepresentation of its agents.

A sharp conflict of authority on this question has existed in the decisions in this state. This conflict has been settled by the recent cases of Speck v. Wylie (Cal. Sup.) 36 P.(2d) 618, 619, and Lozier v. Janss Investment Co. (Cal. Sup.) 36 P.(2d) 620. They hold that the clause quoted cannot prevent a rescission of the contract and a recovery of the money paid with interest where actionable fraud is proven. They adopt, as a statement of the correct rule in this state, sections 259 and 260 of Restatement of the Law of Agency. In Speck v. Wylie, the Supreme Court quotes from these two sections and adds its comment of approval, as follows: "Section 259. 'A transaction into which one is induced to enter by reliance upon untrue and material representations as to the subject-matter, made by an agent entrusted with its preliminary or final negotiations, is subject to rescission at the election of the person deceived. * * * Comment: b. * * * The rule stated in this section applies although the other party knows or has reason to know that the agent is not authorized to make the statement. By contract with the principal, however, he may agree that the principal is not to be liable because of unauthorized statements of an agent, as stated in section 260. * * * Sec. 260. * * * (1) A principal may, by contract with another, relieve himself of liability in deceit for prior or subsequent frauds of an agent to such other. (2) A contract obtained by an agent through fraudulent misrepresentations of facts may be rescinded by the other party although it provides that it shall not be affected by representations not contained therein.'

"Without attempting further elaboration we therefore announce that we are in accord with the above statements of the rule which will, all other things being favorable to the complaining party, allow him to rescind and to pursue the principal far enough to secure a return of the consideration paid." Under these authorities, the contentions of appellant cannot be sustained.

[4, 5] Appellant's sixth ground for reversal presents the argument that respondent was guilty of laches. This is an affirmative de-

fense which must be pleaded. It presents a question of fact to be decided by the trial judge. Ellis v. Union Trust Co., 219 Cal. 50, 25 P.(2d) 1, 2; Hugill v. Keene, 204 Cal. 381, 268 P. 624; French v. Freeman, 191 Cal. 579, 217 P. 515. Although laches was not pleaded, the issue was raised and the trial court found against it. The question being one of fact, and no abuse of discretion appearing, we are bound by the finding.

[6, 7] Appellant urges that respondent waived the fraud by making the August payment when it was perfectly apparent to her that the University and other buildings were not being constructed and that no part of the University would be ready for the reception of students on September 1, 1928. Respondent testified that when she saw the University buildings were not being constructed, she talked to an agent of respondent, who explained the delay by informing her that representatives of the University were in the East raising money. This apparently quieted her fears and she made her payments. Where the vendor by promises or representations to the vendee causes the vendee to postpone efforts to rescind the contract, the vendor cannot urge the failure of the vendee to rescind within the time during which the vendee's fears of fraud have been lulled by such representations. Cooper v. Huntington, supra.

[8, 9] Appellant urges that even though the judgment be sustained it must be reduced by the amount of $700, this being the amount of the commissions on the sales which was paid her by appellant, together with the amount of interest on these commissions which is included in the judgment. This point is well taken.

Where a contract "was tainted with fraud —it was vitiated from the beginning." Ellis v. Union Trust Co., supra. The party seeking to rescind a contract must do equity and the parties must be put in the same position they occupied before the execution of the contract as far as it is possible to do so. 4 Cal. Jur. 764. The judgment in the instant case does not have this effect. Under it appellant will receive back its lots and respondent will receive back all of her own money which she expended, plus interest, and, in addition, will receive $700 more which she would not have had if the fraudulent contracts had not been executed.

The trial court is directed to reduce the amount of the judgment by deducting the sum of $700 paid respondent as real estate commissions on the sale of the lots to her, together with the amount of the interest on the commissions included in the judgment, and the judgment as so reduced and modified is affirmed. Neither party will recover costs of appeal against the other.

We concur: BARNARD, P. J.; JENNINGS, J.



3 Cal.App.2d 606

In re HARRIS' ESTATE.

GRIFFITH et al. v. CALIFORNIA CHRISTIAN COLLEGE et al.

Civ. 1543.

District Court of Appeal, Fourth District, California.

Jan. 15, 1935.

1. Wills ⇐435

Doubts as to the meaning of a will are resolved by construction of the will which is for the court as a matter of law.

2. Wills ⇐324(1)

In application for probate of two instruments which were marked "copy" in testatrix' handwriting, no question of construction was presented, and whether instruments were executed with testamentary intent was properly submitted to jury.

3. Wills ⇐302(1)

In application for probate of two instruments on which the word "copy" had been written by testatrix, evidence *held* sufficient to sustain verdict that instruments had not been executed with testamentary intent.

Evidence disclosed that both instruments filed for probate were marked with word "copy" in testatrix' handwriting; that each instrument was different; that no original will was found; that testatrix had made a will, which she had deposited with another person but later recalled; that such instrument was not marked "copy"; and that testatrix' safety deposit box did not contain a will.

4. Wills ⇐302(1)

In application for probate of two instruments, both of same date and containing word "copy" in testatrix' handwriting, but

which were not copies of each other, jury's verdict that neither was executed with testamentary intent *held* justified, where proponent failed to show which instrument was deceased's last will.

5. Wills ⇐331(1)

In application for probate of two instruments, where parties stipulated that both had been written, dated, and signed by testatrix, refusal to instruct jury to find for proponents if they found that testatrix wrote, dated, and signed both instruments and had not revoked them *held* not error, since requested instruction did not present question of testatrix' intention when instruments were signed.

Appeal from Superior Court, Orange County; Arthur L. Mundo, Judge.

Application by the executors for the probate of the will of Maria L. Harris. From a judgment in favor of the contestants, Mary E. Griffith and others, the California Christian College and others appeal.

Affirmed.

Frank G. Tyrrell, of Los Angeles, and Head, Wellington & Jacobs, of Santa Ana, for appellants.

R. Y. Williams and Chas. D. Swanner, both of Santa Ana, for respondents.

BARNARD, Presiding Justice.

Maria L. Harris died on July 2, 1933. Two separate instruments were offered for probate as her last will by the executors named in both. Each of these instruments consisted of three pages, was dated May 8, 1915, was in the form of a will, and was entirely written, dated, and subscribed by the decedent. The instruments were largely alike, but they were not duplicates. Each purported to give the same amounts to certain relatives and other amounts to certain religious and charitable organizations. In addition to minor differences in wording and in punctuation the instruments differed materially in that one contained some five bequests of $500 each to named individuals which were not in the other, while the other contained one bequest of a similar amount which does not appear in the first. One instrument, introduced as Exhibit 1, contained the word "copy" in the handwriting of the deceased near the top of the first page and was found, after the death of decedent, in a small sealed envelope addressed to Mr. Horatio J. Forgy at an address in Santa Ana. This envelope, also having upon it the word "copy" in the handwriting of the deceased, was found among some letters and receipts in a drawer of a desk which had belonged to her. The other instrument, introduced as Exhibit 2, had the word "copy" in the handwriting of the deceased near the top of each of its three pages. This instrument, in a small sealed envelope addressed to Mr. Horatio J. Forgy, was found in the middle of a bundle of duplicate income tax reports of the decedent by an officer of a bank who testified that the bundle had been brought to the bank, after the death of the deceased, by one of her nieces.

A contest was filed by certain heirs and the matter was submitted to a jury upon the issue as to whether either or both of the instruments in question had been executed by the deceased with testamentary intent. The verdict was in favor of the contestants, and judgment was entered in accordance therewith, from which judgment this appeal was taken by the religious and charitable institutions named as beneficiaries in the offered instruments.

Appellants' first contention is that the fact that each of these instruments, although otherwise entirely sufficient to constitute an holographic will, was plainly and carefully marked "copy" by the supposed testator presents only a question of law which should not have been submitted to the jury. It is argued that each instrument is, in itself, complete evidence of the intention of the writer thereof; that it is immaterial whether or not they are identical with each other or complete duplicates of something else since they are original testamentary writings; and that the only question is one of construction, which was for the court and not for the jury.

[1, 2] It is well settled that whenever doubt arises as to the meaning of a will this doubt is to be resolved by construction, which is for the court as a matter of law. In re Estate of Donnellan, 164 Cal. 14, 127 P. 166. No such question was here presented. The wording of each of these instruments is unambiguous and no question has arisen with regard to the meaning thereof. The word "copy," written on the instruments, throws some light on the intention of the writer, but does not affect the meaning of the language used therein and raises no question with regard to that meaning which calls for any construction thereof. The question presented is not one of construction as to the meaning of the instruments, but is as to whether they were executed with testamentary intent. In Re Estate of Button 209 Cal. 325, 287 P. 964, 967, the court said

"In order for a document to be the last will and testament of a deceased person, it must, in addition to meeting all other legal requirements, clearly show that the decedent intended it to take effect only after his death, and it must satisfactorily appear therefrom that the decedent intended by the very paper itself to make a disposition of his property in favor of the party claiming thereunder."

This question as to the intent of the deceased with respect to these instruments was one of fact which was properly submitted to the jury.

[3] It is next contended that there is no evidence whatever to support the implied finding of the jury, adopted by the court in the judgment, to the effect that the decedent did not intend these documents, either separately or collectively, as her last will. The very fact that these instruments were marked as copies indicates that there had been originals, or an original, and justifies an inference to that effect. They are certainly not copies of each other and, if copies at all, they must have been copies of other documents. The fact, as testified to, that such an original was not found justifies the inference that it had been destroyed and in any event it was incumbent upon the proponents to explain the absence of the original instruments in order to justify the use of copies. In addition to these inferences there was some evidence indicating that at least one original will had existed. H. J. Forgy testified that he had handled certain legal matters for the deceased; that some years prior to 1920 she showed him her will and asked him whether it was properly signed and dated; that he examined it only for the purpose of answering these questions; that he did not see the word "copy" upon the instrument shown him; and that he would have noticed the same had it been there. He further testified that some two years before 1920 Miss Harris, just before leaving on a trip to Alaska, left with him an envelope which she said contained her will; that at that time he gave her a memorandum to the effect that he was holding her will for her; and that when she returned a few weeks later she asked for and was given the paper she had left with him. An officer of the bank above referred to testified that sometime before the death of Miss Harris, when a guardian for her estate was appointed, he was present when her lock box in the bank was opened; that this box contained mortgages, bonds, and other valuable papers; that it also contained a small envelope similar to those in which the two instruments in question were later found, on which was written: "The Last Will and Testament is filed with me. H. J. F."; that no papers of value were found anywhere except in this box; and that the instruments here in question first came to his attention after the death of the decedent.

The word "copy" on these instruments indicates a lack of intention that they were to constitute originals in such a matter as a will, where one instrument only is to take effect, and we think all of the evidence taken together, with the reasonable inferences therefrom, justifies the implied finding that these particular instruments were not executed with testamentary intent, and is sufficient to sustain the verdict of the jury.

[4] A further consideration in support of the verdict is that there is nothing to show which of these instruments, even if they were executed with testamentary intent, is the last will of the deceased. There was an entire failure on the part of the proponents to establish that necessary element, and the two documents, each complete in itself, bear the same date. The appellants in effect concede this by arguing that either or both of the instruments is or are the last will of the deceased, although no attempt is made to point out any evidence to indicate that either was executed after the other or that either was intended to be a codicil of the other.

[5] The appellants maintain that the court committed error in refusing to give two instructions asked for. The first of these was a formula instruction. There was no evidence to justify the first part of the instruction and the remaining portions instructed the jury to find for the proponents in the event they found that the two instruments were wholly written, dated, and signed by the decedent, and that they had not been revoked. It was stipulated at the trial that the instruments were wholly written, dated, and signed by the decedent, and the instruction ignores the real issue in the case as to the intent with which they were written and signed. The second instruction refused, in defining the word "copy," included a further definition which had no relation to this case under the evidence and which, if adopted and followed by the jury, would have compelled a verdict against the appellants. In so far as applicable to this case, everything in this instruction is contained in another instruction given by the court, and the jury was fully and correctly instructed, both as to the meaning of the word "copy" and as to the issue submitted to them, that of testamentary intent. A further objection to a part of one of

the instructions given is based upon appellants' contention that an holographic copy of an holographic will is just as much an original as the one first written and has already been considered under the claim that the only question presented is one of law. We find no error in connection with the instructions given or refused.

The instruments in question purported to give the appellant corporations the sum of $196,000. The respondents made an offer of proof to the effect that between 1915 and the date of her death the deceased gave to these corporations more than $300,000, a large portion of this being given in 1926 and 1927, and that she left an estate amounting only to $71,000. The court refused to receive such evidence and the respondents complain that this ruling was erroneous. They have not appealed from the judgment, which was in their favor, and the point need not be here considered.

We think that a question of fact is here presented which has been resolved by the jury upon sufficient evidence and under correct instructions. The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

4 Cal.App.2d 39

McDOWELL v. SNODGRASS et al.

Civ. 1547.

District Court of Appeal, Fourth District, California.

Jan. 21, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Deeds ⇐208(1), 210, 211(1)

Evidence *held* to show that grantor was competent, that there was consideration for deed, and that deed was delivered, so as not to justify cancellation of deed.

Evidence disclosed that deed was executed by 88 year old father to his daughter and son-in-law; that deed was read to the father before he signed it; that his signature was witnessed; and that one physician and several lay witnesses testified that the father was mentally competent at the time he executed the deed.

2. Appeal and error ⇐110

Order denying motion for new trial is not appealable.

Appeal from Superior Court, Los Angeles County; Carl A. Stutzman, Judge.

Action by Prescott McDowell, executor of the estate of John Purkiss, deceased, against Ellen C. Snodgrass and another. From a judgment for defendants and from an order denying his motion for new trial, plaintiff appeals.

Appeal from order denying motion for new trial dismissed, and judgment affirmed.

William M. Morse, Jr., and Charles S. Wagner, both of Los Angeles, for appellant.

Hamish B. Eddie and George F. Rankin, both of Los Angeles, for respondents.

MARKS, Justice.

This action was instituted by Prescott McDowell, as executor of the last will and testament of John Purkiss, deceased, to cancel a deed conveying two pieces of property to Ellen C. Snodgrass and to quiet title to the property, upon the grounds that Purkiss was mentally incompetent to execute the deed, that there was no consideration for it, and that it had never been delivered. The trial court found against these contentions and rendered judgment accordingly. This appeal is taken from the judgment and from the order denying the motion for new trial.

The sole question presented is whether the evidence supports the findings and judgment. Deceased was the father of Mrs. Snodgrass. He was 88 years old at the time of his death. The deed was executed during his last illness, nine days before he died.

Several days before the deed was signed, deceased sent word to his daughter and her husband that he wanted to see them. When they visited him, he told them he wanted to deed two lots in Los Angeles county to his daughter, and asked her to have the deeds prepared. They visited him again on October 27, 1932. He asked if she had the deed, and she produced it. It was read to him by her husband. Deceased asked if there should not be two deeds, as there were two pieces of property. He was assured that one deed was sufficient as both lots were described in it. He signed the deed by his mark, which was duly witnessed. He then handed the deed to Mr. Snodgrass for his daughter. One physician and several lay witnesses testified that deceased was mentally competent at the time he executed the deed.

[1] This evidence amply supports the findings and judgment. The deed was evidently

made by deceased in contemplation of death. His daughter was the natural object of his bounty. The appeal is absolutely without merit.

[2] The attempted appeal from the order denying the motion for new trial is dismissed. It is not an appealable order.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 58

FONSECA v. GOODWIN et al.

Civ. 9499.

District Court of Appeal, First District, Division 2, California.

Jan. 22, 1935.

As Modified Feb. 18, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Municipal corporations ⇐218(9)

Petition by discharged city employee against city manager and city clerk alleging that order of discharge was without jurisdiction *held* not to state cause of action in certiorari because not alleging that any judicial or quasi judicial action was taken by either respondent which was subject to review (St. 1915, pp. 1889, 1890, § 57).

2. Municipal corporations ⇐218(9)

Order of discharge of civil service employee by city manager of San Jose was ministerial act, not subject to review on certiorari, since charter did not confer on city manager any power to "hear and determine," which are necessary elements of exercise of judicial functions, and charter did not require that any officer or commission must try and sustain charges or reject defense before removal (St. 1915, pp. 1889, 1890, § 57).

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Petition in certiorari by Clarence Fonseca against C. B. Goodwin, as manager of the city of San Jose, and another. Judgment for defendants, and petitioner appeals.

Affirmed.

Wm. H. Johnson and John R. Sullivan, both of San Jose, for appellant.

Archer Bowden, City Atty., of San Jose, for respondents.

NOURSE, Presiding Justice.

The plaintiff filed a petition in certiorari against Goodwin, as city manager of the city of San Jose, and against Lynch, as city clerk. A demurrer to the petition was sustained without leave to amend and judgment followed for the defendants.

The petition alleged that the petitioner was a duly appointed employee of the street department under the classified civil service; that, on October 7, 1932, a complaint was filed "with respondent" charging that petitioner "has wilfully failed, for a long period of time, to pay his just debts, and has filed a petition in bankruptcy in order to avoid the payment of such debts"; that "the matter proceeded to a hearing on said complaint"; and that after said hearing "respondent" made his order discharging petitioner permanently from the service; that said order "was in excess of and without jurisdiction, and was committed without any substantial or legal cause." The prayer is that the city manager certify the record leading up to the order of discharge.

The pertinent provisions of the charter under which the respondents justify the discharge of petitioner are found in section 57 which authorize the city manager to remove any employee within the civil service, "provided that he must file with the council and the civil service commission a statement of the grounds of the removal and give to the person sought to be removed an opportunity to be heard in his own defense at a public hearing." St. 1915, pp. 1889, 1890. This section was included in the new charter adopted in 1915, which contained a complete scheme for the so-called "city manager plan" of local government. The old charter, which it supplanted, contained a course of procedure for the filing and trial of charges "in any case of 'removal for cause.'" St. 1897, p. 629, Art. 13, § 2.

It should be noted that the charter does not provide for the filing of charges, nor that the employee can be removed only "for cause" or after a finding sustaining any charges made and heard. A reading of the civil service provisions of the charter would indicate that the public hearing is for the sole purpose of permitting the employee to publicly

present his side of the controversy and thus deter arbitrary or capricious removals by the manager. In this respect the charter is similar to that of the county of Los Angeles which was interpreted in Cronin v. Civil Service Commission, 71 Cal. App. 633, 236 P. 339, 340. The county charter relating to removals of civil service employees required that the person should be "presented with the reasons for such discharge" and "allowed a reasonable time to reply thereto in writing." Mr. Justice Curtis, speaking for the court, referred to the number of standard works upon the principles of civil service legislation as indicating the trend to extend the power of removal as necessary to the discipline and efficiency of the service, and approving the legislation which checks abuse of this power by requiring written reasons for the removal to be filed with an opportunity given the person removed to put his answers on record. There is very little difference between the provisions of the Los Angeles county charter and that of the city of San Jose. The one permits the person removed to file his reply as a public record with the civil service commission, the other permits him to state his defense at a public hearing. Neither charter provides for nor contemplates a trial upon charges made, and neither requires a judgment of discharge resulting from a trial of charges. The same principle is followed in Krohn v. Board of Water & Power Com'rs, 95 Cal. App. 289, 295, 272 P. 757, 759, where the court, citing a number of New York cases to the rule, said: "In the state of New York it has been held that a provision of a statute, in effect that a civil service employee shall not be removed 'until he has been informed of the cause of his removal and has been allowed an opportunity for explanation,' is clearly distinguishable in its procedural requirements from a provision which provides for removal of such an employee 'for cause after opportunity to be heard.'"

[1, 2] For these reasons, the petition failed to state a cause of action in certiorari. In the first place, it does not allege that any judicial or quasi judicial action was taken by either respondent which is subject to review. In the second place, the order of discharge made by the city manager was a ministerial act and, as such, not subject to review in certiorari. This follows for two reasons—the charter does not confer upon the city manager any power to "hear and determine," which are necessary elements of the exercise of judicial functions; and the charter does not require that any officer or commission must try and sustain the charges or reject the defense before the removal can be made effective.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

4 Cal.App.2d 197

ANDERSEN et al. v. LA RINCONADA COUNTRY CLUB.

Civ. 9227.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1935.

Hearing Denied by Supreme Court March 28, 1935.

1. Contracts ⇐56

Promise of one party to buy from no one else is sufficient consideration for promise by another to furnish whatever quantity of a commodity first party may need or use, even though first party's business may be such that nothing will be needed during period fixed.

2. Contracts ⇐143

Contracts should be reasonably construed, and the law will imply whatever the parties may be reasonably supposed to have meant and what is essential to render transaction fair and just (Civ. Code, § 1643).

3. Contracts ⇐155

Language of contract should be interpreted most strongly against party who caused uncertainty to exist; presumption being that this was the promisor (Civ. Code, § 1654).

4. Waters and water courses ⇐254

Agreement by country club to buy from sellers for a period of 10 years all water necessary for irrigating fairways and for domestic purposes, and that country club during term of contract would purchase water from no other source, except for use in clubhouse if water delivered by sellers was unsuitable for that purpose, *held* breached by country club's purchase of small tract of land containing a well and use of water therefrom, since word "purchase" includes every mode of acquisition except by inheritance.

[Ed. Note.—For other definitions of "Purchase," see Words & Phrases.]

5. Damages ⇐120(1)

Sellers suing for damages for breach of contract of sale of water can recover only the

profit they would have made had buyer performed and not the full contract price.

6. Damages ⇐163(2)

In action for breach of contract of sale of water, burden of showing facts in mitigation of damage is upon buyer who refused to perform.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Niels Andersen and another against the La Rinconada Country Club, a corporation. From a judgment in their favor for a sum less than their claim, plaintiffs appeal.

Affirmed and remanded.

Arthur Joel, of San Francisco, and Bohnett, Hill & Cottrell, of San Jose, for appellants.

John J. Jones, of San Jose, for respondent.

PER CURIAM.

An appeal by the plaintiffs from a judgment entered against defendant for a sum less than plaintiffs' claim.

In 1928 the parties to this action entered into an agreement in writing for the sale and purchase of water to be used for irrigation and domestic purposes. The defendant owns and operates a country club and golf course. The contract recited that "upon the lands of the parties of the first part which adjoin the land of the party of the second part there is a well now equipped with a pumping plant which the parties of the first part believe will produce sufficient water to irrigate the fairways and grounds of such golf course, and also for such domestic and other uses on the lands of the second party as will be required by a golf club; and the party of the second part desires to obtain and have the use of said water supply for the purposes aforesaid." Therein it was provided that, "in consideration of the premises and in consideration also of the mutual covenants and agreements hereinafter set forth," the parties of the first part (hereinafter referred to as the plaintiffs) agreed for a period of ten years to sell and deliver to the party of the second part (hereinafter referred to as the defendant) the water from the well mentioned. The quantity to be delivered was "to the extent and up to the full capacity of the pump with which said well * * * is now equipped or any other pump of equal capacity, * * *" subject to plaintiffs' prior right during certain years to irrigate certain acreage owned by them and another. The water was to be delivered by means of a pipe line, and defendant promised to pay an agreed sum based upon the number of gallons pumped for each hour the pump should be operated and the water therefrom delivered to defendant's premises. The contract also contained the following provision: "The party of the second part agrees that while this contract shall remain in force and effect and while the parties of the first part shall be ready, willing and able to deliver water to the lands of the party of the second part as provided in this contract it will purchase water from no other source, provided, however, that it shall not be precluded hereby from obtaining a supply of water from some other source for household and domestic uses in any clubhouse which may be built upon said lands if it shall find the water from the well of the parties of the first part unsuitable for such domestic or household use."

It is admitted, and the court found, that plaintiffs furnished such water as defendant required according to the terms of the contract from October 20, 1928, to November 1, 1930, and that the latter paid therefor. In September, 1930, the defendant purchased from one Bogner a parcel of land containing one-quarter of an acre, upon which was situated a water well, and also acquired a right of way over other lands of the grantor for a pipe line to its clubhouse. After this purchase, defendant used the water from the Bogner well and practically ceased to take water from the plaintiffs.

Defendant claimed that the Bogner transaction was not a purchase of water, but of land; and that, this well being sufficient to supply its needs, it was no longer bound to purchase water from the plaintiffs. The present action is one to recover damages on the ground that defendant refused to perform the contract.

[1] While it is requisite to the formation of a contract that there must be mutuality, which is in effect a statement that there must be a valid consideration (Williston, Contracts, § 140; Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; Schimmel v. Martin, 190 Cal. 429, 213 P. 33; Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671, 117 P. 934; Shortell v. Evans-Ferguson Corp., 98 Cal. App. 650, 277 P. 519), it is well settled that a promise of one party to buy of no one else is a sufficient consideration for a promise by another to furnish whatever quantity of a commodity the first party may

need or use, even though the latter's business may be such that nothing will be needed during the period fixed (Vickrey v. Maier, 164 Cal. 384, 389, 129 P. 273; Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367; Page on Contracts [2d Ed.] § 580; Williston, Sales [2d Ed.] § 464, p. 1171). Here the defendant agreed to take from plaintiffs all the water it should need for its lands, depending, however, upon seasonal and weather conditions, it being recognized that during certain periods the rainfall would render irrigation unnecessary; but subject to this it agreed that, while the contract remained in force, it would "purchase water from no other source" unless it found the water furnished unsuitable for domestic purposes, in which event it might obtain water from some other source for use in its clubhouse. Defendant made no claim that the water furnished was unsuitable, but that the purchase of the Bogner well was not a purchase of water within the meaning of the contract.

At the trial the evidence established beyond question that the object in making the purchase from Bogner was the acquisition of the water supply which had been developed, and that the land itself—an area, as stated, of approximately one-fourth of an acre—was not otherwise valuable or useful to the defendant.

[2, 3] A contract must receive a reasonable construction, and from an express undertaking the law will imply whatever the parties may be reasonably supposed to have meant and what is essential to render the transaction fair and just (Civ. Code, § 1643; Stein v. Archibald, 151 Cal. 220, 90 P. 536; Stoddart v. Golden, 179 Cal. 663, 178 P. 707, 3 A. L. R. 1060; Kenan v. Yorkville, etc., Co., 109 S. C. 462, 96 S. E. 524, 1 A. L. R. 1387); and its language should be interpreted most strongly against the party who caused the uncertainty to exist, the promisor being presumed to be such party (Civ. Code, § 1654).

[4] It was the view of the trial court that defendant's purchase of the Bogner well and its refusal to receive water from plaintiffs thereafter was not a violation of the contract. While the word "purchase" means to buy, it also means every mode of acquisition except by inheritance. Semi-Tropic, etc., Ass'n v. Johnson, 163 Cal. 639, 643, 126 P. 488; Marsh v. Lott, 8 Cal. App. 384, 97 P. 163; People v. Cockrill, 62 Cal. App. 22, 33, 216 P. 78. Although the language of the contract would not in view of the circumstances justify a construction as broad as this, nevertheless the conclusion that the purchase outright of a developed water supply, the object being the acquisition of water and nothing else, was not a purchase contrary to the letter as well as the spirit of the contract, appears to us to be unreasonable. That the defendant might have developed a water supply on land which it owned at the time the contract was made or upon other land subsequently acquired is not, in view of the facts, material.

[5, 6] By the present action, which was commenced on December 18, 1931, plaintiffs sought to recover damages for defendant's refusal to accept delivery of water in accordance with the contract during the period beginning November 1, 1930, and ending December 3, 1931, and the sum of $113 for water delivered during that period for which, it was alleged, defendant had failed to pay. The theory of plaintiff's claim for damages was that defendant would be liable for the full contract price of all water it should have accepted during the period mentioned. In this plaintiffs are mistaken; they would be entitled to no more than the benefit which performance would have conferred, i. e., their profit. 22 Cal. Jur., Sales, § 129, p. 1072; Thompson v. Hamilton Motor Co., 170 Cal. 737, 151 P. 122, Ann. Cas. 1917A, 677. The burden of showing facts in mitigation of damage would, of course, rest upon the defendant. Vitagraph, Incorporated, v. Liberty Theatres Co., 197 Cal. 694, 242 P 709; Rhodes v. Firestone Tire Co., 51 Cal. App. 569, 197 P. 392. It appears to have been the view of the trial court that, had defendant violated the contract, the plaintiffs would have been entitled to the full contract price without regard to profit, and refused to permit testimony on this question. The question, however, became immaterial in view of the court's conclusion that the refusal to take water was not under the circumstances a violation of the contract. A judgment was entered in plaintiffs' favor for the price of the water delivered, namely, $113, but their claim for damages otherwise was denied. We are of the opinion that the interpretation given the contract was erroneous, and that the plaintiffs should have been permitted to prove in addition their damage, if any.

The judgment is accordingly affirmed as to the above amount, and the cause remanded for the purpose of determining the amount of plaintiffs' damage, if any, by reason of defendant's alleged refusal to receive water from the plaintiffs in accordance with the contract; the appellants to recover costs of this appeal.

COBB v. PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA. *

Civ. 9372.

District Court of Appeal, Second District, Division 2, California.

Jan. 24, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. Insurance ⇐665(3)

In action by insured who became permanently totally disabled due to encephalitis, on policy providing for payment of monthly disability, evidence *held* to show that insured's statement in application as to consultations had with physicians during period under investigation were not false representations.

2. Insurance ⇐666

In insured's action for breach of policy providing for payment of monthly disability benefits, insured *held* entitled only to recover amount of accrued installments.

Appeal from Superior Court, Santa Barbara County; Edward Henderson, Judge.

Suit by Augustus M. Cobb against the Pacific Mutual Life Insurance Company of California, in which the defendant filed cross-complaint. From a judgment for the plaintiff, the defendant appeals.

Reversed, with directions.

Knight, Boland & Riordan, of San Francisco, Heaney, Price & Postel, of Santa Barbara, and Loeb, Walker & Loeb, of Los Angeles, for appellant.

Clifton Hildebrand, of San Francisco, Griffith & Thornburgh, of Santa Barbara, and Erwin P. Werner, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment for damages for breach by defendant of a policy of disability insurance, and from such judgment the latter appeals.

On March 15, 1926, appellant issued a policy of insurance providing $15,000 benefit in case of death or permanent total disability. This policy was canceled by mutual agreement following the issuance August 9, 1929, of two policies, the first a $15,000 death benefit policy and the second (on which this suit was brought) a $250 per month disability benefit policy. Two and a half years after the issuance of the two latter policies respondent became permanently totally disabled due to encephalitis, or "sleeping sickness." Payment of the disability benefits was resisted by appellant, who claimed that respondent had made representations which were both material and false, and were made with intent to deceive appellant, and that, if the truth as to respondent's physical condition had been disclosed at the time, the said policy would not have been issued. This suit was thereupon instituted, and appellant by answer and cross-complaint set up its defense as indicated and asked for cancellation of the contract. On the legal issues the jury returned a general verdict: "We, the jury in the above entitled case, find for the plaintiff and assess his damages in the amount of the present worth of payments of $250 per month for a life expectancy of fifteen years." A special interrogatory was as follows: "Q. What was the probable life expectancy of August M. Cobb on May 19, 1932? A. Fifteen years." Judgment was entered for plaintiff in the sum of $30,830, plus interest and costs.

[1] On the equitable issues the jury returned advisory answers to two interrogatories submitted as follows:

"Q. Did the plaintiff Augustus M. Cobb on the 9th day of August, 1929, answer falsely or conceal any information with intent to deceive the defendant with regard to any question propounded to him by Dr. C. S. Stevens in the application for the noncancellable income policy in this litigation? A. No.

"Q. Within seven years immediately prior to August 9, 1929, had Mr. Cobb had any treatments by or consultations with any physician or practitioner which were not periodic medical examinations? A. No."

Thereupon the court made its findings to the effect that respondent "did not within seven years prior to the date of said application, have any illness or injury other than of a trivial or passing nature," that he did not fail to disclose any material illness or disability, and, while his consultations with physicians was a matter that was material, appellant was placed on notice of the true facts by statement by respondent that he had had a periodic check up of his condition by physicians; further that respondent answered questions asked him at the time of application truly and without intent to deceive, and that appellant was not deceived.

Appellant contends in effect that respondent lulled it into a sense of security by his disclosure that he had visited several physicians during the interval under investigation

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

* For subsequent opinion see 51 P.2d 84.

by reason of an assumption that such visits were merely physical check ups by a cautious man and not occasions for treatment for a sick person. The positive findings of the trial court, based on the advisory verdicts of the jury, are amply supported by the evidence, and this court on appeal is precluded therefore from reaching a conclusion at variance therewith.

At the time the disability policy sued on was issued, respondent had a valid, incontestable policy in effect with premium paid entitling him to $15,000 in a lump sum in case of permanent total disability. At solicitation of an insurance salesman, respondent surrendered for cancellation this policy, thereby relinquishing the right to collect the $15,000 to which he would now be entitled without contest if it had remained in effect. Before the policy in this case was issued, respondent was re-examined by appellant's medical examiner, and no clinical findings were made which would preclude insurance. The nature and extent of previous disorders was covered by written questions, and it is in respondent's answers thereto, which were written by appellant's examiner, that appellant claims deception and fraud. The latter conceded, however, that, although respondent told the examiner he had been to several physicians, it made no effort to obtain from any one of them a report as to respondent's condition, claiming that it relied on his assertion that such visits were merely physical check ups. The evidence indicates that the present disability of respondent had no connection with the alleged disorders which appellant contends were fraudulently concealed.

[2] The verdict appears to have been rendered upon the theory that the refusal of appellant to pay the monthly disability benefit provided by the contract was such an express repudiation of the insurance contract that under the doctrine of anticipatory breach respondent was entitled to judgment for an amount equal to the present value of the monthly payments for the length of time that respondent at the time of trial would be reasonably expected to live. Robinson v. Exempt Fire Co., 103 Cal. 1, 36 P. 955, 24 L. R. A. 715, 42 Am. St. Rep. 93, holds that in a case such as this the person insured is entitled to recover from the insurance carrier only the amount of the accrued installments. Respondent here under the pleadings before us was entitled to only a few installments which had accrued at the time the suit was brought. The case must be remanded for determination by the trial court as to sum total of the accrued installments. When the remittitur herein is received by the trial court, respondent may file a verified supplemental complaint setting up the total amount of such installments as have accrued up to the time of filing thereof. If put in issue, the amount shall be determined by the trial court. If not controverted, judgment shall thereupon be entered for respondent for the amount then accrued, plus 7 per cent. interest from due dates of such installments.

Judgment reversed, with directions to the trial court to proceed in conformity with the above course.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 72

JOHNSON et al. v. GRAY et al.

Civ. 8760.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1935.

1. New trial ⇐143(1)

Juror's affidavit cannot be used to impeach verdict, unless jury resorted to chance (Code Civ. Proc. § 657, subd. 2).

2. Appeal and error ⇐933(4)

Presumption on appeal is that, unless otherwise specified, order granting new trial was not based on insufficiency of evidence (Code Civ. Proc. § 657, subd. 7).

3. Appeal and error ⇐854(6)

Order granting new trial without specifying reasons will be upheld on appeal if sustainable on any statutory ground urged, other than insufficiency of evidence, which must be specified (Code Civ. Proc. § 657, subd. 7).

4. Appeal and error ⇐854(6)

Order granting new trial on juror's affidavit, which declared that jurors misunderstood instructions, could not be upheld on appeal, even if order impliedly stated that verdict was against law, since no errors of law were shown; misunderstanding of instructions being in itself no ground for review.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Actions by Lucille Johnson, by her guardian ad litem, Clifford Johnson, and Clifford Johnson and another, and by Lucille Johnson, by her guardian ad litem, Clifford Johnson, against J. E. Gray and another. From an order granting plaintiffs' motion for a new trial, defendants appeal.

Reversed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Sylas S. Meyer, and C. F. Jorz, both of Los Angeles, for respondent.

ROTH, Justice pro tem.

This is an appeal from an order granting a motion for new trial; the motion having been made on all statutory grounds.

The minute entry of the order appealed from reads: "Plaintiff's motion for a new trial having been heretofore heard and submitted, it is now ordered that the said motion for new trial be granted on affidavit filed of Mrs. H. Ballou, Jury Foreman."

[1] It has long been settled in this state that the affidavit or affidavits of a member or members of a trial jury cannot be used to impeach the verdict of the jury. Saltzman v. Sunset Tel., etc., Co., 125 Cal. 501, 58 P. 169. The only exception to this rule is that provided by statute applicable to a situation where the verdict of the jury has been left for determination to chance. Subdivision 2, § 657, Code Civ. Proc. Nothing in the affidavit referred to indicates or suggests that there was any resort to chance by the jury or any members thereof.

[2] Further, it has been consistently held that, unless the order granting a motion for new trial specifies insufficiency of the evidence as one of the grounds upon which it is based, it will be presumed on appeal that it was not based upon insufficiency of the evidence. Subdivision 7, § 657, Code Civ. Proc.; City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585.

[3, 4] Respondent concedes these rules. No contention is made that the verdict in the instant case was left for determination to some game of chance. Respondent's sole point is that the order means that the retrial was granted on the ground that the verdict is against the law. It is significant, however, that the respondent points out no error of law. The entire argument on this point is predicated on the alleged misunderstanding of the jury as to what the law was, as set forth in the affidavit referred to in the order.

That the jurors did not understand the instructions of the court, or what they might have done had they understood, is of itself no ground for review, and we know of no method of curing a misunderstanding such as described in the juror's affidavit, unless it be that the evidence is insufficient to sustain the verdict. Any other construction would leave a verdict of a jury without a semblance of stability. It is conceivable that a jury misunderstanding the tenor of a set of instructions or of a single instruction would bring in a proper verdict, and the converse is also clearly within the realm of probability. We have been cited to no authority which justifies setting a verdict aside for either reason, and we know of none.

The important question is, Did the trial court, when it granted the order, believe that the verdict was against the law, and did it say so in the order expressly or by implication?

The court unquestionably felt that a new trial should be granted; otherwise the order would not have been made. Conceding for the purposes of this case that the language of the order may be disregarded and treated as surplusage, a situation would be presented in which an order granting a new trial is made, no reasons being specified, which order would be upheld, if it could be sustained upon any statutory ground which had been urged, except that of insufficiency of the evidence which must be specified. Treated in this manner, the order in question may be said to have been based on errors of law. No errors of law, however, are pointed out. There is no contention that the jury was erroneously instructed. On the contrary, it is conceded that the jury was correctly instructed, but misunderstood or misinterpreted the instructions. Appellants in their brief review all the rulings of the trial court, and we are satisfied that such rulings were substantially correct. We assume that respondent is of the same opinion, since none of said rulings are attacked, and no others called to our attention. Conceding, therefore, that the order by implication meant to say that the verdict was against the law, it cannot be sustained, since no errors of law have been shown. If the trial court at the time the order was made was convinced that a new trial should be granted because of the insufficiency of the evidence to sustain the verdict, then the court should have said so in the order. The order, however, does not say so, and, under the law, we cannot presume that it was granted on that ground.

The order is reversed.

We concur: CONREY, P. J.; YORK, J.

3 Cal.App.2d 601

HOUSE v. SCHMELZER et al.

Civ. 1512.

District Court of Appeal, Fourth District, California.

Jan. 15, 1935.

1. Automobiles ⇐245(87)

Where automobile guest had seen driver take several drinks at dance and had started home, dozing at intervals, on the way, whether guest was contributorily negligent in failing to notice driver's intoxicated condition *held* question of fact.

2. Automobiles ⇐224(8)

Guest who had been drinking with driver and who failed to notice driver's intoxicated condition was contributorily negligent precluding recovery for injuries received when automobile ran off road and overturned.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Carol House, by George H. House, her guardian ad litem, against Victor Schmelzer and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for injuries received by the plaintiff through the overturning of an automobile driven by the defendant Victor Schmelzer and owned by the defendant H. G. Schmelzer. The accident happened shortly after 2 o'clock on the morning of February 5, 1933, on the grounds of the Santa Ana Country Club while the plaintiff, a girl 18 years of age, was riding as a guest of the defendant Victor Schmelzer. A young man named Leason was also in the car, and the three were returning from a dance at Balboa when the car left the highway, proceeded for some 150 feet into the grounds of the Country Club, and overturned. The court found that the defendant driver was intoxicated and also found that the plaintiff was guilty of contributory negligence in that the place from which they started was in a business district or well-populated place and that the plaintiff either knew or should have known that the driver of the car was intoxicated. From a judgment in favor of the defendants, the plaintiff has appealed.

The only point raised on this appeal is that the evidence is not sufficient to sustain the finding of contributory negligence on the part of the appellant. This argument is largely based upon the testimony of the appellant and of the third occupant of the car to the effect that they observed nothing "peculiar" or "unusual" about the conduct of the driver of the car at any time prior to the time of the accident.

The appellant testified that between 8 and 9 o'clock on the preceding evening she drank three cocktails in a home in Santa Ana; that in company with a young man and another girl she left Santa Ana about 9 or 9:30 and arrived at Balboa at about 10 o'clock; that they went to a dance there at a place known as the Rendezvous; that later in the evening she was unable to find the young man who took her there; that about 1:15 she met Victor Schmelzer and Leason and asked them to take her home; that shortly after that time the three went to a place in Newport known as the Green Dragon, where each drank Coca-Cola mixed with alcohol; that they then went back to the dance in Balboa; and that when the dance closed about 2 o'clock they started for home. With reference to the ride up to the time of the accident, she testified that she was "kind of half asleep" and that "at intervals I knew we were on the main highway"; that at Costa Mesa, which is some three or four miles from Balboa, they turned off about two blocks from the main part of town and went toward the Country Club; that at a point some three-quarters of a mile before they reached the place where the accident occurred, Leason was sick and left the car and they remained stopped for about 10 minutes; that she knew Leason was sick but did not pay any attention to him; that when they started on she kind of dozed off again; that immediately before the accident "I was rather half asleep and I woke up and trees were just coming towards me"; and that she remembered nothing further.

Leason testified that he and Victor Schmelzer left Anaheim about 10 o'clock that evening after buying a half pint of alcohol; that they arrived at Balboa at about 11 o'clock; that after dancing two or three times, and about 11:30, they went to the Green Dragon, in Newport, where they each drank a Coca-Cola mixed with alcohol; that they met the appellant at the Rendezvous about 1 o'clock; that shortly thereafter the three went to the Green Dragon, where each drank another Co-

ca-Cola mixed with alcohol; that the appellant then asked for more alcohol in her drink, but the witness did not give her any more because "I didn't think she needed it"; that at that time "She was feeling all right. She was perfectly happy"; that Victor was not in his sight all of the time they were at the dance; that they left the dance about 2 o'clock and started for Newport but he could not remember whether they got there or not; that he could remember nothing thereafter until he became conscious eight days after the accident; that he did not feel intoxicated at any time on this evening; and that he saw nothing unusual about Victor.

Victor Schmelzer testified that he and Leason bought some alcohol and left Anaheim about 10 o'clock, arriving at Balboa about 11; that a little later the two went to the Green Dragon and each drank a Coca-Cola mixed with alcohol; that he did not know how much alcohol was placed in the drink; that they went back to the Rendezvous and danced; that about 1 o'clock they went with the appellant to the Green Dragon, where all three had a drink of Coca-Cola mixed with alcohol; that at that time the appellant said: "Make it a little stronger," and that he replied: "No, that is strong enough"; that at that time about half of the alcohol was gone; that they went back to the dance and started home about 2 o'clock; that they went through Newport; and that he was driving along and did not know he had left the road until the car turned upside down. When asked if at any time he felt shaky in his legs he replied: "Well, I felt the liquor that I drank." When asked if he was unsteady he replied: "Well, my vision was clear. I was able to do what I was doing anyway." He then testified as follows:

"Q. Were you intoxicated any time that evening at all? A. Well, I was under the influence of liquor.

"Q. When was that? A. Well, at the time I had it, the two drinks, I felt the first one that I had taken and I felt the second one a little bit more and it made me feel pretty good.

"Q. How did it make you feel? A. Well, it is just the sensation there you are feeling happy or something.

"Q. Did you have any other sensation besides feeling happy? A. Well, I couldn't say. That rounds it up generally. I was feeling happy and as to whether I was unsteady in walking, I never walk steady—I always walk kind of wobbling."

A witness who lived near the scene of the accident testified that his wife awakened him around 2:15 that morning and called his attention to voices; that shortly thereafter Victor Schmelzer came to his house and asked for help; that he was unsteady in his gait; that he leaned against the door and the wall; that as soon as he entered the room a very strong odor of liquor permeated the whole house; that the odor was so strong that the witness opened the door; and that in his opinion the man was intoxicated. He further testified that, after sending for an ambulance, he went to the scene of the accident and that there Victor kept saying, "Oh, speak to me, buddy," and "This cures me," and that he kept this up continually until the ambulance arrived some thirty or forty minutes later.

The doctor who treated Victor at the hospital shortly after the accident testified that he smelled liquor on his breath; that he made an examination of him; that his pulse and respiration were increased from normal; that his pupils were dilated and would not react to a light flashed in his eyes; that his skin was cold and clammy; and that he was in a sort of semicomatose condition. He further testified that from his examination he would say that Victor was intoxicated.

The finding that the driver of the car was intoxicated is fully sustained by the evidence, and the only question is whether his condition was or should have been known to the appellant. While she testified that she did not observe anything peculiar about either of the boys at any time, the question of her negligence, or whether or not she should have known the condition of the driver of the car, does not depend entirely upon what she says she observed, but is governed by what would have been seen and known by a reasonable person. The driver of the car admitted that he was under the influence of liquor. He testified that he drove at a speed of from 40 to 45 miles an hour, and the accident happened within approximately five miles of their starting point. The evidence as to his condition a few minutes after the trip began justifies the inference that his condition when they started must have been apparent to any reasonable person, and his own testimony tends to support the same conclusion. The appellant failed to observe an obvious fact, and we may charitably refrain from drawing any inference as to the probable reason for such failure.

[1, 2] The question before the trial court was one of fact and it may not be said that the finding complained of is without support

under the circumstances shown by the evidence with the reasonable inferences therefrom.

While an innocent person is entitled to protection from intoxicated drivers and to redress for injuries caused by them, one who accepts a ride under circumstances which should be a sufficient warning to any reasonable person that the driver is not in a fit condition to operate his car has no just cause for complaint when the law leaves him where he finds himself. In Jones v. Pacific Gas & Electric Co., 104 Cal. App. 47, 285 P. 709, 714, the court said: "Where one voluntarily participates in midnight festivities leading to the drunken condition of an automobile driver, the law does not permit such an one to shut his eyes to the hazards of riding with the intoxicated driver and in the event of injury following his careless and negligent driving, hold a third party responsible in damages. We think such facts establish contributory negligence barring the right of recovery."

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

4 Cal.App.2d 54

In re BRICKELL'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. KELLENBERG.

Civ. 9628.

District Court of Appeal, First District, Division 1, California.

Jan. 22, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Wills ⇐578(1)

Provision in will that, with exception of one set, all furniture should go to sisters of testatrix *held* to include furniture acquired by testatrix after will was drawn and used by her in the operation of an apartment house.

2. Executors and administrators ⇐296

Decree entered twenty-two months after decedent's death which ordered the distribution pursuant to will of furniture used by the executors in operation of estate's apartment house *held* proper in absence of claim that estate was insolvent and where will directed the sale of all real estate.

3. Wills ⇐728

Decree which ordered payment by executors to legatees, who were willed testatrix' furniture, of $100 per month as rent for twenty-two months, for use of furniture by executors in operating apartment house owned by estate *held* proper where original cost of furniture was about $2,500.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Application by Virginia Kellenberg and another for a partial distribution of Ida M. Brickell's estate. From a decree of partial distribution, the Bank of America National Trust & Savings Association and another appeal.

Affirmed.

Thos. C. Ryan, of San Francisco (James W. Harvey, of San Francisco, of counsel), for appellants.

Walter H. Linforth, William M. Cannon, and Jesse H. Miller, all of San Francisco, for respondents.

TYLER, Presiding Justice.

Appeal by the executors of the will of deceased from a decree of partial distribution of certain furniture belonging to the estate. At the time deceased executed her will, she owned a considerable amount of this character of personal property, some of which was in storage, some in her rooms at the Palace Hotel, and some in an apartment house owned by her. The furnishings in the apartment house present the subject of the present controversy. At the time the will was executed, the deceased owned the Whiteside Apartments, a four-story brick building. The building was leased as a whole, and the lessees owned the furniture in the building. This furniture was mortgaged to the decedent to secure the payment of the rent under the lease. On the 1st of December, 1930, on foreclosure of the chattel mortgage for accrued rental, the deceased became the owner of the furniture, having purchased the same for the sum of $1,350. Between the time she thus acquired the furniture and the time of her death, November 29, 1931, the deceased added about $1,000 to it in the way of replacements and betterments. At the time of her death the furniture cost about $2,500. The will of deceased consists of some sixteen provisions. We will refer only to those necessary for a consideration of the controversy.

Under one provision, deceased bequeathed her dining room suite to one Carolyn Snyder. By another provision she bequeathed all her wearing apparel, furs, and the rest of her furniture to Virginia Kellenberg and Jennie Vandervoort, her two sisters, share and share alike. The fourteenth clause provided that as soon as practicable all corporate stocks, bonds, and real estate should be converted into cash so that distribution might be made in cash.

Virginia Kellenberg and Jennie Vandervoort, the two sisters named in the provision of the will above referred to, petitioned the court for a decree of partial distribution, distributing to them the furniture owned by the decedent at the time of her death, which included that contained in the apartment house as above narrated. The court decreed its distribution to petitioners, together with the sum of $100 per month from the date of the death of decedent as and for reimbursement to petitioners for rental for said furniture received by the executors during the period from the death of decedent up to the date of the decree of distribution. From this decree of partial distribution, this appeal is prosecuted by appellants as executors and as trustees under the last will of deceased. It is their contention: (1) That decedent did not intend to bequeath the furniture in the apartment house to her sisters, but that her intention was to leave only her personal furniture to them; (2) that it was error for the court to decree partial distribution, for the reason it is impossible to rent the apartment house without the furniture, and thereby damage will result to the estate and to those interested therein; and (3) that even if the sisters are entitled to the apartment house furniture, the rental value thereof as fixed by the court is excessive.

[1] In support of their first contention, it is claimed by appellants that as the deceased did not own the apartment house furniture at the time she made her will, it merely being held by her as security for the rental on the real estate, it, together with the rent, should be considered as a covenant running with the land, and should be sold together with the real property and as a part thereof, as directed in the provision of the will requiring her real estate to be converted into cash. There is no force in this argument, for the reason that a year prior to her death deceased acquired full title to the furniture in question and it was subject to whatever disposition she saw fit to make of it, testamentary or otherwise. The rule, as frequently expressed, is that a will generally speaks as of the time of the testator's death. While this rule will not be applied to defeat a testator's intent, where, as here, there is nothing in the will to indicate that the testatrix intended that the will should speak from a different date than from the time of her death, it will be given that effect and will be construed as operating according to the state of things thus existing. The very nature of the testamentary act, which is expected to take effect only at the time of the decease of a testator, presupposes that so far as facts and circumstances are susceptible of anticipation by him, so as to enable him to place himself in the position he will then be, relative to his property and obligations, that he will have used the language of his will, with reference to that period. 1 Redfield on Wills (3d Ed.) § 30; 69 Cor. Jur., p. 126; Estate of Babb, 200 Cal. 252, 252 P. 1039. Here in plain and unambiguous language the testatrix, after making a special bequest of certain furniture, also provided in her will that the rest of her furniture should go to her sisters, respondents herein. Under these circumstances the contention of appellants that the disposition referred to the furniture other than contained in the apartment house cannot be sustained. Such a construction would not only do violence to the intention of the testator, but also to the express and plain language of the will.

[2] Equally without merit is the contention that there is no evidence to sustain the finding of the court that distribution of the furniture in the apartment house can be made without injury to the estate or any person interested therein. No claim is here made that the estate is insolvent. Over twenty-two months had elapsed since the death of decedent at the time the decree was granted. By the express terms of the will the real estate was to be sold. Respondents can hardly be expected to wait indefinitely to enjoy their legacies simply because the estate might possibly profit from the use of the furniture, especially when the value of this character of property is very materially affected by its use.

[3] Nor do we think the court erred in distributing the sum of $2,200 cash as a reasonable rental value for the period of its use. This question presented an issue of fact. The evidence before the court was ample to justify its finding that $100 per month, the sum allowed, was the reasonable rental value of the property.

Respondents raise the point that appellants, as executors and trustees, are not par-

ties aggrieved by the decree, as they are in no manner affected by it and have therefore no right to prosecute this appeal. It appears from the will that the trustees are bequeathed the sum of $70,000 to be held in trust for the nieces and nephews of the deceased. Whether under the circumstances they are aggrieved parties and entitled to appeal as such is a question that is unimportant considering we have decided the appeal on its merits.

The order and decree are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



4 Cal.App.2d 317

THOMAS v. THOMAS.

Civ. 5301.

District Court of Appeal, Third District, California.

Jan. 31, 1935.

Divorce ⇐280

Order adjudging that defendant in divorce action was not in contempt for failure to make monthly payments required in decree and discharging order to show cause *held* conclusive and not appealable (Code Civ. Proc. § 1222).

Appeal from Superior Court, Butte County; Warren Steel, Judge.

Proceeding by Suzette Thomas against Clyde Thomas. From an order discharging an order to show cause why defendant should not be punished for contempt, plaintiff appeals. On motion to dismiss the appeal.

Motion granted and appeal dismissed.

William Ellis Lady, of Los Angeles, for appellant.

Horowitz & McCloskey, of Los Angeles, for respondent.

PER CURIAM.

Upon affidavits, appellant obtained an order to show cause why respondent should not be punished for contempt for failure to make certain monthly payments as required in the decree of divorce theretofore entered between the parties. Upon the hearing the trial court held respondent not in contempt and discharged the order to show cause. From that order plaintiff appealed to this court, whereupon defendant now moves to dismiss the appeal upon the ground that the order appealed from is a final order or judgment from which no appeal lies.

The appeal must be dismissed. It is an attempt to appeal from an order finding respondent not guilty of contempt of court, and section 1222 of the Code of Civil Procedure provides that the judgment and order of the court made in cases of contempt are final and conclusive.

We need but to cite the case of Gale v. Tuolumne Water Co., 169 Cal. 46, 145 P. 532, as an answer to the contention of appellant.

The motion is granted and the appeal is dismissed.



4 Cal.App.2d 61

SUGAYA v. MORTON.

Civ. 9590.

District Court of Appeal, First District, Division 2, California.

Jan. 23, 1935.

Rehearing Denied Feb. 21, 1935.

1. Physicians and surgeons ⇐18(9)

In malpractice action, whether needle discovered in patient's abdomen was negligently left there by surgeon that had removed patient's appendix *held* for jury.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by K. Sugaya against A. W. Morton. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for appellant.

James F. Brennan, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff brought this action seeking to recover damages for alleged malpractice. Upon a trial by jury, plaintiff had judgment for the sum of $4,000, from which judgment defendant appeals.

Appellant's main contention challenges the sufficiency of the evidence to support the judgment. The point raised requires the solution of the question of whether the evidence was sufficient to prove that a needle, which was found in respondent's psoas muscle, entered the abdomen of respondent during an operation performed for the purpose of removing respondent's appendix. There was no direct evidence to prove this fact, and we shall therefore briefly state the indirect evidence on this subject.

Respondent was a patient of Dr. Nakamura. He was suffering from abdominal trouble. Dr. Nakamura suspected appendicitis, and, as said doctor was not engaging in surgery, he took his patient to appellant. Tests indicated that the appendix had exploded, and appellant advised an immediate operation. The operation was performed on April 13, 1932. Although Dr. Nakamura was present and performed certain small services at appellant's request, appellant was the chief surgeon, and conceded that he was "solely responsible for the performance of the incision and sewing up." It was found that the appendix had exploded, and, after the operation, a drain was left in the lower portion of the incision to permit drainage from the infected area. A gauze was then placed over the wound. Respondent was then moved to his room in the hospital, where he remained for 12 or 14 days. Appellant attended him during the critical period following the operation, and thereafter Dr. Nakamura handled the case exclusively, making the necessary changes in the bandages. Respondent ultimately returned to his work, but prior to August 1, 1932, he suffered from a sharp pain in his abdomen. He consulted Dr. Kitagawa. After some days of observation, Dr. Kitagawa took X-rays which showed a needle in the abdomen. Said doctor called in Dr. Jones, a surgical consultant, and on August 17th Dr. Jones operated and removed the needle from the psoas muscle. The needle was a straight needle between 2½ and 3 inches in length. It was the type of needle which might be used either for the purpose of surgical operations or for the purpose of ordinary sewing.

The negligence charged was that appellant "negligently and carelessly left an operating and surgical needle in the wound and opening." While none of the medical witnesses ventured any definite opinion as to how this particular needle had come into respondent's abdomen, it was suggested by one of appellant's witnesses that it might have come there either (1) through swallowing the same or (2) during the operation or (3) during the subsequent treatment by Dr. Nakamura. Respondent testified that he had not swallowed the needle and that he had had no previous operation. Dr. Nakamura testified that he used no needle in the subsequent treatment. On behalf of appellant, the testimony showed that, while such needles were carried on the tray by the nurse during the operation, curved needles and not straight needles were used by appellant in this particular operation. Assuming all of this testimony to be true, then the needle must have come into the abdomen of respondent through inadvertence and without any actual knowledge on the part of any of the persons mentioned.

Appellant contends that the implied finding of the jury rests upon speculation and conjecture, and therefore cannot be sustained. In this connection appellant cites and relies upon Wilbur v. Emergency Hospital Assoc., 27 Cal. App. 751, 151 P. 155, but the facts in that case are not analogous, and the decision in that case is not determinative of the question before us. Here it appeared that, so far as the knowledge of the witnesses was concerned, the only time that needles similar to the one in question were in close proximity to the abdomen of respondent was during the operation. Under the evidence the jury could properly conclude that it was more probable that the needle entered the abdomen through inadvertence during the operation and while the wound was fully open than at any time before or after. We therefore believe that the jury's implied finding was sustained.

It is conceded by appellant that, if the evidence was sufficient to sustain the implied finding that the needle entered respondent's abdomen by reason of some act or omission on the part of appellant during the operation, then the doctrine of res ipsa loquitur was applicable. The court instructed the jury on this doctrine, and appellant takes exception to the wording of certain instructions on this subject and certain other subjects. Appellant further claims error in the admission of certain evidence. We have examined the several contentions of appellant in the light of the evidence appearing in the record and the issues between the parties in the trial court. It appears that during the trial the parties treated the issue of whether the needle entered the abdomen of respondent during the operation as the paramount issue and practically the only issue in the case other than the issue of the amount of damage sustained. This issue was deter-

mined adversely to appellant upon sufficient evidence, and we find no prejudicial error in the instructions given or in the rulings upon evidence.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



4 Cal.App.2d 69

BOURNE v. NORTHERN COUNTIES TITLE INS. CO. et al.

Civ. 9278.

District Court of Appeal, First District, Division 1, California.

Jan. 24, 1934.

Rehearing Denied Feb. 23, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. Automobiles ⇐242(6)

In action against employer and employee for injuries from automobile collision, where it is shown that employee was working for employer, inference obtained that employee at time of collision was acting within scope of his employment.

2. Automobiles ⇐244(26)

Inference that an employee driving an automobile owned by his employer is acting within the scope of his employment cannot stand in face of clear, positive, and convincing testimony to the contrary.

3. Automobiles ⇐244(26)

Evidence *held* insufficient to sustain finding that employee, driving his employer's automobile at time of collision, was acting within the scope of his employment so as to impose liability on employer for injuries.

Evidence disclosed that employee, who was through work at 2 o'clock in the afternoon, drove automobile to his home, that at about 10 o'clock that night, without obtaining his employer's permission and contrary to the express rules of his employment, he used automobile to deliver some Christmas gifts, and that on the way home the collision occurred.

4. Automobiles ⇐245(30)

Where facts are admitted or are susceptible of but one meaning, whether employee's act was within the scope of his employment is question of law.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Robert Bourne against the Northern Counties Title Insurance Company and another. From a judgment in favor of plaintiff, the Northern Counties Title Insurance Company appeals.

Reversed.

Bronson, Bronson & Slaven, of San Francisco, for appellant.

Edmund J. Holl, of San Francisco, for respondent.

JAMES, Justice pro tem.

The sole question presented by this appeal is the sufficiency of the evidence to support the judgment in favor of plaintiff and against the defendant and appellant, Northern Counties Title Insurance Company.

[1, 2] The action is one for damages for personal injuries received by the plaintiff in an automobile collision between an automobile operated by him and one belonging to appellant, which at the time of the accident was being operated by the defendant Bollinger, who admittedly at that time was in appellant's employ. It may be conceded, therefore, that an inference arose from these admitted facts sufficient to establish a prima facie case that appellant's automobile was then being operated by Bollinger under the authority of his employer. McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 73; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Dierks v. Newsom, 49 Cal. App. 789, 194 P. 518; Fahey v. Madden, 56 Cal. App. 593, 206 P. 128. But it appears to be well settled that "in the face of clear, positive, and convincing testimony to the contrary, the inference that an employee driving an automobile owned by his employer is acting within the scope of his employment cannot stand." Market Street Ry. Co. v. George, 116 Cal. App. 572, 3 P.(2d) 41, 43. Other cases holding to the same effect are Rock v. Orlando, 100 Cal. App. 498, 280 P. 377; Maupin v. Solomon, 41 Cal. App. 323, 183 P. 198; Kish v. California State Auto. Ass'n, 190 Cal. 246, 212 P. 27, and Gousse v. Lowe, 41 Cal. App. 715, 183 P. 295. In other words, as said in Ransford v. Ainsworth, 196 Cal. 279, 237 P. 747, 748, such inference is sufficient to support a verdict against the owner "in the absence of substantial proof sufficient to destroy such inference."

[3, 4] Here the accident happened late on Christmas Eve; and the undisputed uncontradicted testimony in the case is that Bol-

linger at that time was not using the car in any sense in furtherance of the business of his employer, nor with his employer's permission. On the contrary, it shows without any contradiction or conflict whatever that, after having finished his work about 2 o'clock on the afternoon of that day, he drove the car to his home; and then about 10 o'clock that night, without obtaining any permission from his employer and contrary to the express rules of his employment, he took the car out to use for his own personal pleasure, namely, to deliver some Christmas gifts, and that on the way home the collision occurred. Manifestly, therefore, in view of these undisputed facts, the verdict of the jury cannot be allowed to stand. Rock v. Orlando, supra; Maupin v. Solomon, supra. As said in Gousse v. Lowe, supra, where the facts are admitted or are susceptible of but one meaning, the question of whether the act was within the scope of the servant's employment becomes one of law. It is when reasonable minds may differ thereon that the question remains one exclusively for the jury. See Kish v. California State Auto. Ass'n, supra, to same effect. True, the question of credibility of the witnesses is one also exclusively for the jury; but in the group of cases relied on by respondent, such as Market Street Ry. Co. v. George, supra, Irwin v. Pickwick Stages System, Inc., 134 Cal. App. 443, 25 P.(2d) 998, and Bushnell v. Yoshika Tashiro, 115 Cal. App. 563, 2 P.(2d) 550, in which the verdicts were sustained, it was pointed out either that the credibility of the witnesses produced by the defendants was such as warranted a rejection of their testimony, or that their testimony might reasonably bear different meanings. Neither of those situations has arisen here. Respondent has not pointed out any facts or circumstances whatever which would furnish the slightest justification for rejecting the clear, convincing, and undisputed testimony given in support of appellant's case; nor is there a shred of evidence to warrant the inference that Bollinger was using the car that night in connection with his employer's business. All of the evidence proves positively to the contrary. Respondent calls attention to certain portions of the cross-examination of Bollinger and appellant's executive under whom Bollinger worked, to the effect that at different times during Bollinger's employment he parked the car at night in two different garages, and that occasionally he took it home with him at night for the purpose of servicing it or to make deliveries of documents after office hours or at distant points. But even so, the evidence establishes without dispute that Bollinger was forbidden to use the car at any time for any purposes of his own; and it is not claimed that on this Christmas Eve he was performing any duty in connection with his employment.

Therefore, inasmuch as the state of the evidence is such that the verdict against appellant cannot be allowed to stand (Rock v. Orlando, supra; Maupin v. Solomon, supra), the judgment against appellant based thereon must be reversed. It is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.



3 Cal.App.2d 743

DEMOCRAT-HERALD PUB. CO. v. PETTIT et al.

Civ. 9066.

District Court of Appeal, First District, Division 1, California.

Jan. 19, 1935.

Rehearing Denied Feb. 18, 1935.

Hearing Denied by Supreme Court March 18, 1935.

1. Appeal and error ⇐1097(1)

Judgment rendered on former appeal *held* law of case on succeeding appeal where facts were the same.

2. Appeal and error ⇐1152

In action in claim and delivery of printing press where defendant prayed for no affirmative relief and evidence showed that press had been retained in defendant's possession, portion of judgment providing for recovery of printing press from plaintiff, or, in lieu thereof, the sum of $2,100 as its value, *held* error and should be stricken out from judgment for defendant.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action in claim and delivery by the Democrat-Herald Publishing Company against Raymond C. Pettit and others. From a judgment for the defendant J. De Menezes, plaintiff appeals.

Affirmed.

Herbert Choynski and Sidney Rhein, both of San Francisco, for appellant.

A. Q. Lomba and G. E. Jackson, both of Oakland, for respondents.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

OGDEN, Justice pro tem.

This is an action in claim and delivery for the recovery of a printing press purchased by respondent J. De Menezes from the defendant Pettit. Pettit, under the name of the Pacific Printing Machinery Company, was, at the time, engaged in the city of San Francisco in the business of buying, repairing, and reselling new and rebuilt printing machinery. Representing to De Menezes that the press in question had been received by him in an exchange, Pettit sold and delivered the press to him at the latter's printing establishment in the city of Oakland where it has ever since been in use. Respondent De Menezes purchased the machinery in good faith in the ordinary course of business and paid the full purchase price of $2,200 therefor. Pettit had, in fact, received the press from appellant, a corporation having its place of business in the state of Oregon, upon a conditional sale agreement, reserving title in the latter until full payment of the purchase price. Upon receipt of the press and before its sale to De Menezes, Pettit disguised the press by removing the serial number therefrom and repainting it. After selling the press to De Menezes, Pettit disappeared, retaining the full purchase price and failing to account to appellant for the amount due under his conditional sale agreement.

This appeal is taken from judgment rendered in favor of respondent De Menezes upon a retrial of the cause after reversal upon appeal of a judgment in favor of appellant. See Democrat-Herald Publishing Company v. Pettit, 94 Cal. App. 724, 271 P. 910. The evidence received in the second trial discloses substantially the same set of facts as in the first trial and which formed the basis of that decision. Although, upon the retrial of the issues, the officer of appellant corporation who negotiated with Pettit for the conditional sale of the press to him did testify through his deposition that he neither knew nor had any information that Pettit was engaged in the buying and selling of printing machinery, the finding of the trial court to the contrary is supported by the evidence. Upon the first trial the same witness testified that he had had prior negotiations with Pettit for the sale to him of a different press, had seen advertisements of the Pacific Machinery Company in a trade journal and admitted that he did have such knowledge of the character of Pettit's business. As part of the negotiations between the witness and Pettit, the latter sent him a telegram reading as follows: "Will you supply bill of sale on Huber Press in return for postdated check payable July first, cannot finance sale to our customer otherwise." That appellant, through its officer, had knowledge, not only of the character of Pettit's business, but also that he intended to resell the printing press, appears from the evidence received in the retrial just as it did upon the first hearing.

[1] It is unnecessary here to review the many authorities cited upon the question of when title passes from a conditional vendee to a purchaser from him in good faith for the law of this case has been determined upon the former appeal. The same set of circumstances being presented upon this appeal as upon the former, the decision thereon is the law of the case and determinative here. Ellis v. Witmer, 148 Cal. 528, 83 P. 800; Hoffman v. Southern Pacific Co., 215 Cal. 454, 11 P.(2d) 387. The decision on the former appeal holds that under the provisions of section 1142 of the Civil Code title to the machinery passed to respondents. This section, since repealed, provided: "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him."

Applying the provisions of this section to the facts presented, the decision states: "The original owner's authority to sell, mentioned in Civil Code, § 1142, may be implied as well as expressed. * * * Respondent [referring to appellant here] knew that Pettit was in the business of selling presses, knew that he intended to offer for sale this press, both from knowing the nature of his business and from the exchange of telegrams. Respondent [appellant] must therefore be held to have authorized a resale by Pettit." Democrat-Herald Pub. Co. v. Pettit, supra.

[2] The judgment as rendered does, however, require modification. Although the press appears still to be in possession of respondent De Menezes who prayed for no affirmative relief, the judgment provides for its recovery from appellant, or, in lieu thereof, the sum of $2,100 as its value. This portion of the judgment is clearly erroneous and is accordingly ordered stricken therefrom.

As thus modified, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

4 Cal.App.2d 140

SECURITIES RESEARCH ASSOCIATES, Inc., v. McPHERSON.

Civ. 9805.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1935.

Appeal and error ⇐553(2), 612(2)

Clerk's transcript is incompetent to authenticate, for purpose of review on appeal, any portion of record other than judgment roll and notice of appeal, and if any matters other than such as appear on face of judgment roll are sought to be reviewed on appeal, record thereof must be presented either by bill of exceptions or by reporter's transcript.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by J. Roy Stewart against Aimee Semple McPherson, in which the court granted a motion to file a supplemental complaint and add as party plaintiff Securities Research Associates, Inc. Judgment for plaintiff Securities Research Associates, Inc., and defendant appeals.

Appeal dismissed.

Willedd Andrews, of Los Angeles, for appellant.

William W. Kaye and Homer Johnstone, both of Los Angeles, for respondent.

PER CURIAM.

Suit for breach of contract was filed against defendant by one J. Roy Stewart. After issue was joined, the court granted motion to file supplemental complaint and add party plaintiff. The minute order shows said motion was granted by consent. A supplemental complaint was filed showing this respondent as sole party plaintiff, and defendant filed her answer thereto. The case was tried and judgment rendered for plaintiff. Defendant appeals on the judgment roll, no bill of exceptions nor reporter's transcript being furnished.

Appellant's contention on appeal concerns the validity of an assignment from the original plaintiff to the parties who in turn assigned to this respondent, and she relies on certain affidavits which are not part of the judgment roll, but which the clerk included in his transcript. "The clerk's transcript is incompetent to authenticate for the purpose of a review upon appeal any portion of the record other than the judgment roll and notice of appeal. * * * If any matters other than such as appear upon the face of the judgment roll are sought to be reviewed upon appeal, the record thereof must be presented either by a bill of exceptions or by a reporter's transcript." Jeffords v. Young, 197 Cal. 224, 227, 239 P. 1054, 1055. It is not suggested that the judgment roll discloses any error entitling appellant to relief, and it would be contrary to law and reason for this court to undertake a determination of the case on the basis of a partial record and a few selected affidavits which appellant has chosen to have incorporated in the clerk's transcript. It should be borne in mind that this appellant consented to the change in plaintiffs of which she now complains—that she was satisfied to take an appeal without furnishing to this court the record of what transpired in the trial court.

A careful reading of appellant's brief and supplement thereto indicates that the appeal, even though it were presented in the manner most favorable to appellant, would not show that any injustice had been done her, or that her appeal was based on any substantial error of the trial court.

Appeal dismissed.

4 Cal.App.2d 142

SECURITIES RESEARCH ASSOCIATES, Inc., v. McPHERSON.

Civ. 9980.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1935.

Appeal and error ⇐790(3)

Whether order setting aside certification of clerk's transcript after filing of such transcript on appeal was ineffectual *held* moot question, where decision on appeal in which transcript was filed was adverse to appellant's contention.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Securities Research Associates, Inc., against Aimee Semple McPherson. From an adverse judgment, defendant appeals.

Appeal dismissed.

Willedd Andrews, of Los Angeles, for appellant.

William W. Kaye and Homer Johnstone, both of Los Angeles, for respondent.

PER CURIAM.

This appeal is taken from order of the trial court made after filing of clerk's transcript in (Cal. App.) 40 P.(2d) 586, this day decided. Attention of said court having been directed to the inclusion in the clerk's transcript of improper matters referred to in the earlier appeal, it undertook to make a further order setting aside its certification to said transcript on the ground that said order had been inadvertently entered.

Assuming, without deciding, that the order setting aside the certificate was ineffectual, as appellant urges, it appears that the question has become moot by reason of our decision of the above-mentioned appeal, in which said transcript was filed, the decision being adverse to appellant's contention notwithstanding this latter order of the trial court.

Appeal dismissed.



4 Cal.App.2d 306

PENFIELD v. BENNETT FILM LABORATORIES et al.

Civ. 9194.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1935.

1. Fraud ⇐11(2)

Statements made by president of film laboratories corporation to investor, to induce him to advance money to complete motion picture serial, that, if balance of picture was as good as portions he had seen, there would be no trouble selling picture, and that it should sell for $75,000, with profit to investor of $25,000, *held* expressions of opinion and not actionable fraud.

2. Trusts ⇐250

In action by investor in moving picture serial for damages for breach of trust, where selling agent had proceeded in usual and reasonable manner to sell picture, that theoretical value of picture was not realized when it was sold *held* not to constitute breach of trust.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by C. U. Penfield against the Bennett Film Laboratories and another. From an order of nonsuit, plaintiff appeals.

Affirmed.

David Welts, of Los Angeles, for appellant.

Loeb, Walker & Loeb and Herman F. Selvin, all of Los Angeles, for respondent Bennett Film Laboratories.

SCOTT, Justice pro tem.

Plaintiff appeals from order of nonsuit in favor of defendant corporation and its president, defendant James.

[1] Suit was brought to recover damages for fraud and for breach of trust. Defendant James had told plaintiff that defendant corporation was making a motion picture serial, and that, if plaintiff would advance money to complete the series, he could thereby earn half the net profits. The picture was completed, and the right to exhibit it was sold through a third party. The proceeds were insufficient to reimburse plaintiff for money advanced, and no profit was realized. Certain statements were made by James to induce plaintiff to advance the money, which amounted to no more than expressions of opinion. For example, plaintiff testified: "Mr. James assured me that the picture—he would sell it to Universal Pictures Corporation when completed. What he had seen of the picture was very good, and if the balance was as good as that there would be no question about him selling it to them." With such qualification in mind, statements that the picture when completed should sell for $75,000 with profit to plaintiff of $25,000 cannot be considered actionable fraud (Coleman v. Dawson, 110 Cal. App. 201, 294 P. 13; Herrill v. Rugg, 114 Cal. App. 492, 300 P. 140; 12 Cal. Jur. 729); uncertainties as to actors, purchasers, and public taste being matters of general knowledge.

[2] To support the second cause of action, for breach of trust, plaintiff sought to show that out of proceeds of sale of the picture he, rather than defendant corporation, was to be the first to be reimbursed. The letter from defendant corporation to plaintiff, and accepted by the latter, setting out the agreement, does not support this contention, and no other competent evidence to this effect was presented at the trial. Further complaint is made that the theoretical value of the picture

was not realized when it was sold; but it appears that the selling agent went ahead in a usual and reasonable manner to sell the picture, and that plaintiff's objection arises rather from the unsatisfactory results than from improper conduct. No failure to account for funds received is charged, except as above stated.

The rulings of the trial court with regard to the introduction of evidence were proper.

The motion for nonsuit was properly granted, and the order is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 191

SHAW v. OWL DRUG CO. et al.

Civ. 8904.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1935.

Hearing Denied by Supreme Court March 28, 1935.

1. Damages ⊂=185(3)

In pedestrian's action for injuries received when struck by sudden rising of sidewalk elevator doors, evidence *held* to show causal connection between accident and collapse of plaintiff's leg eight months thereafter, in that collapse of leg was caused by cancerous condition of bone which was precipitated by contusion of leg received in accident.

2. Damages ⊂=208(2)

In pedestrian's action for injuries received when struck by sudden rising of sidewalk elevator doors, whether collapse of pedestrian's leg eight months after accident was caused by cancerous condition of bone which was precipitated by contusion of leg received in accident or was caused by independent intervening cause *held* for jury.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Cynthia M. Shaw against the Owl Drug Company and another. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

Jesse H. Steinhart, John J. Goldberg, Hartley F. Peart, and Gus L. Baraty, all of San Francisco (Russel Shearer, of San Francisco, of counsel), for appellants.

Ford & Johnson, David A. Fall, and Oliva & Fall, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an action for damages on account of personal injuries plaintiff claims to have sustained through the negligence of defendants. The jury returned a verdict in plaintiff's favor, and defendants appealed from the judgment entered thereon.

The case grows out of a sidewalk accident which happened in San Francisco on December 4, 1930. On that day plaintiff was walking along the easterly side of Stockton street, and just as she was crossing over the doors of a sidewalk elevator operated by the defendant drug company in connection with the basement of a building it was then occupying, the doors of the elevator were suddenly and without warning raised from below by the defendant Gerardo, an employee of said drug company, and thereby plaintiff was thrown violently to the pavement and severely injured. She suffered a severe sprain and tearing of the ligaments of the left ankle and left knee, a sprain of the left hip and groin, and a particularly severe contusion of the left leg above the knee and over the outside of the left femur. The next day the entire leg was badly swollen and discolored from the hip to the ankle. She was confined to her bed, under the care of a nurse, for about six days, and thereafter, although suffering intense and constant pain in the leg, was able to get about with the aid of a cane. Immediately following the accident the employees of the drug company summoned Dr. Chapman to administer whatever medical and surgical treatment was necessary; and he continued to treat her until May, 1931, at which time he went away on a vacation. Dr. Parsons then took charge of the case, and every two or three days, sometimes oftener, plaintiff called at his office to receive treatments, including electro-therapeutic, heat, and diathermy. These treatments continued until August 27, 1931. On that day and while plaintiff was still under the care of Dr. Parsons, her left leg collapsed without any apparent reason, and she fell to the floor. This happened in her apartment while she was walking from one room to another. Dr. Parsons was called at once and plaintiff was sent to the hospital. X-ray pictures were taken and they revealed

an irregular fracture of the femur just above the knee at the particular site of the severe contusions suffered by plaintiff in the sidewalk accident. The pictures also disclosed a pathological condition of the bone, doubtless due to a metastatic carcinoma or secondary cancerous condition. The center of the bone at the exact point where the fracture occurred was rarefied—in a porous condition—and the diseased condition of the bone was unquestionably the immediate cause of the collapse of the leg. This second injury rendered plaintiff helpless. Since it happened she has not been able to walk at all, and can be moved about only on a stretcher; and she has been compelled to undergo a great deal of medical, surgical, and hospital treatment. The jury awarded her $9,000 damages.

Defendants admit responsibility for the damages resulting from the injuries plaintiff sustained in the sidewalk accident; but they claimed at the trial, as here, that there was no evidence showing a causal connection between that accident and the collapse of the plaintiff's leg some eight months afterwards. In this regard it was contended that the diseased condition of the femur was neither precipitated nor aggravated by the injuries received in the sidewalk accident, but was the natural sequence of a cancerous condition of the breast with which plaintiff had been previously afflicted. And in furtherance of such contention defendants moved the court to strike out all evidence relating to the fracture of the femur. The motion was denied; and later the court refused to instruct the jury as requested by defendants to disregard all such evidence. It is now contended on appeal that these rulings of the trial court were erroneous, and that consequently defendants were prejudiced thereby for the reason that the jury was allowed to take into consideration said subsequent injury in fixing the amount of damages.

[1] On the other hand, plaintiff's position is that the trauma to the thigh resulting from the sidewalk accident precipitated the diseased condition of the femur at the site of the fracture, or aggravated a dormant diseased condition in plaintiff to such an extent that it caused the femur to rarefy at the point where the fracture occurred, and that consequently, in either event, the injuries received by plaintiff in the sidewalk accident on December 4, 1930, were the proximate cause of said fracture. The sole question presented for determination by the appeal is, therefore, whether there are any circumstances established by the evidence which reasonably construed may be said to support the implied finding of the jury and the conclusion reached by the trial court in ruling upon the motion for new trial that there was a causal connection between the two injuries. In our opinion there are.

As to plaintiff's previous condition of health, the evidence shows that in 1926 she submitted to an operation for a cancerous growth on the breast; and that in April, 1930, she underwent a second operation for a recurrence of the same ailment, which at that time appeared to be affecting some of plaintiff's ribs. But the evidence also shows that during the eight months elapsing between the second operation and the date of the sidewalk accident plaintiff enjoyed good health. During that period she was actively and successfully engaged in the real estate business, and drove an automobile extensively. Furthermore, X-ray pictures taken of the leg on December 8, 1930, immediately following the sidewalk accident, showed no traces whatever of bone rarefaction; and about two months later other X-ray pictures were taken, and at that time the bones of the leg appeared normal, except there was some evidences of arthritis, which it was explained was common in persons of plaintiff's age; but as stated, on August 27, 1931, following the fracture of the leg, X-ray pictures revealed the abnormal condition of the bone above described; and medical testimony was introduced showing that metastatic carcinoma or secondary cancerous growth, such as was found present here, is usually precipitated by trauma or injury. As stated, up to the time of the sidewalk accident plaintiff was in good health; but never thereafter was her leg free from pain. Immediately following the accident Dr. Chapman bandaged the leg and called on plaintiff every day at her home during the several days she remained in bed, and thereafter, up to the time he went away, she was treated at his office. But just before the second pictures were taken she had a very bad spell and was compelled to go to bed again, and medicine was given to relieve the pain; and notwithstanding the continuous treatments administered by Dr. Parsons after he took charge of the case the pain in her leg kept growing gradually worse and eventually settled just above the knee where the fracture afterwards occurred. At times the pain was excruciating; and on the day the leg collapsed it was intense all through the leg from hip to ankle. Dr. Parsons stated that metastatic carcinoma—that is, the traveling of malignancy from one part of the body to another—may occur where primarily there

is a cancer of an organ such as the breast, but that if it does, it develops usually where there has been trauma; that it takes its seat in some part of the body that has been injured or devitalized. And in this regard he went on to point out that the X-ray pictures taken after the fracture on August 27, 1931, besides showing the rarefaction of the center of the femur, disclosed that the periosteum or covering of the bone itself was inflamed, and that it evidently resulted from the external bruising of the leg. While he gave no definite, absolute opinion that the diseased condition of the femur at the point of fracture was precipitated by the injuries plaintiff received to the leg in the sidewalk accident, his entire testimony was such as to warrant such conclusion. Therefore, when it is considered with all the other circumstances established by the evidence, it is legally sufficient, in our opinion, to support the verdict. Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953; White v. Red Mountain Fruit Co., 186 Cal. 335, 199 P. 318; Averdieck v. Barris, 87 Cal. App. 626, 262 P. 423. As said in Bethlehem Shipbuilding Corp. v. Industrial Accident Comm., 181 Cal. 500, 185 P. 179, 181, 7 A. L. R. 1180: "The reluctance of the courts to determine the question of proximate cause as a matter of law in cases similar to the instant case is illustrated by Baltimore City Passenger Ry. Co. v. Kemp, 61 Md. 619, 48 Am. Rep. 134, wherein it was held that it was properly left to the jury to determine whether or not a supervening cancerous growth was caused by injuries sustained by plaintiff as a result of defendant's negligence. The evidence in this behalf was to the effect that the personal injury might have superinduced and contributed to the production and development of the cancer. The court quoted with approval from Beauchamp v. Saginaw Mining Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30, wherein it was held that it was for the jury to determine whether or not a blow on the head was a proximate cause of death from pneumonia, the evidence being to the effect that the personal injury had so reduced the vitality of the deceased as to render him more susceptible to disease and less able to resist it. [Citing a number of authorities.]"

[2] Several other medical experts ventured opinions that the diseased condition of the femur did not have its origin in the injuries sustained in the sidewalk accident, and that it was the natural sequence of plaintiff's previous ailment. But at best their opinions raised merely a conflict; and as to what should be the true deduction from conflicting testimony is a problem for the jury and not the reviewing courts. Gambrel v. Duensing, 127 Cal. App. 593, 16 P.(2d) 284. In other words, the question of whether the subsequent injury was such or should be regarded as having its origin in an independent, intervening cause was a question of fact for the fact-finding body to decide from all the circumstances; and its conclusion must be sustained whenever there is, as here, any reasonable theory evidenced by the record on which its conclusion can be sustained. Bethlehem Shipbuilding Corp. v. Industrial Accident Comm., supra.

Accordingly the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



4 Cal.App.2d 21

CROOKS v. DOEG et al.

Civ. 9135.

District Court of Appeal, Second District, Division 2, California.

Jan. 21, 1935.

1. Automobiles ⇐146

Motorist cannot assume that road is clear, but at all times must anticipate presence of others.

2. Automobiles ⇐168(1)

Motorist to avoid charge of negligence must keep vehicle under such control as will enable him to avoid collision with another using proper care and caution.

3. Automobiles ⇐160(1), 216, 245(6, 72)

In absence of contrary statute or ordinance, duties of pedestrian and motorist to use ordinary care while on highway are equal and reciprocal, and question whether either failed to exercise such care, founded on evidence from which different inferences may be drawn, is ordinarily one of fact and not of law.

4. Automobiles ⇐217(5)

Pedestrian is not absolutely required to keep constant gaze in direction from which automobiles may be expected after once looking and justifiably concluding that intersection can be crossed in safety.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

5. Negligence ⇐136(9)

Contributory negligence is question of law only when court is impelled to say from facts that reasonable men can draw but one inference and that inference pointing unerringly to negligence of plaintiff contributing to injury.

6. Automobiles ⇐245(6)

Negligence of motorist striking pedestrian crossing highway at dusk *held* for jury where motorist did not see pedestrian until at moment of impact and automobile traveled 102 feet from point of impact before stopping, last 42 feet of its course being evidenced by skid marks.

7. Automobiles ⇐245(72)

Contributory negligence of pedestrian who looked and concluded that she could cross intersection in safety and who did not see defendant's automobile approaching from direction from which traffic could be expected until automobile struck her *held* for jury.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Elena Crooks against Miss Violet Hope Doeg, Mrs. Violet Hope Doeg, and another. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Emmett A. Tompkins, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and Porter & Sutton, all of Los Angeles, for respondents.

WILLIS, Justice pro tem.

This is an appeal from a judgment of nonsuit in an action by a pedestrian for injuries suffered from collision with an automobile at a street intersection. Trial was begun with a jury, and plaintiff's evidence revealed the following facts: At the time of day usually called dusk, plaintiff was walking across a double or two-way highway in Westwood, there being a parked strip along the center. She had passed over one of the highways and the center parking and, having "looked for a clear crossing" of the second half of the highway and seeing no cars or traffic thereon, started across to the opposite side where she expected to board a bus when it arrived. This part of the highway was 30 feet wide. When she reached a point about 12 feet from the opposite curb, she was struck by defendants' automobile, which approached from her right at a speed not definitely shown by proofs. The right front fender and headlight struck plaintiff and she was carried thereon for a distance of about 37 feet before falling to the pavement, and the automobile stopped after traveling 102 feet from the point of impact, the last 42 feet of its course being evidenced by skid marks. Plaintiff did not see the automobile until it struck her, and the defendant driver's admissions made at the time revealed that she did not see plaintiff until at the moment of impact. No witnesses to the collision other than plaintiff testified, and the declarations and admissions of defendant driver comprised all the proofs relating to the driver's conduct and the speed of the automobile, other than such proofs as to speed as may be deduced under natural law from the evidence of distance and skid marks between impact and stopping place of the machine.

[1-5] Under the law neither the pedestrian nor the automobile has a superior right of way, each being entitled to use the highway; and the conduct of both must be regulated and judged with reference to this fundamental rule. Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649. The driver of an automobile has no right to assume that the road is clear, and at all times must anticipate and expect the presence of others; and, in order to avoid the charge of negligence, must keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution. Cuarrado v. Tarver, 127 Cal. App. 434, 15 P.(2d) 898. In the absence of statute or ordinance to the contrary, the duties of the pedestrian and the driver to use ordinary care while on the highway are equal and reciprocal, and the question whether either failed to exercise such care, founded on evidence from which different inferences may be drawn, is ordinarily one of fact and not of law. Filson v. Balkins, 206 Cal. 209, 273 P. 578; Maggart v. Bell, 116 Cal. App. 306, 2 P.(2d) 516; Burgesser v. Bullock's supra. There is no rule of law that absolutely requires the pedestrian to keep a continuous gaze in the direction from which automobiles may be expected, after once looking and justifiably concluding that he can cross an intersection in safety. Filson v. Balkins, supra. Contributory negligence is a question of law only when the court is impelled to say from the facts that reasonable men can draw but one inference and that an inference pointing unerringly to the negligence of the plaintiff contributing to the injury. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125;

Pinello v. Taylor, 128 Cal. App. 508, 17 P.(2d) 1039.

[6, 7] It is clear from the evidence herein that the question whether respondent driver was negligent was a question of fact and not of law; and whether appellant was negligent was a question of fact to be determined from all the facts and circumstances in evidence, and was not a question which the trial court was authorized to decide as a matter of law. Reaugh v. Cudahy Packing Co. supra. The motion for nonsuit was therefore improperly granted.

The judgment is reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 700

PEOPLE v. VALDEZ.

Cr. 2524.

District Court of Appeal, Second District, Division 1, California.

Jan. 18, 1935.

1. Kidnapping ⇐5

Evidence sustained conviction for kidnapping.

Evidence disclosed that defendant, who had been convicted of a felony and while being taken to prison in an automobile in charge of a deputy sheriff and his wife, by the threatened use of a pistol which he had secured, compelled deputy to drive the automobile to another county before deputy and his wife were released.

2. Criminal law ⇐1202(1)

Person convicted of kidnapping, who previously had been imprisoned in another state for robbery and had been convicted of robbery but not imprisoned in California, could not be adjudged an habitual criminal and sentenced to life imprisonment (Pen. Code, §§ 207, 208, 644).

3. Criminal law ⇐991(2)

Judgment which sentenced defendant, not an habitual criminal who had been convicted of kidnapping, to imprisonment for term prescribed by law, and contained recommendation that imprisonment be for life, did not impose a higher or different punishment than the one to 25-year term prescribed by law, since recommendation, not being a legal part of the judgment, would be stricken (Pen. Code, §§ 207, 208, 644).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Joe Valdez was convicted of kidnaping, and he appeals.

Judgment modified and affirmed.

Joe Valdez, in pro. per.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

[1] Appellant was convicted on two counts charging the crime of kidnaping. The evidence shows that the defendant was being transported to the state prison to serve a term after conviction of a felony. The officer in charge was a deputy sheriff, and the deputy's wife was riding in the automobile with her husband and the prisoner. When they had arrived at a point near Richmond, in the county of Contra Costa, the defendant obtained possession of a revolver, by the threatened use of which he compelled the deputy to transport him to the county of Los Angeles, at which place the sheriff and the sheriff's wife were released from the custody and control of the defendant. Having been convicted on two counts of the crime of kidnaping, defendant appeals from the judgment, and from an order denying his motion for a new trial. Appellant appears in propria persona, and presents his case by brief. Several grounds of appeal are stated in the brief, but no argument is presented in support of any of them, other than on his claim that the evidence is not sufficient to support the verdict. After reading the transcript of the evidence, we find that there is no merit in appellant's contention that the evidence is not sufficient to sustain the conviction.

[2, 3] Furthermore, except as hereinafter stated, there is no merit in appellant's other stated grounds of appeal. He asserts that by its judgment the court pronounced a higher and different punishment than that prescribed by law.

The crime charged against defendant was the crime of kidnaping, only within the definition of that crime as it is described in section 207 of the Penal Code. The term of imprisonment therefor is not less than one nor more than twenty-five years. Pen. Code, § 208.

The defendant, prior to this offense of kidnaping, had been convicted of robbery and served a term of imprisonment therefor, in the state of Utah. Also he had been again convicted of robbery in this state, but had not yet served any term of imprisonment under that conviction. Therefore he was not, and could not be, "adjudged an habitual criminal" (Pen. Code, § 644), and was not subject to sentence of imprisonment for life. The judgment in this case properly ordered that he be punished by imprisonment "for the term prescribed by law." But there is in the judgment, following the words last quoted, a further "recommendation" hereinafter quoted. This "recommendation" is not in any legal sense a part of the judgment. In order to avoid any future misunderstanding, it should be stricken out.

The judgment as entered is hereby modified by striking therefrom the following words: "The court recommends that defendant be imprisoned for the rest of his natural life." As thus modified, the judgment is affirmed. The order denying defendant's motion for a new trial is affirmed.

We concur: HOUSER, J.; YORK, J.



4 Cal.App.2d 188

PRICE v. MARYLAND CASUALTY CO.

Civ. 9276.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1935.

1. Appeal and error ⇐1223

Bond designated "cost and stay bond on appeal" and following exact form of such bond will be construed as such, notwithstanding that surety intended to issue only cost bond and cost and stay bond was issued through error on part of one of its employees.

2. Appeal and error ⇐1234(4)

Liability of surety on cost and stay bond on appeal *held* not limited by provision therein designating $100 as double amount of judgment, where bond also recited that amount of judgment was $2,000 and bound surety in double that amount, since in such case insertion of sum of $100 as maximum penal sum must be treated as clerical error.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Basil B. Price, by J. C. Price, his guardian ad litem, against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

John Ralph Wilson and Carl E. Day, both of San Francisco, for appellant.

James M. Hanley, of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff was awarded judgment in the municipal court against one Simo Naranen for the sum of $2,000 and costs; and Naranen took an appeal to the superior court. In perfecting such appeal he filed a bond in the form of and designated as a "cost and stay bond on appeal," on which the defendant herein was the surety. Notice of the filing of said bond was served on plaintiff, and accordingly he was stayed thereby, pending the appeal, from collecting the judgment. Eventually Naranen dismissed his appeal, but, on demand, the surety refused to pay the amount of the judgment; whereupon plaintiff brought this action against the surety to recover on the bond, and was given judgment, from which defendant has appealed.

[1] At the trial and over plaintiff's objection defendant was allowed to introduce testimony as to the circumstances under which Naranen applied for and the defendant issued the bond, the purpose thereof being to show, as a defense, that Naranen applied for a cost bond only and that defendant intended to issue only such a bond; but that through an error on the part of one of its employees a cost and stay bond was issued. And by reason of such testimony defendant contended at the trial and now urges on this appeal that said bond should be construed only as a cost bond. Obviously this cannot be done, because it is well settled that the character of an instrument must be determined by its terms; and here the instrument was not only expressly designated as a "cost and stay bond on appeal," but in terms it followed the exact form of such a bond. In this regard the first paragraph recited the rendition of the judgment from which the appeal was taken, etc.; and the second and third paragraphs read as follows: "Now, therefore, in consideration of the premises, and of such appeal, the Maryland Casualty Company, * * *

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

as Surety, does hereby undertake and promise on the part of the Appellant, that the said Appellant will pay all damages and costs which may be awarded against the defendant on the appeal, or on a dismissal thereof, not exceeding One Hundred Dollars ($100), to which amount it acknowledges itself bound. And, whereas, the appellant is desirous of staying the execution of said judgment so appealed from, the said Maryland Casualty Company does further, in consideration thereof, and of the premises, undertake and promise, and does acknowledge itself bound in the further sum of One Hundred and no/100 Dollars, being double the amount named in said Judgment, including costs, that the appellant will pay the amount of the Judgment appealed from and all costs, if the Appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against said defendant in the action in said Superior Court." Moreover, the judgment debtor reaped the full benefit of a stay bond, because plaintiff was prevented thereby from exercising his right to execute the judgment pending the determination of the appeal. It cannot reasonably be held, therefore, that plaintiff should be made the victim of negligence or mistakes on the part of defendant's employees in issuing such a bond.

[2] Defendant further contends that inasmuch as the bond provided that the surety shall be bound "in the further sum of One Hundred and no/100 Dollars, being double the amount named in said Judgment," its liability thereunder in any event is limited to $100. A similar situation was presented in the case of Austin v. Union Paving, etc., Co., 4 Cal. App. 610, 88 P. 731, but was disposed of adversely to the contention defendant here makes. There the bond was given to stay execution upon a judgment aggregating $1,000, but the maximum penal sum inserted in the bond was $200, followed, as here, by the recital "being double the amount named in the judgment"; and it was held in effect that since it was evident from the terms of the bond and the subject-matter to which it related, as well as from the presumed knowledge of the sureties as to what the law required to stay execution, they intended to bind themselves in the penal sum of double the amount of the judgment; and the bond was so construed. Here the bond recites that the amount of the judgment was $2,000, and binds the surety in double that amount; furthermore, as will be seen, it provides "that the appellant will pay the amount of the Judgment appealed from and all costs, if the Appeal be withdrawn or dismissed * * *." Therefore, in view of these clearly expressed provisions in the bond and under the authority of the case cited, the insertion of the sum of $100 as the maximum penal sum must be treated as a clerical error.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.



3 Cal.App.2d 709

COMMERCIAL DISCOUNT CO. v. WILSON.

Civ. 9158.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1935.

Rehearing Denied Feb. 15, 1935.

Guaranty ⇐77(2)

Under guaranty whereby guarantor, as inducement to guarantee to buy automobile retail contracts and flooring contracts from retailer, agreed to indemnify guarantee against loss under such contracts, provided that as to retail contracts guarantee should first charge losses to a reserve fund, and, upon its exhaustion, should look to guarantor for payment, principal debtor was the retailer and not buyers on retail contracts, and hence complaint to recover on guaranty need not have alleged effort to enforce collection from such buyers or reasons for not doing so (Civ. Code, §§ 2800, 2801).

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Commercial Discount Company against Philip L. Wilson. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Overton, Lyman & Plumb and Chalmers L. McGaughey, all of Los Angeles, for appellant.

Chapman & Chapman, of Los Angeles (by Ward Chapman, of Los Angeles), for respondent.

CRAIL, Justice.

The defendant appeals from a money judgment in favor of plaintiff (respondent) in an

action brought to recover on a written guaranty. E. M. Stanton, for whose benefit the guaranty was given, was engaged in the retail sale of automobiles. The guaranty provides that, as an inducement to the plaintiff to purchase automobile "retail contracts" and "flooring contracts" from said Stanton, the defendant agrees to fully indemnify plaintiff against any and all loss which plaintiff may sustain by reason of such contracts or any of them immediately upon demand and as soon as said loss has been suffered, provided, however, that as to the retail contracts, before plaintiff shall look to defendant to make payment under the guaranty, plaintiff will charge said losses to a certain reserve fund which plaintiff will set up in accordance with his understanding with said Stanton, and that as and when said reserve fund becomes exhausted defendant agrees to pay any and all further losses to plaintiff upon demand. Business was conducted with Stanton as contemplated in the guaranty, but as time went on Stanton defaulted on the contracts. Thereupon the plaintiff took possession of all the stock remaining on Stanton's "floor" and proceeded to close out Stanton's business using reasonable diligence according to the usage of the trade to salvage the losses through recourse against the security and also against the vendees in the retail contracts; and, Stanton being insolvent, the plaintiff then sued the defendant for the amount of his losses, the reserve fund having been exhausted. In the complaint the plaintiff alleged that in the business in which the parties were engaged the terms "flooring contracts" and "retail contracts" had well-defined meanings which were well known to the defendant.

Appellant's first contention is that the defendant's guaranty was a guaranty of collection rather than a guaranty of payment and, since the complaint failed to allege an effort to enforce collection from the contract purchasers on the retail contracts or reasons for not doing so, it failed to state a cause of action. This contention is made in spite of the fact that the complaint did make such allegations as to Stanton against whose losses the guaranty was given. In this connection appellant contends that the purchasers on the retail contracts were the "principal debtors" within the meaning of section 2801 of the Civil Code. We do not think so. Stanton's obligation is the one that appellant guaranteed. If the guaranty is construed as coming within the provisions of section 2800 of the Civil Code, as appellant contends, then it is an undertaking of collectibility from Stanton. Stanton is the debtor whose solvency the guaranty imports, and Stanton is the "principal debtor" within the meaning of section 2801 of the Civil Code. As between plaintiff and appellant Stanton was the principal debtor even on the retail contracts. On each assignment of these contracts Stanton became by express terms primarily liable to plaintiff. The parties in entering into the agreement were contracting with reference to a specialized business, conducted in a particular manner, the peculiarities of which were well known to both. The terms of the guaranty fixed the event which would determine when the losses on the retail contracts might be recovered to be the exhaustion of the "reserve fund." As to the vendees in the retail contracts, a fair construction of the agreement is that the losses of Stanton which were indemnified were to be paid as soon as they became established by following the practice of recoupment customarily followed in the business but only after the reserve fund was exhausted. If paintiff's duty was to first proceed against the principal debtor, then it was his duty to proceed against Stanton [Irving v. Irwin, 133 Cal. App. 374, 24 P.(2d) 215], and to so allege in his complaint. This he did. Even so, if the contention that these allegations were missing from the complaint had been called to the attention of the trial court in a fashion commensurate with the importance which appellant now gives to them the allegations undoubtedly would have been set up by way of amendment; for the evidence shows and the court found that the plaintiff did proceed diligently to salvage the losses through recourse against the security and as against the vendees in the retail contracts. Indeed the appellant makes no claim that plaintiff failed in any duty to salvage the losses. Under the evidence and the facts found there could be no basis for such a claim. This—appellant's first and principal contention—is directed solely at the pleadings. We see nothing therein which would justify a reversal. Courts endeavor to be arbiters of justice; not mere referees of legalistic fencing bouts in which fine points in the rules of pleading are used as foils.

Appellant's points 2, 3, 4, and 5 are based upon the primary contention common to all and essential to all that with regard to the flooring contracts and the retail contracts respectively there was a material variance between the pleadings and proof. However, we find no substantial variance in this re-

gard, certainly not a material one such as would reverse the judgment. The plaintiff may have pleaded the legal effect of the transaction somewhat clumsily, but he also stated the various steps in the transaction exactly as they occurred. The obligations of the parties were not altered by such pleading of the legal effect and the appellant was in nowise misled.

Appellant's three remaining contentions are: (6) That plaintiff, after he had knowledge that Stanton had misappropriated funds, continued to do business with Stanton, thus exonerating the guarantor; (7) that certain commissions paid to a subsidiary were improperly charged as losses; and (8) that certain outside collection charges were also improperly charged as losses. Each of these contentions depends upon the proper determination of questions of fact. The facts were found adversely to appellant by the trial court; its findings are supported by substantial evidence, and such findings therefore cannot be set aside on appeal.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

4 Cal.App.2d 109

IMPERIAL GYPSUM & OIL CORPORATION v. CHAPLIN et al.

Civ. 1340.

District Court of Appeal, Fourth District, California.

Jan. 24, 1935.

1. Appeal and error ⇐1011(1)

Judgment on questions of fact will not be disturbed on appeal, where there is sufficient evidence to raise conflict.

2. Bills and notes ⇐518(1), 520

In action on note transferred to plaintiff by payee, evidence *held* to sustain findings that note was procured by fraudulent representations and that there was total failure of consideration.

Evidence of maker of note showed that officials of payee company assured her that notes were merely to be used to show as assets of corporation on financial statement, and that notes would go into its vaults and be returned to her before maturity. Testimony of other witnesses corroborated such statement, though trial court could have accepted maker's testimony without corroboration.

3. Bills and notes ⇐520

Testimony of maker of note to show it was procured by fraudulent representations and that there was no consideration therefor may be accepted without corroboration, where not inherently improbable.

4. Bills and notes ⇐525

Evidence *held* to support finding that transferee of note was not bona fide purchaser, but took note with knowledge, or means of knowledge, that it was procured by false and fraudulent representations and without consideration.

Evidence showed that president of transferee corporation, who was also vice president of payee corporation, represented transferee in negotiations for sale or pledge of note. It was also shown that such officer telephoned banker to inquire of financial rating of maker of note, but officer testified that he did not hear suggestion that circumstances surrounding giving of note made it advisable to take matter up with maker before investing money on it, though banker testified that such suggestion was made over telephone.

5. Bills and notes ⇐339

Purchaser of negotiable paper before maturity is not charged to make inquiry of makers as to consideration thereof and circumstances leading up to its execution.

6. Bills and notes ⇐343

Mere inadequacy of price on purchase of negotiable paper is not of itself sufficient to raise inference or suspicion that purchaser is buying tainted instrument.

7. Bills and notes ⇐339

Mere knowledge of facts sufficient to put reasonable man on inquiry, without actual knowledge, or mere suspicion of defect or infirmity of title to note, does not preclude indorsee from keeping position of holder in due course, unless circumstances justify conclusion that failure to make inquiry arose from suspicion that such action would disclose defect.

8. Bills and notes ⇐337

Purchaser of negotiable paper must have knowledge of such facts that his action in taking instrument amounts to bad faith before he loses favored position of bona fide purchaser.

9. Bills and notes ⇐339

Purchase of note before maturity for inadequate price, with knowledge upon inquiry

of maker's solvency, but without inquiry as to consideration of note, is circumstance to be considered in determining whether purchase was made in good faith.

10. Bills and notes ⇐113

Maker of note *held* not estopped from claiming invalidity and denying liability thereon as against transferee, where acts relied on transpired after transfer of note to plaintiff, since necessary elements to establish estoppel in pais, such as reliance on defendant's conduct and its inducement of plaintiff's action in taking note, were lacking.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Imperial Gypsum & Oil Corporation against Sarah J. Chaplin and another. Judgment for named defendant, and plaintiff appeals.

Affirmed.

Rush M. Blodget and Victor T. Watkins, both of Los Angeles, for appellant.

Russell & Heid, of Tulare, for respondent.

ALLYN, Justice pro tem.

In February, 1929, the defendant Chaplin executed and delivered to the defendant Abramson-Bode Corporation four promissory notes, totaling $50,000, to be used by it in the formation of a merger or syndicate of this corporation and the Universal Silicate Stucco Corporation of Hollywood, the new concern to be known as the Universal Silicate Stucco & Lime Products Corporation. There is a conflict in the testimony as to whether these notes were merely to be held as assets for the purpose of showing a good financial statement, to be released through ordinary business channels or applied in the purchase of stock of the newly formed corporation. In March of that year the payee transferred one of these notes, the subject of this action, to the Imperial Gypsum & Oil Corporation, the plaintiff herein. This note was defaulted, and in answer to a complaint thereon it was set up in defense that the note was procured by false and fraudulent representations, that there was a lack and failure of consideration thereof, and that the plaintiff was not a bona fide purchaser for value. The trial court found for the defendant Chaplin on all issues.

On this appeal it is submitted that plaintiff is a bona fide purchaser of the note in due course and for value; that the defendant Chaplin is estopped from claiming its invalidity; and that certain material findings of the trial court are unsupported by the evidence. These specifications of error can all be disposed of by the decision as to the sufficiency of the evidence on three points: First, was the note secured by false representation or was there a lack or failure of consideration? Second, was the plaintiff a bona fide purchaser? Third, was defendant Chaplin estopped from denying the invalidity of the note?

[1-3] It is too well established to require citation of authority that the judgment of a trial court on questions of fact will not be disturbed on appeal where there is sufficient evidence to raise a conflict. If, therefore, there is evidence in the record, even though slight, to sustain defendant Chaplin's contentions at the trial, this court cannot set aside the conclusion of the trial judge who heard the evidence and whose duty it was to find the facts.

The testimony of Mrs. Chaplin is quite definite and certain that the officials of the Abramson-Bode Corporation definitely assured her that these notes were merely to be used to show as assets of the corporation on its financial statement; that they would go into its vaults and be returned to her before maturity. She was promised great profit and reward for lending her credit to the corporation, and was to have the option to purchase its stock at an advantageous price when the Universal Silicate Stucco & Lime Products Corporation came into being. The testimony of Messrs. Abramson and Bode lends corroboration to her statement of this transaction, although the trial court could accept her testimony without corroboration. It is not in any sense inherently improbable. There is further evidence that this Universal enterprise never secured recognition of its universality from the commissioner of corporations of the state of California, and that no permit to sell stock or interests in the proposed merger or for the proposed syndicating of the two companies was ever granted. Hence no stock could legally be issued. There is ample evidence in the record to sustain the finding that the note was procured by fraudulent representations, that there was no consideration therefor, and that there was a total failure of consideration.

[4] This finding, however, is of no value to defendant, unless the further finding that the plaintiff was not a bona fide purchaser of said note, but took the same with full knowledge or means of knowledge that the

same was procured by false and fraudulent representations, that there was no consideration given therefor, and that there was total failure of consideration, can be sustained.

The evidence to support this finding may briefly be summarized as follows: Mr. Coons, the president of the plaintiff Imperial Gypsum & Oil Corporation, and also vice president of the Abramson-Bode Corporation, although he denied knowledge of this latter connection, represented the plaintiff corporation in all negotiations for the sale or pledge of the Chaplin note. Mr. Hotchkiss, secretary of plaintiff corporation, was also a director of the Abramson-Bode Corporation. Coons further had knowledge of the pending formation of the Universal Silicate Stucco & Lime Products Corporation by the merger of the Abramson-Bode Corporation and the Universal Company of Hollywood. There is testimony that Coons was told that the Chaplin note was given for the purchase of stock in the new corporation. He admitted that he telephoned a banker at Tulare to inquire of Mrs. Chaplin's financial rating, but that he did not hear the latter's suggestion that the circumstances surrounding the giving of this note made it advisable to take the matter up with Mrs. Chaplin before investing money on it. Mr. Dunlap, the banker, testified that this suggestion was made over the telephone. The $12,500 note was, following this investigation, discounted $2,500 and accrued interest.

[5-8] The purchaser of negotiable paper before maturity is not charged to make inquiry of the makers as to the consideration thereof and the circumstances leading up to its execution, and mere inadequacy of price is not of itself sufficient to raise an inference or suspicion that the purchaser is buying a tainted instrument. Witty v. Clinch, 207 Cal. 779, 279 P. 797. Neither is mere knowledge of facts sufficient to put a reasonable man on inquiry without actual knowledge, nor does mere suspicion of a defect or infirmity of title preclude the indorsee of such paper from keeping the position of a holder in due course unless the circumstances are such as to justify the conclusion that the failure to make inquiry arose from the suspicion that such action would disclose a vice or defect in the instrument. Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113. In other words, the purchaser must have knowledge of such facts that his action in taking the instrument amounts to bad faith before he loses the favored position of a bona fide purchaser. Goodale v. Thorn, 199 Cal. 307, 249 P. 11. The circumstances or suspicions must be so cogent or obvious that to remain passive amounts to bad faith. Popp v. Exchange Bank, supra.

[9] The purchase of a note before maturity for an inadequate price with knowledge upon inquiry of the maker's solvency, but without inquiry as to the consideration of the note, is a circumstance to be considered in determining whether the purchase was made in good faith. Flippen v. Abbey, 135 Cal. App. 666, 27 P.(2d) 792; Witty v. Clinch, supra.

A study of the entire transcript forces the conclusion that the evidence in this case sustains the conclusion of the trial court that the plaintiff corporation had more than a mere suspicion of the taint in this note, and that the facts and circumstances within the knowledge of its officers justified the conclusion that it was at least suspected that a further inquiry would disclose the true facts concerning the execution of this note.

[10] Appellant cites no authority in support of its argument that the defendant Chaplin is estopped from claiming the invalidity of the note and from denying liability thereon. It is admitted that she was notified of the transfer to the plaintiff, and responded merely that she would take the matter up with Abramson and Bode, and that she subsequently made one payment of interest to plaintiff. If these things had transpired prior to the transfer, this argument would be almost conclusive, but plaintiff had already parted with its money and had received the note. The necessary elements to establish an estoppel in pais, that is, reliance on the defendant's conduct and its inducement of plaintiff's action in taking the note, are entirely lacking, and therefore there can be no estoppel in this case. 10 Cal. Jur. pp. 626, 627.

The remaining specifications of error are either disposed of by the foregoing conclusions as to the main issues of the case or go to findings immaterial to the essential issues or go to findings based upon conflicting evidence upon which the determination of the trial court is conclusive.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

4 Cal.App.2d 250

Ex parte ROZIER.

Cr. 2682.

District Court of Appeal, Second District, Division 1, California.

Jan. 30, 1935.

1. Habeas corpus ⇐55

Failure of habeas corpus petition attacking validity of sentence for burglary to set forth copy of judgment or commitment was not material omission invalidating petition.

2. Criminal law ⇐995(7)

Prisoner sentenced for one year in county jail on each of two counts of burglary information *held* not entitled to release at end of one year because of Penal Code provision prohibiting commitment to county jail in excess of one year, since two counts charging two offenses, though contained in one information, constituted basis for two legal consecutive sentences (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2; § 461, as amended by St. 1933, p. 2216).

3. Criminal law ⇐995(7)

Where accused was sentenced to one year in county jail on each of two counts of burglary information, court had jurisdiction to direct whether terms of imprisonment should run consecutively or concurrently without violating Penal Code prohibiting commitment to county jail in excess of one year (Pen. Code, § 669; § 19a, as added by St. 1933, p. 2217, § 2; § 461, as amended by St. 1933, p. 2216).

Application of Hilbert Rozier for a writ of habeas corpus.

Petition denied.

Anna Zacsek, of Los Angeles, for petitioner.

PER CURIAM.

[1-3] Petitioner was convicted of burglary in the second degree, as charged in two counts of an information. On January 22, 1934, on each count he was sentenced to imprisonment for one year in the county jail, in accordance with section 461 of the Penal Code as amended in 1933 (St. 1933, p. 2216), wherein it is provided that burglary in the second degree is punishable "by imprisonment in the county jail not exceeding one year or in the State prison for not less than one year or more than fifteen years." It was ordered that the sentences run consecutively. In section 19a, which was added to the Penal Code in 1933 (St. 1933, p. 2217, § 2), it is provided that: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year. * * *" Basing his contention upon said provision of said section 19a, petitioner argues that because he has served a term of imprisonment in the county jail for the full period of one year, he is now entitled to be released. The petition does not set forth any copy of the judgment or judgments, or of the commitment or commitments, but we will not regard this as a material omission. In any event, he was in legal effect sentenced to serve for each separate offense a term of one year in the county jail. The two counts charging the two offenses, even though contained in one information, furnished a legal foundation for two legal consecutive sentences, notwithstanding anything contained in section 19a of the Penal Code. For the purposes and within the meaning of that section there were two cases. It was within the power and it was the duty of the court to direct whether the terms of imprisonment should run consecutively or concurrently. Pen. Code, § 669.

The petition for writ of habeas corpus is denied.



4 Cal.App.2d 276

AUFDEMKAMP v. PIERCE et ux.

PIERCE et ux. v. AUFDEMKAMP et ux.

Civ. 5263, 5264.

District Court of Appeal, Third District, California.

Jan. 30, 1935.

1. Judgment ⇐202

Generally, where actions have been consolidated for trial, only one set of findings and a single judgment are necessary, but court may grant a nonsuit or dismiss one of the actions on motion therefor because of an absolute failure of proof and make findings and enter judgment in the other action (Code Civ. Proc. § 581).

2. Trial ⇐388(3)

Findings of fact and conclusions of law are improper in case of a nonsuit, which is, in effect, a dismissal of the action (Code Civ. Proc. § 581).

3. Trial ⇐388(3)

Where actions had been consolidated for trial and at conclusion of the evidence in one of them nonsuit was properly granted for lack of evidence to sustain plaintiffs' complaint, adoption of only one set of findings which pertained to the other action *held* proper (Code Civ. Proc. § 581).

4. Trial ⇐384

In actions to set aside deeds for fraud on creditors, motion for nonsuit on ground that there was no evidence that grantee giving valuable consideration for property knew of grantor's alleged intent to defraud sufficiently specified grounds of motion (Code Civ. Proc. § 581).

5. Fraudulent conveyances ⇐94

In action to set aside deeds as fraud on creditors, consummation of marriage pursuant to antenuptial agreement to convey property involved to intended wife and conveyance of property to wife who received it without any knowledge of grantor's alleged intent to defraud creditors entitled wife to decree.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Separate actions by Bessie Smith Aufdemkamp against Ed Pierce and Lyda Pierce, his wife, and by Ed Pierce and Lyda Pierce, his wife, against Henry Aufdemkamp and Bessie Smith Aufdemkamp, which were consolidated for trial. From judgments for Bessie Smith Aufdemkamp and for Henry Aufdemkamp and Bessie Smith Aufdemkamp, Ed Pierce and Lyda Pierce, his wife, appeal.

Judgments affirmed.

James E. Martin, of Los Angeles, and Earl J. Opsahl, of Hollywood, for appellants.

Benjamin Lewis, of Los Angeles, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

The above-entitled cases were consolidated for the purpose of trial. The first-mentioned one is a suit to quiet title to certain Los Angeles lots. The other one is an action to set aside deeds to the same lots alleged to have been executed by the defendant Henry Aufdemkamp to his codefendant Bessie Smith Aufdemkamp to defraud creditors. These deeds were made in fulfillment of an antenuptial contract between the parties thereto. The marriage was subsequently consummated. In the first case findings were adopted, and a judgment was rendered quieting title to the lots in the plaintiff Bessie Smith Aufdemkamp. In the last-mentioned case a judgment of nonsuit was entered in favor of the defendants. From these judgments separate notices of appeal were served and filed.

The record, consisting chiefly of documentary evidence, shows that in 1925 Henry Aufdemkamp was married to Mary Aufdemkamp, who was the sole owner of all the real property which is involved in these cases, consisting of several Los Angeles lots, together with secured notes aggregating the sum of $10,700. October 17, 1925, for value received, M. J. and Sadie M. Gordon, who are strangers to these actions, executed and delivered to Henry Aufdemkamp their promissory note for the sum of $2,400, which was subsequently sold and transferred to the appellants, Ed and Lyda Pierce, about one year thereafter. This note was not paid at the time of its maturity, and suit thereon was subsequently commenced against both the makers thereof and Henry Aufdemkamp, the payee. Mr. Aufdemkamp's bank account of $1,400 was attached. Pending the litigation in the last-mentioned suit, a written agreement to settle the case was executed by the terms of which the attachment was released, and Mr. Aufdemkamp consented that a judgment should be rendered against him in the sum of $1,400, which he agreed to pay in installments of $25 per month. The attachment was released, and a judgment for $1,400 was accordingly rendered against him on October 30, 1931. The sum of $125 only was paid on the judgment. Mr. Aufdemkamp then defaulted in the payment of further installments thereon. An alias execution was then issued in the last-mentioned suit March 23, 1932, which was returned unsatisfied.

During the time of the transactions above related, Henry Aufdemkamp filed a petition in bankruptcy, including in his schedule of liabilities and assets the Gordon note of $2,400. December 2, 1929, he was discharged in bankruptcy. April 3, 1930, his first wife, Mary, died testate, leaving to him, as her sole heir and legatee, all of her property, including the real estate which is involved in these suits. Upon application therefor, Henry Aufdemkamp was appointed and qualified as executor of the last will of his deceased wife. July 10, 1930, Henry Aufdemkamp and Bessie Smith entered into a written antenuptial contract, by the terms of which he agreed to assign to her his entire interest in the estate of his deceased wife, Mary, and to convey to Bessie Smith all of

the real property which is involved in these cases, in consideration of their subsequent marriage. Pursuant to that written agreement the respondents were married July 18, 1930. Since their marriage they have resided as husband and wife in the dwelling house which is one of the properties in controversy herein. In compliance with the antenuptial agreement referred to, Henry Aufdemkamp assigned and conveyed all of his interest in the estate of his former wife, Mary, to his second wife, Bessie. Upon presentation of these conveyances to the probate court, the entire estate of Mary Aufdemkamp, deceased, was distributed to Bessie Aufdemkamp, September 17, 1931. She thereafter remained the owner and in the exclusive possession and management thereof.

September 30, 1932, the appellants commenced the suit against Henry and Bessie Aufdemkamp to set aside the conveyances to Bessie on the ground that the deeds were made for the purpose of defrauding creditors, among whom Ed and Lyda Pierce were the holders of the $1,400 judgment heretofore mentioned. Thereupon Bessie Smith Aufdemkamp commenced her action to quiet title to these same lots which are involved in the last-mentioned suit. These actions were consolidated for the purpose of trial, and they were heard together. Documentary evidence supporting the facts above related was received in evidence. Henry Aufdemkamp was sworn and examined under the provisions of section 2055 of the Code of Civil Procedure. He conceded the facts heretofore related, denied that the property was conveyed to his present wife to defraud creditors, and asserted that, at the time he assigned his interest in the estate of his former wife, he then owned in his own name $1,400 cash, which was deposited in a Los Angeles bank, together with three promissory notes for the aggregate sum of $7,200, which were secured by second deeds of trust. Assuming, without so deciding, for there is no evidence to support such a conclusion, that Henry Aufdemkamp conveyed the property which may have originally been his, to his first wife, Mary, before he was adjudged a bankrupt, and that he did subsequently transfer that same property to his second wife pursuant to his antenuptial agreement with her, for the purpose of defeating the $1,400 judgment, still there is no evidence in the record indicating that Bessie Smith was a party thereto, or that she had any knowledge of such fraudulent purpose. In the suit to quiet title, the only defense which was alleged or sought to be proved by the appellants is the asserted conveyance of the property to defraud creditors. The merits of both cases rest upon the same facts.

At the close of the appellants' evidence in the suit to quiet title, Bessie Smith Aufdemkamp rested her cause. The court thereupon adopted findings in her favor holding that she is the owner and entitled to the possession of all of the real property involved in these suits, that the conveyances of title to the properties from Henry Aufdemkamp to Bessie Smith, as an antenuptial property settlement in contemplation of marriage, were not made to defraud creditors, and that Ed and Lyda Pierce have no right, title or interest therein. A judgment was accordingly rendered in favor of Bessie Smith Aufdemkamp quieting title to the lots in question in her.

At the close of plaintiffs' evidence in the suit to set aside the deeds of conveyance on the ground that they were made to defraud creditors, the respondents moved for a nonsuit on the ground that there is no evidence of fraud in the execution of the deeds from Henry Aufdemkamp to Bessie Smith, and particularly because the record is devoid of evidence that she had any knowledge of an intention on the part of her intended husband to defraud creditors. The motion for a nonsuit was granted, and a judgment to that effect was accordingly rendered. From these judgments separate notices of appeal were served and filed.

The appellants contend that the judgment of nonsuit in the case based on the alleged transfer of property to defraud creditors was erroneously rendered, for the reason that there is substantial evidence to support the plaintiffs' cause of action, that the judgment which was rendered in the suit to quiet title is not supported by the evidence, for the same reason assigned with respect to the other case, and that the court erroneously adopted but one set of findings with relation to the suit to quiet title.

[1-3] It is true that suits which have been properly consolidated for trial are ordinarily deemed to be but a single action in which it is necessary to file only one set of findings and a single judgment. 1 Cal. Jur. p. 375, § 52; Stanton v. Superior Court, 202 Cal. 478, 484, 261 P. 1001; Willamette Steam Mills L. & M. Co. v. College Co., 94 Cal. 229, 29 P. 629. The consolidation of cases for the trial thereof, however, does not deprive the court of its authority to grant a nonsuit, or dismiss one of the causes on motion therefor because of an absolute failure of proof. In the present

instance, after the plaintiffs had rested their case in the action based on an alleged transfer of real property to defraud creditors, a nonsuit was properly granted for lack of evidence to support the issues presented by the pleadings. A judgment dismissing that cause was accordingly rendered. That left but one cause of action in the consolidated cases in which the court was required to adopt findings. It is a well-established rule of law that findings of fact and conclusions of law are not necessary or proper when a nonsuit has been granted. 9 Cal. Jur. p. 565, § 40; 24 Cal. Jur. p. 934, § 182; In re Estate of Baird, 198 Cal. 490, 506, 246 P. 324. The granting of a nonsuit under the provisions of section 581 of the Code of Civil Procedure is, in effect, a dismissal of the action. Lewis v. Hammond Lumber Co., 114 Cal. App. 390, 300 P. 49.

[4] The motion for a nonsuit sufficiently specified the grounds upon which the defendants relied. At the close of plaintiff's case in the suit to set aside the deeds on the alleged ground that they were executed with the intention of defrauding creditors, the attorney for the defendants said: "I wish to urge a motion for a nonsuit * * * on the ground that the defendants Pierce in the suit to set aside an alleged fraudulent conveyance, have not proven any case whatsoever. * * * They (the plaintiffs) must prove * * * that there was an intent to defraud by or with the knowledge of that person from whom they are seeking to take the property away. Now in other words, in this case, they would have to show affirmatively that Mrs. Bessie Smith Aufdemkamp had knowledge, guilty knowledge, that Mr. Aufdemkamp had tried and was trying to defraud his creditors." The fatal defect in the proof which was offered by the plaintiffs in that case is that there is absolutely no evidence in the record to indicate that Bessie Smith had any knowledge that her intended husband proposed to defraud his creditors by transferring to her the land in question. Proof of that knowledge on her part was absolutely necessary to establish a case of fraudulent conveyance against her. That proof was not furnished, and the defendants pointed that fact out to the court in assigning the grounds for their motion for a nonsuit.

[5] The evidence in that case shows without conflict that Henry Aufdemkamp and Bessie Smith entered into a valid written antenuptial contract to marry, conditioned upon his deeding to her the real property in controversy. Their marriage was actually consummated, and, pursuant to the antenuptial contract, the property was subsequently conveyed to her. The agreement to marry furnishes a sufficient valuable consideration for the transfer of the property. 27 Cal. Jur. p. 540, § 236; 12 Cal. Jur. p. 1021, § 62; Cohen v. Knox, 90 Cal. 266, 27 P. 215, 13 L. R. A. 711; La Liberty v. La Liberty, 127 Cal. App. 669, 16 P.(2d) 681; Prewit v. Wilson, 103 U. S. 22, 26 L. Ed. 360. In the case last cited the late Mr. Justice Field says in that regard: "An antenuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud."

In the present case there is no evidence that Bessie Smith had any knowledge of a fraudulent design on the part of her intended husband to convey the real property to her to defraud creditors. The antenuptial agreement appears to have been executed in good faith, and their marriage was thereafter actually consummated. So far as the record is concerned, they are still living happily as husband and wife. Moreover, the evidence is undisputed that the challenged conveyance of property to his intended wife did not render Mr. Aufdemkamp insolvent, or prevent him from meeting his obligations to his creditors. He testified that he still had $1,400 cash in the bank and also several secured notes aggregating the sum of $7,200. It does not appear that he owed any debts, with the exception of the unpaid portion of the appellants' $1,400 judgment. We are of the opinion that the court properly granted the motion for a nonsuit, chiefly for the reason that the evidence fails to show that the grantee had any knowledge of an intent on the part of her husband to defraud creditors.

In the suit to quiet title, it is true that the plaintiff Bessie Smith Aufdemkamp was required to assume the burden of proving her title to the lots in question, and that she must rely on the strength of her own title rather than on the weakness of the appellants' claim. 22 Cal. Jur. p. 167, § 42; 51 C. J. p. 247, § 223. The appellants relied on the same evidence adduced in the so-called fraudulent conveyance cause to defeat her action to quiet title. The evidence affirmatively shows that she held valid deeds of conveyance and a decree of distribution in the estate of the former deceased wife of her husband, which conveyances were made pursuant to a written antenuptial agreement to deed her the property in consideration of their marriage which was subsequently consummated. There was

no evidence to the contrary. She rested her case on that showing. The court adopted findings in the suit to quiet title to the effect that Bessie Smith Aufdemkamp was the owner by virtue of the provisions of valid deeds of conveyance therefor, and in possession of the lots in dispute, that the lots were not conveyed to her with an intent to defraud the appellants, and that neither Ed Pierce nor his wife, Lyda Pierce, had any right, title, or interest in the property. These findings are amply supported by the evidence. Judgment was rendered accordingly.

The judgments are affirmed; respondents Henry Aufdemkamp and Bessie Smith Aufdemkamp to recover costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 687

HORTON et al. v. STOLL.

Civ. 9294.

District Court of Appeal, First District, Division 1, California.

Jan. 18, 1935.

Hearing Denied by Supreme Court March 18, 1935.

1. Negligence ⇐136(8)

Where facts are clear and no other inference than that of negligence or contributory negligence can be drawn, court is authorized to withdraw question from jury.

2. Automobiles ⇐217(5)

Pedestrian crossing city street has duty to look carefully in direction from which approach of vehicles may be anticipated, before venturing into pathway of traffic.

3. Automobiles ⇐217(3)

Pedestrian crossing street in middle of block should yield right of way to vehicle approaching from right (St. 1931, p. 2127, § 131½ (c).

4. Automobiles ⇐217(5)

Pedestrian who, while crossing street in middle of block, merely glanced to see if automobiles were approaching from right, was contributorily negligent, precluding recovery for injuries received when struck by motorist (St. 1931, p. 2127, § 131½ (c).

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Maxine Libby Horton and others against Charles W. Stoll. From a judgment of nonsuit and an order denying motion for new trial, named plaintiff appeals.

Affirmed.

Henderson, Henderson & Carey, of San Francisco, for appellant.

Donahue, Hynes & Hamlin, of Oakland, for respondent.

TYLER, Presiding Justice.

Action for damages for personal injuries. The injuries sustained by plaintiff Maxine Libby Horton, a pedestrian, were alleged to have been caused by the negligence of defendant automobile driver. The case went to trial before the court sitting with a jury. At the close of plaintiff's case, defendant moved for a nonsuit on the grounds: (1) That plaintiff had failed to show defendant was negligent; and (2) that plaintiff was guilty of contributory negligence as a matter of law. The court found in accord with defendant's contention, withdrew the case from the jury, and granted a judgment of nonsuit. Motion for a new trial was made and denied. This is an appeal from the judgment and order. Before the transcript could be prepared, the court reporter who reported the trial died without having transcribed his notes in full. The only testimony transcribed was the testimony of three witnesses. In lieu of the full transcript of the testimony, the parties entered into a stipulation as to what constitutes the record. The facts are therefore undisputed.

It appears from the record that on the day of the accident plaintiff, who was twenty years of age and a student of Continuation High School in Berkeley, stood with three other young ladies in front of that institution. The school is located on the east side of Grove street, between Allston way and Kittredge street. Grove street runs north and south. Allston way runs east and west, and is north of the school building. On the afternoon of the day of the accident, at about 5 o'clock p. m., the young ladies came out of the high school and walked across Grove street to a store on the west side of the street. After purchasing some candy, they returned to the east side of this street in front of the school building. They then decided that some of them should return to the store and purchase more candy. Accordingly, plaintiff and a Miss Moen proceeded

to cross Grove street again from east to west in the direction of the candy store. There was no crosswalk or pedestrian way at the point where plaintiff and her friend were walking across the street. The other two young ladies, a Miss Dale and Miss Rutland, remained on the sidewalk. Only two eyewitnesses to the accident, beside plaintiff, testified at the trial. They were Miss Moen and Miss Dale. Miss Moen testified that, as she and plaintiff started across the street, several automobiles were approaching them from the south, and that they stopped behind a parked car and awaited an opportunity to go out into the street. They then proceeded to the middle of the street at a moderate pace, and passed the center thereof, and when at the first rail of the farther car track located on the street they hesitated. Miss Moen was on plaintiff's right and slightly behind her about an arm's length away. Plaintiff looked or glanced to the north, but failed to remember what, if anything, she saw; she was of the impression, however, that she had plenty of time to cross the street. After taking a step or so, and while still on the car track, she was struck by the left front corner of defendant's car, and was carried on the bumper for a distance of approximately fifty feet, when she fell off and was run over by the car. She further testified that when she became conscious she was about ninety feet from the place of the impact. Miss Moen testified that she "sort of glanced," and, while she testified she saw nothing, her further testimony would indicate otherwise, for she testified that she was hesitating for the machine which struck plaintiff to pass in front of her. Miss Dale was not an actual witness to the impact, as her back was turned to plaintiff. Her testimony as to where the car stopped was substantially the same as that of Miss Moen. Although Miss Moen saw the car before it struck plaintiff, she did not testify as to the speed at which it was traveling, and in fact there was no direct evidence upon the subject, nor was there any evidence as to when the brakes were applied, which might indicate the speed.

[1-4] Under these facts, it is appellant's contention that the court erred in granting defendant's motion for a nonsuit for the reasons: (1) That there is evidence from which the jury would have been justified in finding defendant negligent; and (2) that the evidence does not support the court's finding that plaintiff was guilty of contributory negligence as a matter of law. It is well established that, where the facts are clear and undisputed, and where no other inference than that of negligence or contributory negligence can be drawn from such facts, a court is authorized to withdraw the question from the consideration of the jury. A pedestrian can be so careless that his conduct is negligence as a matter of law. Burgesser v. Bullock's, 190 Cal. 673, 214 P. 649; Finkle v. Tait, 55 Cal. App. 425, 203 P. 1031. We are of the opinion that the facts of this case show affirmatively that plaintiff failed to use due care, and that her failure in this respect was the proximate cause of the injury, precluding a recovery. It shows that plaintiff in her position in the center of the street, where there was no marked crosswalk, failed to use a proper degree of care for her safety. She did not remember that she looked for approaching cars in the directions from which they would come, but only that she gained the impression she had plenty of time to get across the street. Had she looked, she must have seen defendant's car approaching a few feet away, for she had taken only a step or two from her position of safety when she was struck. It is the invariable rule that it becomes the duty of a person who purposes to cross a city street to look carefully in the direction from which he may anticipate the approach of vehicles immediately before venturing into the pathway of traffic. Bence v. Teddy's Taxi, 101 Cal. App. 748, 282 P. 392, 283 P. 86. It was plaintiff's further duty from the position she was in upon the highway to yield to defendant the right of way. California Vehicle Act (St. 1923, p. 517), § 131½ (c), as added by St. 1931, p. 2127. The only conclusion that can be reached from the evidence is that plaintiff failed to take the trouble to properly look for automobiles on the side of the street as she crossed, or that she saw the automobile and for some unexplained reason stepped directly in its path. Under either theory she failed to use due care, which precludes her right to a recovery. Spring v. Tawa, 49 Cal. App. 100, 192 P. 1051; Finkle v. Tait, supra. Under the circumstances, we fail to see how the trial court could have reached a different conclusion.

The contention that the evidence clearly shows facts from which a jury might reasonably have concluded that respondent was negligent is in our opinion without merit. This question, however, does not require a discussion, for, even if it be conceded that

an inference of negligence might be drawn from the facts, the undisputed evidence showing a lack of caution or care on the part of plaintiff precludes a recovery by her.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.



4 Cal.App.2d 41

SAN PEDRO LUMBER CO. v. WILSON et al.

Civ. 1499.

District Court of Appeal, Fourth District, California.

Jan. 21, 1935.

Hearing Denied by Supreme Court March 21, 1935.

Mortgages ⇐151(3)

Where materialman furnished material for erection of house by lessee on land which lessor had incumbered with prior recorded mortgage and deed of trust, materialman's lien on house and land was subject to mortgage and deed of trust (Code Civ. Proc. § 1186).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by the San Pedro Lumber Company against F. B. Wilson and others. From the judgment, the plaintiff appeals.

Affirmed.

Harry C. Westover, of Santa Ana, for appellant.

Forgy, Reinhaus & Forgy and R. M. Crookshank, all of Santa Ana, for respondents.

MARKS, Justice.

Defendant Albert Moog was the owner of land in Orange county. He placed a mortgage upon it to secure a note in the sum of $10,000 to the Farmers' & Merchants' Savings Bank, and thereafter executed a deed of trust to secure a note in the sum of $2,800 to the First National Bank of Santa Ana. The mortgage and deed of trust were recorded each in the order of its execution.

Thereafter Moog leased the property to F. B. Wilson who went into possession and with the knowledge and consent of Moog erected a house upon it. Plaintiff was not paid for the materials it had furnished and filed its materialman's lien.

This action was commenced to foreclose the lien. The trial court held that the house was a fixture; that the materials furnished went into its construction; that the liens of the mortgage and deed of trust were prior to the materialman's lien. Personal judgment was rendered against Moog and Wilson for the amount of the claim of plaintiff, and its lien was ordered foreclosed; the foreclosure to be subject to the mortgage and deed of trust.

It has long been the law in California that a prior recorded mortgage or deed of trust creates a lien superior to the subsequent lien of a materialman. Section 1186, Code Civ. Proc.; Smith v. Anglo-California Trust Co., 205 Cal. 496, 271 P. 898; Middleton v. Arastraville M. Co., 146 Cal. 219, 79 P. 889; Warren v. Hopkins, 110 Cal. 506, 42 P. 986; Williams v. Santa Clara Mining Ass'n, 66 Cal. 193, 5 P. 85; Foellmer v. Midway Lime & Cement Co., 119 Cal. App. 192, 6 P.(2d) 333; Barrett-Hicks Co. v. Glas, 14 Cal. App. 289, 111 P. 760; Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 P. 58.

Plaintiff complains of but one portion of the judgment. It urges that upon the house alone, and not the land, its lien should be held to be superior to the liens of the mortgage and of the deed of trust. It relies solely upon the case of English v. Olympic Auditorium, Inc., 217 Cal. 631, 20 P.(2d) 946, 87 A. L. R. 1281, to support this contention. That case is easily distinguishable from the instant case. In it no question of the priority of the lien of a prior mortgage or deed of trust was involved. For that reason it is not controlling here.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

2 Cal.2d 266

GANLEY v. CLAEYS et al.

S. F. 14809.

Supreme Court of California.

Jan. 21, 1935.

Municipal corporations ⊂=597

Ordinance regulating barber shops, providing that shops must be closed from 6:30 p. m. until 8 o'clock of the following morning except on Saturdays and days preceding specified holidays, *held* void as having no reasonable relation to public health, which was purpose assigned for its adoption (Const. Cal. art. 1, §§ 1, 21, and art. 4, § 25, subds. 2, 33; Const. U. S. Amend. 14, § 1).

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Suit by M. J. Ganley against R. E. Claeys, City Council of the City of Martinez, and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

A. F. Bray, of Martinez (J. E. Rodgers and W. L. Wollitz, both of Martinez, of counsel), for appellants.

Ivan N. Maroevich, of San Francisco, for respondent.

THOMPSON, Justice.

This is an appeal from a judgment declaring void and of no effect an ordinance of the city of Martinez (No. 2 C. S.) entitled "An Ordinance of the City of Martinez regulating the hours and times for the carrying on and conducting of the business of barbering in the City of Martinez." The ordinance in question provided that all barber shops should be closed from 6:30 p. m. of each day until 8 o'clock of the following morning except on Saturdays and days preceding holidays specified in the ordinance, on which days they should close at 8 o'clock p. m. and remain closed all day on Sundays and the specified holidays. The trial court held the ordinance was not a valid exercise of the police power of the city, and hence was a violation of sections 1 and 21 of article 1 and subdivisions 2 and 33 of section 25 of article 4 of the state Constitution and section 1 of Amendment 14 of the Constitution of the United States, in that it constituted an unnecessary and undue restraint of and interference with personal liberty, a deprivation of property without due process of law, being an unwarranted interference with the carrying on of a lawful business, and, further, that it was special legislation based upon an arbitrary classification.

In the case of Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L. R. A. 664, this court considered a section of the Penal Code making it a misdemeanor for barber shops to remain open Sundays or on a legal holiday after the hour of 12 o'clock m., and concluded that it constituted an undue restraint of personal liberty and was for that reason unconstitutional and void.

It is asserted by appellants, however, that the present case is different from the one there considered, because, since that time, the state, by the California Barber Law (Deering's Gen. Laws 1931, p. 325, Act 665), has acted to regulate the business of barbering and has defined therein unsanitary practices and provided for the appointment by the board of barbers of such inspectors as "are necessary to carry out the provisions of the act." Section 21. It may be added that it is also provided that no one may practice barbering unless and until he shall have secured a certificate of registration, which may be suspended or revoked for a violation of any of the rules of sanitation. It is said, and a witness testified, that the inspectors are only on duty from 9 a. m. until 5 p. m., and that 90 per cent. of the complaints from the public concern violations occurring late in the evening or on Sundays or holidays; hence the ordinance is a health measure. However, a reading of the barber law will convince the most skeptical that the state has provided a complete plan or method for the regulation of the business and to prevent any one from engaging therein who does not conform to the standards therein announced. Inspections are very rarely made, but there is nothing to prevent the board from proceeding with the hearing provided for in section 16 of the act whenever complaints are of such a character as to justify their action. In this regard the business is not different from the profession of dentistry or medicine or law. It was the apparent purpose of the Legislature, subject to certain standards, to vest regulation of the barbers in themselves, by the appointment of a board of barbers charged with the responsibility of enforcing the act. These latter statements are made because of their bearing upon the question of whether the ordinance here has a reasonable relation to the health of the public. In State v. City of Laramie, 40 Wyo. 74, 275 P. 106, 107, the court quotes from Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385, as follows: "To

justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." The Laramie Case to which we have just referred dealt with an ordinance substantially the same as the one here involved. The Supreme Court of Wyoming, while specifically recognizing the right of the state to regulate barber shops by proper measures for the protection of the public health, determined that the closing measure did not bear "a real and substantial relation to the purpose of protecting the public from the spread of disease," and hence it stood "on the same footing as any similar restriction on the right of a citizen to engage in a harmless and useful occupation."

It is well that we should note at this juncture that the Laramie Case was decided subsequently to that of Falco v. Atlantic City, 99 N. J. Law, 19, 21, 122 A. 610, in which latter case a similar ordinance was sustained, and it was pointed out that in the New Jersey Case, the ordinance was passed pursuant to a legislative enactment authorizing municipalities to regulate the opening and closing of barber shops in aid of their regulation thereof, whereas in the Laramie Case the Legislature had only granted to municipalities the power to regulate the business. In the present case there is no specific legislative grant of any character, but rather the state, as already indicated, has acted to completely regulate the barbering business.

Appellants stress two cases (In re Lowenthal, 92 Cal. App. 200, 267 P. 886, and In re Gatsios, 95 Cal. App. 762, 273 P. 826), involving and upholding ordinances requiring the closing of butcher shops between certain hours, and argue that they are controlling here. We cannot agree with this contention for two reasons. In the first place, the statute while committing to the director of agriculture the general supervision of slaughterhouses and establishments used in preparing animals for food purposes, expressly conferred upon cities the right to provide for local supervision and local inspections. In the second place, regulation in the butchering business, as undertaken by the state, deals directly with the product which is subject to rigid inspection in order to secure a wholesome supply of meat; whereas in the barbering business the regulation is accomplished by limiting the practitioners to those who understand and will comply with sanitary methods adopted and approved by the state. It is apparent that, if the latter course is successfully pursued, the barbering business is completely and thoroughly regulated. It is equally obvious that, if the respondent in this case is not one who understands and who will not conform to the sanitary methods adopted, compelling him to close his shop an hour earlier is not going to accomplish that purpose. In view of these facts, we are of the opinion that the rule adopted in the Laramie Case is the proper one, and that the ordinance has not a reasonable relation to the purpose assigned for its adoption.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; SEAWELL, J.



2 Cal.2d 280

JULIAN v. SCHWARTZ et al.

L. A. 14609.

Supreme Court of California.

Jan. 22, 1935.

Rehearing Denied Feb. 21, 1935.

Appeal and error ⊂=460(2)

Supersedeas would issue to stay, pending appeal, enforcement of judgment directing payment of money and transfer of possession of oil property by trustees, without undertaking by applicants, where fund and property were already in possession of bonded trustee who was officer of corporation to which payment and transfer had been directed and money was safely deposited and property was being managed economically.

In Bank.

Writs of Supersedeas from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by C. C. Julian against W. A. Schwartz, who filed cross-complaint against plaintiff, H. V. Redfield and others, and

Barnhart-Morrow, Consolidated, and others. On application for writs of supersedeas.

Writs issued.

Rehearing denied; cause transferred to District Court of Appeal, First District, Division No. 1 for hearing and determination.

Olson & Olson, of Los Angeles, and J. W. Falkner, of El Monte, for L. V. Redfield, F. E. Foster, and H. A. Penn.

Hanna & Morton, of Los Angeles, for J. A. Smith and W. A. Schwartz.

Simpson & Simpson, of Los Angeles, for Barnhart-Morrow, Consol., Ralph S. Armour, receiver of Barnhart-Morrow, Consol., W. J. Barnhart, and Barnhart-Morrow & Co., Inc.

Hunsaker & Cosgrove, of Los Angeles, for Citizens' Nat. Trust & Sav. Bank of Los Angeles.

Hyams & Himrod, of Los Angeles, for United Oil Well Supply Co., Wm. B. Himrod, W. W. Hyams, J. A. Smith, and J. P. Cooney.

Hunsaker, Moote & Longcroft and Moote & Longcroft, all of Los Angeles, for Santa Fé Springs Oil Co. and A. L. Jameson.

Dunlap & Larwill, of Los Angeles, for D. R. Morrow.

PER CURIAM.

Applications for writs of supersedeas. A similar application was made by the appellants L. V. Redfield, F. E. Foster, and H. A. Penn, and denied on July 11, 1934, without prejudice, as being premature. Julian v. Schwartz et al. (Cal. Sup.) 34 P.(2d) 487. On July 23, 1934, the court made the special order after final judgment, as anticipated prior to the first application, directing the trustees to pay impounded moneys in stated amounts to the parties and to surrender possession of oil well property to certain of them as their interests appeared and were settled by the judgment from which appeals have been taken. The interests so settled were the proportionate interests of the parties in and to the oil properties involved and the proceeds from the production thereof. Redfield, Foster, and Penn on their own behalf and as managing agents and trustees for holders of certain participating oil agreements and equitable owners of interests in production, also appealed from certain portions of the special order after judgment, and W. A. Schwartz appealed from the remaining portions thereof. Redfield, Foster, and Penn now renew their application for a writ of supersedeas, and Schwartz has applied for a like stay as to the items in the order to which he takes exception.

In its order directing the payment of money the trial court provided that in the event an appeal be taken from the order or any part thereof by any party, the order might be stayed by any such appellant by furnishing a bond in double the amount directed to be paid by the particular portions of the order appealed from; and that the portion of the order directing the delivery of possession might be stayed by any appellant by furnishing a bond in an amount to be fixed by the court.

The portions of the order requiring payment and from which Redfield, Foster, and Penn have appealed, require the payment of about $200,000. The stay bond required by the order would therefore be approximately $400,000, an amount which the appellants contend is exorbitant and beyond their ability to furnish, and that in any event no stay bond should be required. It is pointed out that the order requires the payment of $149,852.13 to Barnhart-Morrow, Consolidated, a corporation controlled and almost wholly owned by J. A. Smith, one of the trustees, and that no damage could be suffered by him in requiring him to hold the fund over which he has control as trustee pending a determination of the rights of the parties on the appeal from the judgment and order. The order for possession requires delivery also to Barnhart-Morrow, Consolidated, and it is urged by the petitioners herein that since the owner of Barnhart-Morrow, Consolidated, is in possession and control and is operating the properties in conjunction with his cotrustee (and each trustee is under a $25,000 bond), no harm can come to either the corporation or the owner thereof pending the appeal.

It is conceded by some of the respondents and not denied by any others that the oil properties are being safely and economically operated and that the funds are being deposited in financially sound banks in interest-bearing deposits, except a small drawing account for operating expenses.

The only damage which the respondents are able to indicate by reason of the stay of the order is the difference between the interest which the time deposits draw and the interest which they might obtain by some other form of investment. On the showing made we see no opportunity for the respondents to suffer any substantial damages pending a determination of the appeals from the judgment and order, and we conclude that

their interests are adequately protected in the meantime without the requirement of an undertaking.

Let the writ of supersedeas as to each application issue as prayed.



PACIFIC ELECTRIC RY. CO. v. DEPARTMENT OF MOTOR VEHICLES et al.*

S. F. 15343.

Supreme Court of California.

Jan. 28, 1935.

1. Taxation ⇐37

Gross receipts tax provided for in Constitution *held* to mean taxes for ensuing fiscal year as defined by constitutional provision providing that fiscal year shall commence on 1st day of July (Const. art. 13, § 14, as amended Nov. 4, 1930; art. 20, § 5).

2. Automobiles ⇐98

Utility which tendered to Department of Motor Vehicles registration fees for utility's motor vehicles and weight charges in amount which would have been sufficient only in case registration had taken place on July 1, 1935, *held* entitled to issuance of registration certificates for calendar year 1935, where gross receipts tax for fiscal year 1934–35 had been assessed against utility (St. 1929, p. 524, § 77 (a, c); Const. art. 13, § 14, as amended Nov. 4, 1930, and art. 20, § 5).

3. Automobiles ⇐98

Utility against which was assessed gross receipts tax for fiscal year 1934–35 could not be required to pay weight charges on utility's motor vehicles for all of 1935 in order to secure registration certificates for calendar year 1935, where to do so would result in discrimination against utility in favor of other motor vehicle owners and particularly in favor of other corporations doing business within state, which discrimination was specifically forbidden by Constitution (St. 1929, p. 524, § 77 (a, c); Const. art. 13, § 14, as amended Nov. 4, 1930, art. 20, § 5, and art. 13, § 14½, adopted June 27, 1933).

In Bank.

Mandamus proceeding by the Pacific Electric Railway Company, a corporation, against the Department of Motor Vehicles of the State of California and others.

Peremptory writ of mandate issued.

R. E. Wedekind and Frank Karr, both of Los Angeles, for petitioner.

Guy V. Shoup and Henly C. Booth, both of San Francisco, amici curiæ.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen. (Roger J. Traynor, of Berkeley, and Frank M. Keesling, of Sacramento, of counsel), for respondents.

PRESTON, Justice.

Petitioner, a public utility corporation, claiming the benefit of sections 41, 77(a), and 77(c), of the California Vehicle Act of the state of California (chapter 266, pp. 523, 536, St. 1923, as amended), tendered on December 29, 1934, to respondent Department of Motor Vehicles of the state of California the sum of $5,942, and demanded therefor registration certificates for the calendar year 1935 for 212 motor vehicles used by it in the operation of its business as an electric interurban railway corporation during the year 1934. This demand was refused on the ground that said tender was insufficient in amount to comply with the said statute. Hence this proceeding in mandamus.

No facts essential to determination of the controversy are in dispute. The tender made was for the $3 registration item in full for each car as required by said section 77(a), as amended by St. 1929, p. 524, but as to the weight charges provided for in said section 77(c) petitioner tendered an amount which would have been sufficient only in case registration had taken place on July 1, 1935, instead of January 1st of said year. In other words, the essence of petitioner's claim is that it has already paid or has already obligated itself to pay a fee in lieu of said charges for the first half of said year 1935 because of the gross receipts tax assessed against it for the fiscal year 1934-35, pursuant to section 14, article 13, of the Constitution of the state of California, as it stood on May 1, 1933. The real issue then is whether such exemption exists, and a subsidiary issue is also present as to whether or not, if the exemption exists, respondent department has power to issue the certificates for the sum tendered.

The in lieu provisions of said section 14, article 13, of the Constitution, as of May 1, 1933, clearly embraced the excise or privilege

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 43 P.2d 657.

tax here involved. Pacific Gas & Electric Co. v. Roberts, 168 Cal. 420, 432, 143 P. 700. Had this provision remained without amendment it would have served to forbid additional taxation on excise charges for the same period upon the same subject-matter. What period is covered by the gross receipts tax assessed in the year 1934, based upon gross earnings of the utility for the calendar year 1933, is a matter in dispute in this proceeding.

[1] By analogy, inference, and contemporaneous construction we have reached the conclusion that by the gross receipts tax provided for in section 14, article 13, of the Constitution as it read on May 1, 1933, is meant taxes for the ensuing fiscal year, as defined by section 5, article 20, of the Constitution, to wit, "The fiscal year shall commence on the first day of July." That it is so construed as to ad valorem taxes is clear from the following authority: Rollins v. Wright, 93 Cal. 395, 29 P. 58; Rode v. Siebe, 119 Cal. 518, 51 P. 869, 39 L. R. A. 342; Pol. Code, § 3713, as it formerly read. Since the inauguration of the gross receipts tax, the practical construction of the provision has been in accord with the above-mentioned authorities. See Southern California Edison Co. v. State Board, 220 Cal. 420, 423, 424, 426, 31 P.(2d) 384; Southern Pacific Co. v. Richardson, 181 Cal. 280, 281, 184 P. 3.

[2] This being true, petitioner, when the 1934 assessment is paid, will have paid all taxes and licenses assessable against it for the fiscal year ending June 30, 1935. To assess petitioner for full annual weight fees under the California Vehicle Act (St. 1923, p. 523 as amended) would be to collect double charges from it for the first half of said year 1935.

At this juncture, however, respondents invoke the provisions of section 14½, article 13, of the Constitution, voted therein June 27, 1933, reading as follows: "The provisions of section 14 of this article as they read on May 1, 1933, shall remain fully operative to and including December 31, 1934, notwithstanding any other provision in this Constitution. From and after January 1, 1935, said provisions shall no longer be of any force and effect; provided, however, that any taxes assessed in pursuance thereof, prior to said date, shall remain fully collectible."

Under this provision it is insisted that the force which held the California Vehicle Act in abeyance as to petitioner was lifted as of December 31, 1934, and therefore the said act is in full operation. But in this connection it is to be noted that the taxes already assessed against petitioner remain "fully collectible." We readily conclude, then, that this section does not of itself authorize double taxation. However, conceding that it does so provide, we are then confronted with the following provision, which became a part of section 14 of article 13 of the Constitution on June 27, 1933: "* * * Provided further, that no excise, or income tax or any other form of tax of license charge shall be levied or assessed upon or collected from the companies, or any of them, mentioned in the first paragraph of this section, in any manner or form, different from, or at a higher rate than that imposed upon or collected from mercantile, manufacturing and business corporations doing business within this State."

[3] Therefore, should petitioner be required to pay full annual fees for the year 1935 for its said motor vehicles, there would result a clear discrimination against it in favor of other motor vehicle owners, and particularly in favor of other corporations such as "mercantile, manufacturing and business corporations doing business within the state," which discrimination seems to have been specifically forbidden by said section 14 as amended.

We are therefore face to face with the fact that petitioner has paid or will have paid full weight fees for the first half of the year 1935. It has tendered to respondents in full the $3 per vehicle charge for the whole year and has also tendered the balance properly due for weight charges for the remainder of the year. In practical operation we are pointed to no reason why respondents should not now issue the certificates provided for and otherwise comply with the statute upon receipt of the fees tendered.

Let the peremptory writ of mandate issue as prayed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

2 Cal.2d 290

BEACH v. FAUST et al.

L. A. 14238.

Supreme Court of California.

Jan. 25, 1935.

1. Vendor and purchaser ⇐233

Purpose of recording laws is to protect those who honestly believe they are acquiring good title and who invest substantial sum in reliance on that belief, but laws do not protect those whose ignorance of title is deliberate and intentional, nor those who merely pay nominal consideration (Civ. Code, §§ 1213, 1214, 1217).

2. Vendor and purchaser ⇐233

That deed conveys merely right, title, and interest of grantor does not prevent grantee from being "purchaser for valuable consideration without notice" within recording laws so as to be protected from unrecorded instruments affecting title to property of which he had no notice (Civ. Code, §§ 1213, 1214, 1217).

[Ed. Note.—For other definitions of "Purchaser for Valuable Consideration," see Words & Phrases.]

3. Vendor and purchaser ⇐233

Realty or interest therein can be alienated or assigned by quitclaim deed which is good as against even an unrecorded grant, bargain, and sale deed (Civ. Code, §§ 1213, 1214, 1217).

4. Bankruptcy ⇐100(1)

Adjudication in bankruptcy *held* not of itself notice per se as to encumbrance on bankrupt's realty, but trustee was required within 30 days after adjudication to file certified copy of decree of adjudication in office, where conveyances of realty were recorded in every county where bankrupt owned realty not exempt from execution (Civ. Code, §§ 1213, 1214, 1217; Bankr. Act § 47c, 11 USCA § 75 (c).

5. Vendor and purchaser ⇐224, 233

Transferee of grantee under quitclaim deed who paid valuable consideration without notice that grantor at time of conveyance had been adjudicated a bankrupt *held* "bona fide purchaser" of realty, and was protected by recording laws as against bankruptcy trustee's grantee, where no certified copy of decree of adjudication was filed in county where realty was located, and bankrupt did not include realty in schedule of assets (Civ. Code, §§ 1213, 1214, 1217; Bankr. Act § 47c, 11 USCA § 75 (c).

[Ed. Note.—For other definitions of "Bona Fide Purchaser," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action to quiet title by F. A. Beach against Frank F. Faust and others, in which Frank C. Ayars was substituted as plaintiff. From an adverse judgment, defendants appeal.

Reversed.

For prior opinion, see 31 P.(2d) 1060.

Kemp, Partridge & Kemp and Thomas C. Ridgway, all of Los Angeles, and Herbert C. Kelly, of San Diego, for appellants.

Powell & Powell and Hubert F. Laugharn, all of Los Angeles, for respondent.

WASTE, Chief Justice.

This controversy involves a one-third interest in a vacant tract of land in Kings county near the Kettleman Oil Field. This interest originally stood of record in the name of B. W. Marks. While the interest in the property stood of record in Marks' name, he filed a petition in bankruptcy, and was adjudicated a bankrupt by the United States District Court for the Southern District of California, which includes Kings county. The order of adjudication was made January 29, 1929. No certified copy of the decree of adjudication of bankruptcy was filed in Kings county, as required by the Bankruptcy Act (11 USCA § 75 (c). Marks did not include the property in controversy in the schedule of assets, and the trustee in bankruptcy did not learn of its existence until some time later. Without any knowledge of the bankruptcy, T. A. Slocum, in May, 1929, paid Marks $100 for a quitclaim deed to the property. Shortly thereafter, Frank F. Faust, one of the appellants, obtained a search of title which showed title vested in Marks, and contained no reference to any bankruptcy proceedings. Faust then called on Marks, who told him that he (Marks) had conveyed his interest in the property to Slocum, but did not mention his (Marks') bankruptcy. Faust, without any knowledge of the bankruptcy, then paid Slocum $250 for a deed to the property. Thereafter, and on January 7, 1930, the trustee in bankruptcy, having learned of Marks' interest in the property, sold the one-third interest to the plaintiff Beach, who bought the property for Frank C. Ayars, and the latter has been substituted as the plaintiff in this action. In the meantime, one C. A. Walker instituted an action to quiet title against Marks and others, covering the property. Lis pendens in usual form was recorded. Walker

obtained judgment against Marks, and subsequently quitclaimed the property to appellant Faust.

Upon this state of facts the trial court gave judgment for the plaintiff on the theory that the bankruptcy proceeding in the federal court was constructive notice per se to all intending purchasers that Marks, the original owner of the property, had been declared a bankrupt. There is some evidence that Marks told Slocum at the time he paid Marks the $100 for a quitclaim deed that he did not think he was the owner of the property. As already stated, Marks made no reference to his previous adjudication in insolvency. Concisely stated, the respondent claims under the court sale in the bankruptcy proceeding, while the appellants claim under the quitclaim deeds from the bankrupt Marks and Slocum and under the Walker judgment.

It is the contention of appellants that, since a certified copy of the order adjudicating Marks a bankrupt and a certified copy of the order approving the trustee's bond were not recorded in Kings county until after the recordation of the quitclaim deeds referred to, and as both Slocum and Faust paid a consideration (not shown to be inadequate) for the respective quitclaim deeds, Slocum was a bona fide purchaser for value, and without notice, and that Faust, who acquired from Slocum, is similarly a bona fide purchaser, and is protected by the recording laws of this state.

[1-3] The recording laws were not enacted to protect those whose ignorance of the title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Their purpose is to protect those who honestly believe they are acquiring a good title, and who invest some substantial sum in reliance on that belief. That a deed conveys merely "the right, title and interest" of the grantor does not prevent the grantee from being a purchaser for a valuable consideration, without notice, within the recording laws, so as to be protected from unrecorded instruments affecting the title to the property of which he had no notice. Phœnix Title & Trust Co. v. Old Dominion Co., 31 Ariz. 324, 253 P. 435, 59 A. L. R. 625; Wisconsin River Land Co. v. Selover, 135 Wis. 594, 116 N. W. 265, 16 L. R. A. (N. S.) 1073. The pertinent provisions of our own recording laws are found in sections 1213, 1214, and 1217 of the Civil Code. It has long been the accepted rule in this state that real estate, or an interest in real estate, can be aliened or assigned by a quitclaim deed. Graff v. Middleton, 43 Cal. 341–344. Such a deed is good as against even an unrecorded grant, bargain, and sale deed. Dunn v. Carroll, 101 Cal. App. 209, 281 P. 506, and cases cited.

[4] The adjudication of Marks in the bankruptcy court was not of itself notice per se, and the trustee was required within thirty days after the adjudication to file a certified copy of the decree of adjudication in the office where conveyances of real estate are recorded in every county where the bankrupt owned real estate not exempt from execution. U. S. Code, title 11, § 75, subd. [c], 11 USCA § 75 (c). It is not here claimed the property was exempt.

[5] For the foregoing reason, we are of the view that the appellant Faust, defendant in the court below, was a bona fide purchaser of the property in controversy, and was protected by the recording laws.

For these reasons, the judgment must be, and is, reversed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



2 Cal.2d 270

PEOPLE v. BERMIJO.

Cr. 3767.

Supreme Court of California.

Jan. 22, 1935.

Rehearing Denied Feb. 21, 1935.

1. Homicide ⇐234(8)

Evidence showing that bullets taken from body of deceased were fired by gun held in hands of accused *held* to sustain conviction of murder.

2. Homicide ⇐163(2)

In murder prosecution, disallowing deceased's wife to testify whether deceased ever used denatured alcohol, and whether deceased drank denatured alcohol on day of homicide, *held* not error, where accused sought to introduce such testimony to show effect of such alcohol upon body of individual who drinks it, and record did not disclose that deceased was dangerous either when sober or

intoxicated, or that accused thought that deceased was dangerous.

3. Homicide ⇐163(2)
In murder prosecution, character of deceased must be shown by his general reputation, and not by isolated specific act.

4. Criminal law ⇐627½
In murder prosecution, refusal to order prosecution to allow accused's attorney to examine private memoranda of questions asked of accused, and answers made thereto by accused short time after shooting, *held* not error, where memoranda were not signed by accused but were notes made by district attorney of questions asked and answers given.

5. Criminal law ⇐686(2)
In murder prosecution, permitting prosecution after it closed its case in chief to show by physician that deceased died from gunshot wounds *held* not error, where it clearly appeared that accused fired two shots at deceased who died within few minutes thereafter.

6. Homicide ⇐228(2)
Corpus delicti may be shown by circumstantial as well as by direct testimony.

7. Criminal law ⇐673(2)
In murder prosecution, instruction that testimony of deceased's wife concerning return of accused and his firing of third shot was introduced solely for purpose of attempting to connect accused with offense charged, and could not be considered for any other purpose, *held* properly refused, where no objection was urged to introduction of testimony or that it should be allowed to be introduced for specific purpose.

8. Homicide ⇐287
In murder prosecution, refusal to instruct that when offense fails to show any motive to commit crime charged on part of accused, it is circumstance in favor of innocence of accused, *held* not error.

9. Criminal law ⇐1122(4)
In murder prosecution, instruction regarding reputation of deceased as being a violent, turbulent, or dangerous man *held* properly refused, where no testimony appeared in record on subject.

10. Criminal law ⇐720(9)
In murder prosecution, district attorney's argument that if accused denied having returned and fired third shot, how could jury believe his other testimony, *held* not prejudicial, where testimony of deceased's wife and physical facts contradicted accused's testimony, and tended to prove that accused had fired three shots, and other testimony tended to establish contention of prosecution that shooting was premeditated.

In Bank.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Anastacio Bermijo was convicted of murder, and he appeals.

Affirmed.

Archibald M. Mull, Jr., of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

PLUMMER, Justice pro tem.

The defendant was tried upon an information charging him with the crime of murder, in that he did, on or about the 7th day of June, 1933, in the county of Sacramento, willfully and feloniously kill one Felix Villasor, a human being. The jury returned a verdict of guilty of murder in the first degree, without recommendation. The defendant interposed a motion for new trial, which was denied, and thereafter judgment and sentence was passed upon the defendant, imposing the extreme penalty. From the order denying his motion for new trial, and the judgment just referred to, the defendant appeals.

Briefly stated, the testimony introduced on the part of the People showed the following:

That prior to the commission of the offense of which the defendant was found guilty he and the deceased Felix Villasor were partners, or were jointly interested in farming a ranch or tract of land in the vicinity of Hood, in the county of Sacramento; that the defendant left the farm at Hood some time during the preceding month of May, and after his departure a rumor was passed around among the defendant's acquaintances that when the defendant left the farm he took some money with him that he should not have taken. Shortly thereafter the deceased with his wife Francesco Villasor and their three children moved to the town of Walnut Grove, where they were living on the day of the homicide. On the morning of the 17th day of June, 1933, the defendant having returned, went to the home of the deceased in Walnut Grove, and there engaged both the deceased and his wife in conversation relative to the rumor that the defendant had taken with him, when he went away, money that he should not have taken.

At the time the defendant went to the house where the deceased and his wife and children were living, the deceased was in the kitchen preparing a chicken which they were intending to have for their dinner. The defendant

came to the door of the room leading to the kitchen, after he had been admitted to the house, stopping at the door and leaning against the same; the deceased in the meanwhile kept on working with the chicken. The defendant then spoke to the deceased about the rumor, claiming that the deceased had circulated the same. The deceased made reply to the effect that he had heard the rumor, and that the boss had circulated the report, and that he could not overcome it. At this instant while the defendant was still leaning against the door, his wife Francesco Villasor, who was nearby, came into the kitchen and told her husband, in the presence of the defendant, that she would go ahead with the cleaning of the chicken. The deceased thereupon went over to one of the walls of the kitchen and started to dry his hands on a towel. While the deceased was thus engaged in drying his hands on the towel it appears that the defendant drew a gun and shot the deceased in the back, the bullet entering just below the right scapula. The deceased thereupon grabbed an axe which was nearby and turned toward the defendant.. At this instant the defendant fired a second shot. This shot took effect in the right breast just below the clavicle. The bullets so fired by the defendant at the deceased ranged downward through his body, from which death shortly followed. With the axe in his hand after the shooting began the deceased started toward the defendant. After firing the second shot the defendant ran from the house; the deceased followed a short distance, dropped upon the floor with his face downward. His wife turned him over, holding the deceased in her arms, and while in this position it appears that the defendant returned and fired a third shot, this shot striking neither the deceased nor his wife, but found lodgment in one of the walls of the building. Immediately after the killing the defendant made the remark that there were two bodies to be burned, and that he had killed them.

Two witnesses testified that the defendant, shortly before the shooting, stated that he was going to kill the deceased. To one of them he said he was going to kill the deceased even though he hung for it. This remark was made to one of the witnesses on the morning of the shooting. After the shooting the defendant stated to a witness by the name of Parks, in answer to an inquiry as to why he did the shooting, that he was mad. Also, in answer to an inquiry as to why he shot at Mrs. Villasor, he said he was afraid she would talk.

The defendant denied that he returned to the house and fired a third shot; denied that he had made statements before the shooting that he was going to kill the deceased; and also denied that he had made any statements to the witness Parks as to why he had killed the deceased; and also denied that he had made any remarks as to why he shot at Mrs. Villasor, denying, also, that he fired a third shot. The defendant also stated that he had had an argument with the deceased over the payment of bills; that he wanted the deceased to pay certain bills, which the deceased refused to do, and that the deceased said to him, "Get out," following that remark with an attempt to reach the axe which we have heretofore mentioned.

The defendant also testified that during his conversation with the deceased, the deceased went toward the axe which we have referred to, lifted the axe over his head, and swung at the defendant; that the defendant then shot at him, firing the two shots in rapid succession; that the force of the movement in swinging the axe caused the deceased to turn partly around, and that caused one of the shots to strike the deceased in the back; after firing the two shots, that he ran from the house to protect himself from the axe in the hands of the deceased.

Upon this appeal the appellant assigns as grounds for reversal that the court erred in excluding, and also in the admission of certain testimony, and that the court erred in its instructions to the jury. The appellant also urges that the court erred in permitting the prosecution to reopen its case in chief and introduce the testimony of a physician that the bullet wounds had caused the death of the deceased.

Preliminarily, we may refer to the argument of the appellant that there is no testimony in the record showing that the bullets found in the body of the deceased actually were fired from the gun in the hands of the defendant, that is, there is no testimony in the record showing that the caliber of the gun and the size of the bullets corresponded. The testimony of the defendant himself is to the effect that he fired two shots at the deceased, and the testimony of the wife of the deceased is likewise to the effect that while the defendant was standing in the door of the kitchen he fired the two shots, following which the deceased fell upon his face and shortly expired.

[1] In the light of these facts, we think that the argument of the appellant, that there is

no showing that the bullets found in and taken from the body of the deceased were fired by a gun held in the hands of the defendant, requires no comment.

[2] Upon cross-examination of the wife of the deceased, Francesco Villasor, the defense sought to introduce testimony to the effect that her husband drank denatured alcohol, and proceeded to ask the witness if her husband did not buy denatured alcohol at a certain drug store in Walnut Grove. To the question, "Did your husband ever use denatured alcohol"? the court sustained the objection interposed by the prosecution. This is one of the errors assigned by the appellant. No attempt, and no offer was made to the court to show that the deceased was under the influence of any kind of intoxicating liquor at the time of the killing. The question simply refers to what the deceased may have done at some former time. The question was then asked: "Was your husband drinking denatured alcohol on the 17th day of June, 1933?" To this query the court sustained an objection interposed by the prosecution. As the reasons urged for the admission of such testimony the appellant made the following statement: "For the purpose of showing that the deceased drank denatured alcohol, and the effect denatured alcohol has upon the body of an individual who drinks it; in order to show his nature and his conduct at the time." This offer, of course, relates only to the general effect of denatured alcohol upon human beings generally, which, of course, would not tend to prove that the deceased was the aggressor at the time the defendant fired the fatal shots. The testimony of the defendant himself shows that he sought out the deceased; went to the home of the deceased armed with a gun.

Our attention has not been called to anything in the record, and we have been unable to find anything therein, tending to show that the deceased was a quarrelsome, turbulent, or dangerous character either when sober or under the influence of intoxicating liquor. Our attention has not been called to anything in the record, nor have we been able to find anything therein tending to show, even though the deceased were of a violent disposition, that the defendant knew thereof, or acted in the manner in which he did by reason of any such knowledge.

Our attention has been called to the case of People v. Lamar, 148 Cal. 564, 83 P. 903. The facts in that case, however, show that the deceased not only was drinking, but was going from place to place making threats against the defendant, which, of course, laid a foundation for the introduction of testimony tending to show that the deceased was the aggressor.

[3] Again, the character of the deceased must be shown by his general reputation, and not by some isolated, specific act. State v. Ricks, 170 La. 507, 128 So. 293; 13 Cal. Jur. 693; 13 R. C. L. 916. See, also, notes collected in 64 A. L. R. 1041.

In the case of Moseley v. State, 89 Miss. 802, 41 So. 384, relied upon by the appellant, it clearly appears that a foundation was laid tending to show self-defense, before testimony as to the character or reputation for violence of the deceased was admitted.

[4] We find no merit in the contention of the appellant that the court erred in refusing to order the prosecution to allow the attorney for appellant to examine certain private notes and memoranda of questions asked of the defendant, and answers made thereto by the defendant a short time after the shooting. The memoranda sought to be examined was not a statement of the defendant, was not signed by him, but were simply notes made by the district attorney of questions asked of the defendant, and answers given thereto. The appellant cites no authorities to support his contention of the alleged error.

[5, 6] The record, as we have stated, shows that the prosecution closed its case in chief without the testimony of the physician thereafter called having been introduced, to the effect that the deceased died from the gunshot wounds. At this juncture the appellant moved for a directed verdict of acquittal, on the grounds that the corpus delicti had not been proven, that is, that it was not proven by any direct testimony that the deceased died from the effects of the shots fired at him by the defendant. The case was then reopened, and the people allowed, over the objection of the defendant, to introduce the testimony of a physician that the death of the deceased resulted from the gunshot wounds. No authorities are cited to show that this action of the trial court was erroneous, and in view of the testimony which we have stated generally herein as appearing in the record, we do not well perceive how any prejudice followed, as it clearly appears that the defendant fired two shots at the deceased, and that the deceased died within a very few minutes thereafter. It is well settled that the corpus delicti may be shown by circumstantial as well as by direct testimony. See the cases

cited by the court in the case of People v. Hudson (Cal. App.) 34 P.(2d) 741; People v. Hill (Cal. App.) 37 P.(2d) 849.

[7] No objection appears to have been interposed to the testimony of the wife of the deceased concerning the return of the defendant and his firing of a third shot. Objection only appears to the refusal of the court to give the proffered instruction No. 52 to the jury, to the effect that such testimony was introduced solely for the purpose of attempting to connect the defendant with the offense charged in the information, and could not be considered for any other purpose.

No objection having been urged to the introduction of the testimony, or that it be allowed to be introduced for a specific purpose, the proffered instruction was properly refused.

A similar situation is presented in the case of People v. Walters, 98 Cal. 138, 32 P. 864. Here, as there, the act of the defendant in returning and firing a third shot was held admissible to prove motive, and likewise, to disprove any claim of self-defense. See, also, 13 Cal. Jur. 703, as to when all the acts of the defendant connected with the offense may be admitted showing the motive and animus of the defendant, even though it does show an attempt to commit an additional crime.

[8] The court did not commit any error in its refusal of the appellant's proposed instruction No. 9, which is to the effect that: "When the offense fails to show any motive to commit the crime charged on the part of the accused, it is a circumstance in favor of the innocence of the accused," etc. While such an instruction would be harmless, it is not error to refuse an instruction based upon assumed absence of motive. People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Page, 86 Cal. App. 148, 260 P. 591. See, also, 8 California Jurisprudence, p. 329, § 377, where it is held that such an instruction relates to a matter of fact and invades the province of the jury.

[9] No testimony appearing in the record as to the reputation of the deceased as being a violent, turbulent, or dangerous man, the court properly refused the defendant's proposed instruction No. 46 relating to that subject.

Without lengthening this opinion it is sufficient to say that we have carefully considered not only the proffered instructions by the defendant, which were refused, but also the instructions given by the court to the jury either of its own motion or upon the request of the prosecution, and are satisfied that the jury was not only correctly but fully instructed as to the law which should govern in reaching a verdict.

[10] It is finally urged that the district attorney was guilty of prejudicial misconduct during his argument to the jury, in which the following statement was made: "Then where does—and the defendant says he fired only two shots. Well, where did the other shot come from that went over the dead body of the deceased between the dining room and the kitchen, if he only shot twice, because the bullets were in the body—two of them were taken out of the body. Then where did the other one come from? Where did the bullet, the bullet in the wall come from? Then if he is untruthful in that, and he is wilfully false in that part of his testimony, how can you believe him in any other part of it—because he denies that he shot at Mrs. Villasor, denies that he returned to the house and shot?"

At this point counsel for the appellant interposed and assigned the remarks as prejudicial misconduct. The district attorney then resumed: "And he says that he returned to the house after he left, and he says he only fired two shots into the dead man's body, and then he went out. Well, where does the third one come from? I defy counsel or anybody else to state where the third bullet came from, if only two shots were fired. Then if he is wilfully false in that part of the testimony, how are you going to believe him in any other part? Can you? So how are they going to explain the three bullets if only two were shot—two fired? How is that explainable according to the defendant's story?"

The testimony of the defendant, as we have just shown, is that he denied he returned to the house of the deceased; denied that he told the witness Parks that he had tried to kill Mrs. Villasor; denied on cross-examination that he fired more than two shots in the house of the deceased. The argument of counsel properly called attention of the jury to the fact that not only the testimony of Mrs. Villasor, but the physical facts contradicted the defendant's testimony and tended to prove that the defendant had fired three shots; that he came back to the house after shooting the deceased and made an attempt to kill Mrs. Villasor, just as he had stated to the witness Parks. This testimony goes to establish the contention of the prosecution that the shooting was premeditated, and laid a foundation for the argument of the district attorney that the defendant's version of the affair

was untruthful and unreliable, and that the circumstances of the case amply supported the verdict which the jury subsequently returned.

The record is exceptionally free from error. The testimony is direct. The trial appears to have been fairly conducted, and the verdict returned amply supported by the evidence.

The order and judgment are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.



2 Cal.2d 257

KUHLEMEIER v. LOS ANGELES COUNTY.

L. A. 14693.

Supreme Court of California.

Jan. 21, 1935.

Taxation ⇐540

That book value figure of factory equipment of taxpayer's bookkeeper, which assessor adopted as book value upon which assessment was based, was not computed in same manner as assessor would have computed value, so that tax was greater than it would have been had assessor computed book value, *held* not "clerical error of tax assessor" so as to enable taxpayer to recover excess tax paid under statute providing for refund of excessive taxes as result of overassessment caused by clerical error of assessor (Pol. Code, § 3804).

[Ed. Note.—For other definitions of "Clerical Error," see Words & Phrases.]

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. L. Bogue, Judge.

Action by William H. Kuhlemeier against Los Angeles County. From a judgment for the plaintiff, the defendant appeals, and plaintiff moves to affirm.

Motion to affirm denied, and judgment reversed, with directions.

Everett W. Mattoon, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellant.

Daniel E. Farr, of Minneapolis, Minn., and W. Torrence Stockman, of Los Angeles, for respondent.

S. Laz Lansburgh, of San Francisco (S. Joseph Theisen, of San Francisco, of counsel for Orpheum Circuit, Inc.), amici curiæ.

WASTE, Chief Justice.

Plaintiff brought this action under section 3804 of the Political Code to recover $2,652.44 from the defendant county, such sum representing the aggregate of alleged excessive taxes collected from plaintiff on certain factory equipment for the years 1929, 1930, and 1931. The complaint alleged that this excess was the result of a "clerical error" on the part of the county assessor in fixing the book value of the property. The cited Code section provides for relief in the event of such an error. That portion of the tax here sought to be recovered was not paid "under protest," and we are therefore not presently concerned with the provisions of section 3819 of the Political Code.

A general demurrer to the complaint was interposed and overruled. The county having thereafter failed to answer within the time provided therefor, judgment was entered for the plaintiff, from which this appeal was taken. The appeal now comes before us both on the merits and on motion to affirm.

So far as material here, section 3804, supra, provides that "Any taxes, penalties or costs thereon heretofore or hereafter paid more than once, or heretofore or hereafter erroneously or illegally collected, or *any taxes heretofore or hereafter paid upon an assessment in excess of the actual cash value of the property so assessed by reason of a clerical error of the assessor as to the excess in such cases*, or any taxes heretofore or hereafter paid upon an erroneous assessment of improvements on real estate not in fact in existence, when said taxes became a lien, may, by order of the board of supervisors, be refunded by the county treasurer. * * *"

Plaintiff's claims for the asserted excess having been rejected by the board of supervisors of the county, this action was commenced. The italicized portion of the above Code section is here pertinent. Preliminarily, it should be stated that the defendant county contends, and the plaintiff concedes, that under the decisions of this court no relief will be granted, in the absence of fraud, where a complaint for recovery of alleged excessive taxes is based merely on an overvaluation

or an excessive assessment of property unless relief has been first sought from the county board of equalization, except where, as provided in the cited Code section, the overvaluation is the result of a "clerical error" of the assessor. With this principle in mind, the plaintiff urges that the complaint herein states a cause of action for the recovery of an excess attributable to a "clerical error" of the assessor in determining the book value of plaintiff's taxable property. In support of its general demurrer the county argues that the complaint is deficient, in that it fails to allege facts showing such "clerical error," but, on the contrary, merely indicates that the assessor followed and adopted the book value of the property as the same appears on the books kept by plaintiff's bookkeeper. It is also urged that the complaint fails to allege, as required by the Code section, that the asserted erroneous assessment was in "excess of the *actual cash value* of the property." While originally some point was also made as to the asserted insufficiency of the complaint to allege the verification of the claims sued on, it has been since conceded by the defendant county that the claims were, in fact, duly verified, and the desire is expressed that the determination of the case not "turn upon this point."

Inasmuch as excessive taxes paid as the result of an overassessment are recoverable under section 3804, supra, only when such overassessment is attributable to a "clerical error" of the assessor, we now direct our attention to the allegations of the complaint with a view to determining whether they disclose such clerical error. In this particular the complaint alleges:

"That in arriving at the assessed valuation of all property in Los Angeles county of like kind, to-wit: factory equipment, during the said years, the said assessor discounted the book valuation of said property twenty per cent and fifty per cent off, or, in other words, assessed said property at a net of forty per cent of the book valuation thereof. That such method was the general usage, custom and formula of said assessor during said years and the same was used in computing all personal property of like kind and character in the county of Los Angeles, and the said assessor endeavored and attempted to assess the aforementioned property of this plaintiff by such formula. That by usage, custom and formula of the said assessor in said years, the book valuation of property was determined by depreciating the cost of said property ten per cent per year accumulated. That the said assessor used said formula in computing the book valuation of all property of like kind and character as above mentioned in the county of Los Angeles, and the said assessor attempted and endeavored to compute the book valuation of the property above mentioned belonging to this plaintiff according to said formula.

"That due to a faulty system of bookkeeping and clerical errors therein committed by the bookkeeper of this plaintiff, which faulty system of bookkeeping and clerical errors occurring therein were adopted and continued by the said assessor, an excessive net book valuation was reflected by the books of the plaintiff as follows:

"The bookkeeper of plaintiff erroneously depreciated the said original cost, regardless of time of purchase, only the amount of $1,000.00 because of her habit of depreciating the said equipment at the rate of $500.00 per month during the fiscal year of plaintiff's business which commenced on the first day of January and terminated upon the 31st day of December each year and at the end of the year would credit the depreciation reserve account and charge all accumulated depreciation for said year to a proprietorship or investment account and that, because thereof, the depreciation reserve account, upon the first Monday in March of each of said years, showed only a depreciation of $500.00 for January, and $500.00 for February, or a total depreciation of $1,000.00. That such depreciation reserve was incorrect and in a much less amount than allowed by the assessor and as computed by the above set forth formula. That the said clerical error was copied and continued by the said assessor and resulted in an erroneous assessed valuation of the said factory equipment of this plaintiff."

In our opinion the foregoing allegations of the complaint, setting forth in detail the specific facts from which plaintiff deduces his conclusion that the assessment and excessive taxes were the result of a "clerical error" on the part of the assessor, do not warrant or support such a conclusion. In fact, the allegations negative any theory of "clerical error." On the contrary they constitute, at best, but a criticism of the method or theory of bookkeeping adopted by plaintiff's bookkeeper. It cannot be said that the latter's book value figure, which the assessor adopted, was the result of clerical or other error. Rightly or wrongly computed, it was the bookkeeper's deliberate and intended estimate of the value of the property. This being so, the adoption of such figure by the assessor

cannot reasonably be said to be a "clerical error" on his part. Nor do the facts pleaded warrant the conclusion stated in the complaint that the assessor "attempted to assess the aforementioned property of this plaintiff by such [assessor's] formula" and "attempted and endeavored to compute the book valuation of the property * * * according to said formula." The specific allegation of what actually transpired negatives the pleader's conclusion, for the complaint very definitely indicates that the assessor did not compute, nor did he intend to compute, the book valuation of plaintiff's property by his, or any other, formula, but instead was content to take, and did take, plaintiff's own figure. If, in so doing, he acted to the prejudice of plaintiff, the remedy therefor lay elsewhere than under the provisions of section 3804, supra, for, construed as a whole, the complaint fails to allege a cause of action founded on a "clerical error" of the assessor in fixing the assessment value of plaintiff's property. The error of the assessor, if any, was one of substance or of judgment, and was not clerical in character.

In construing a statute somewhat similar to our section 3804, supra, and providing for the correction of assessments and the refunding of taxes improperly collected by reason of "any manifest, clerical, or other error in any assessments or returns," the New York courts have declared that " 'clerical' errors are mentioned to distinguish them from, and exclude errors of substance, of judgment, or of law," the latter being described as "errors affecting the merits of the assessment." Hermance v. Supervisors of Ulster County, 71 N. Y. 481, 486; People v. Forrest, 96 N. Y. 544, 548; In re Morewood Realty Holding Co., 241 App. Div. 841, 271 N. Y. S. 392, 396. As stated above, the allegations of the complaint herein disclose that the error of the assessor, if any, in adopting the book value determined by plaintiff's bookkeeper, rather than computing such value for himself, as was his alleged custom, cannot by any stretch of the imagination be characterized as clerical, but rather goes to the substance of the assessment and to the propriety of the assessor's judgment in so doing.

In conclusion, we experience no difficulty with the case of Pacific Coast Co. v. Wells, 134 Cal. 471, 66 P. 657, cited by the respondent as being "on all fours with the present case." At the time that case was decided, section 3804, supra, did not provide, as it now does, for a refund where an excessive assessment resulted from a "clerical error" of the assessor. In the cited case plaintiff's bookkeeper had inadvertently reported its solvent credits at $323,776.51 instead of $223,776.51, thus causing plaintiff to pay a tax on nonexistent property of the value of $100,000. Section 3804, supra, then provided for a refund of taxes "erroneously or illegally collected," whereupon this court by writ of mandate directed the county auditor to refund the excess, as provided in a resolution of the board of supervisors, as a tax "on property that had no existence." However, even had the Code section then provided for a refund based on a "clerical error" of the assessor, the cited case, as distinguished from the cause now before us, clearly presented a situation wherein a "clerical error" had occurred by reason of plaintiff's bookkeeper inadvertently using the figure $323,776.51 when he intended $223,776.51, which clerical error was copied and adopted by the assessor in fixing the assessment. In the present case, as already stated, neither plaintiff's bookkeeper nor the assessor had fallen into a "clerical error," in the true meaning of that term, but, on the contrary, the former had intentionally adopted a certain system of bookkeeping, some of the figures of which the latter had apparently just as deliberately adopted. Under the circumstances, any impropriety in the conduct of either cannot be said to be the result of a "clerical error." Our conclusion makes it unnecessary to discuss other contentions advanced by the parties.

The motion to affirm is denied, and the judgment is reversed with directions to the court below to enter its order sustaining the demurrer to the complaint.

We concur: SHENK, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

2 Cal.2d 152

FULLER v. BERKELEY SCHOOL DIST. OF ALAMEDA COUNTY et al.

S. F. 15077.

Supreme Court of California.

Dec. 27, 1934.

Rehearing Denied Jan. 25, 1935.

1. Appeal and error ⇐1010(1)

Findings of trial court supported by evidence will not be disturbed.

2. Schools and school districts ⇐141(4)

Dismissal of part time assistant and associate kindergarten directors at close of school year and employment of directors only *held* within statute authorizing decrease of number of employees on account of discontinuance of particular kind of service (School Code, § 5.710).

3. Schools and school districts ⇐141(1)

Where teacher serving as part-time assistant and associate kindergarten director was lawfully dismissed because of policy to employ directors only, teacher was not entitled to assignment to teach in primary grades or to re-employment unless policy to employ part-time assistant or associate kindergarten directors should be re-established within one year of teacher's dismissal (School Code, §§ 5.710, 5.712).

On Petition for Rehearing.

4. Schools and school districts ⇐141(1)

Provision that school board may discontinue a particular kind of service requires that board act in "good faith," which connotes without subterfuge (School Code, § 5.-710).

[Ed. Note.—For other definitions of "Good Faith," see Words & Phrases.]

5. Mandamus ⇐187(9)

Good faith of school board in discontinuing employment of part-time assistant and associate kindergarten director cannot be considered on appeal where trial court's finding of school board's good faith was supported by evidence (School Code, § 5.710).

LANGDON and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Mandamus by Ida Clare Fuller against Berkeley School District of Alameda County, State of California, etc., and others to compel defendants to reinstate plaintiff as a kindergarten teacher. From a judgment for defendants, plaintiff appeals.

Affirmed.

Prior opinion, 27 P.(2d) 109.

Frank M. Carr, of Oakland (W. W. Laidley, of Oakland, of counsel), for appellant.

Earl Warren, Dist. Atty., Alameda County, Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for respondents.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, amici curiæ for Los Angeles City School Dist.

PER CURIAM.

A petition for hearing in this case was granted for the purpose of giving further consideration to the questions presented. After a full consideration of the evidence and the arguments, we conclude that the findings and conclusions of the trial court that the particular kind of service rendered by the plaintiff as a teacher in the Berkeley school district of Alameda county was discontinued; that the discontinuance thereof was not a subterfuge nor an expedient for the purpose of evading the Teachers' Tenure Act; and that the plaintiff was not entitled to a writ of mandate to compel her reinstatement as a teacher in the district, are sustained by the facts and the law. We therefore adopt the following portions of the opinion of the District Court of Appeal, First Appellate District, Division 2, prepared by Mr. Justice Sturtevant, as the opinion of this court:

From a judgment refusing to her a writ of mandate the plaintiff has appealed. From 1923 down to the end of the school year June, 1932, the plaintiff was a teacher in the defendant district. At that time the defendant board, claiming to act under the statute, made certain changes regarding the teachers. By virtue of that change the plaintiff and all others holding the same status were dismissed. The plaintiff contends that the change was wrongful. These conflicting contentions arise out of the following facts: During the entire period of plaintiff's employment by the district there were three classes of teachers teaching in the kindergartens of the Berkeley school district: Directors, assistant directors, and associate directors. Each kindergarten class was in the independent charge of a kindergarten director who was responsible to the principal of her school and to the superintendent of schools of the

city of Berkeley for the conduct of the kindergarten in her charge. The assistant and associate kindergarten directors took orders from the directors and were responsible only to the director under whom they taught. The assistant and associate kindergarten directors were employed to assist the kindergarten directors when the number of children in any one kindergarten exceeded a specified number. If the number of children was over thirty and under fifty-six, an assistant kindergarten director was employed to assist the director, and if the number was fifty-six and over, an associate kindergarten director was employed to assist the director. Kindergarten directors, assistant kindergarten directors, and associate kindergarten directors rendered only a half day's service during the entire period of plaintiff's employment until the second term of the year 1931–1932.

The rate of compensation of the three classes of kindergarten teachers was different. A kindergarten director received seven-eighths of the amount fixed in salary schedule for a full-time teacher and this amount increased automatically with the length of service in accordance with the salary schedule. The salaries of assistant directors remained at $4 per day, and the salaries of associate directors remained at $5 per day, regardless of the length of service. The director in each case determined the program and activities for each week and day.

The director, in addition to teaching, performed the following duties which the assistant and associate directors were not required or permitted to perform: Kept the state school register; made and swore to the correctness of the annual report to the county superintendent of schools; prepared and signed the requisitions for supplies needed to conduct the kindergarten in her charge; gave directions to her assistant and associate directors as to the duties they were to perform; prepared monthly reports required by the Berkeley board of education; received orders from the principal; and determined the weekly and daily programs and activities for the kindergarten in her charge.

The record of plaintiff shows that she entered the employment of the Berkeley school district in August, 1923, and served during the school year of 1923–1924 as an assistant kindergarten director; that during the first term of the school year 1925–1926 she served as a kindergarten director, substituting for the regular teacher; that during the second term of the school year 1925–1926 she served as an associate kindergarten director; that during the school year 1926–1927 she served as an acting kindergarten director; that during the school years 1927–1928, 1928–1929, 1929–1930, and 1930–1931 she served as an assistant kindergarten director; that during the first term of the school year 1931–1932 she served as an assistant kindergarten director; and that during the second term of the school year 1931–1932 she served as an associate kindergarten director.

From the time plaintiff became an employee of the Berkeley school district until March, 1925, she held a kindergarten primary certificate, qualifying her to teach kindergarten and the first grade. Later she obtained a kindergarten, first, second, and third grade certificate, and, at the time of her dismissal at the close of the school year 1931–1932, she held a life certificate qualifying her to teach kindergarten and the first, second, and third grades.

During the school year 1931–1932, the board of education of the Berkeley school district reorganized the administration of the kindergartens of the district, effective July 1, 1932. The kindergarten directors, as a result of this change, taught one class in the morning and one in the afternoon, instead of one class only in the morning. On April 25, 1932, the board of education of the city of Berkeley and of Berkeley school district of Alameda county resolved and ordered that on account of the reorganization of the kindergartens during the school year 1931–1932, the kind of service rendered by assistant and associate kindergarten directors be discontinued at the close of the school year 1931–1932, and that all assistant and associate kindergarten directors be dismissed at the close of the school year 1931–1932. Plaintiff was given a written notice of dismissal in accordance with this resolution, which was dated April 29, 1932, and was received by plaintiff on or about May 1, 1932.

All other assistant and associate kindergarten directors of the Berkeley school district were also dismissed at the close of the school year 1931–1932, and since that time the only kindergarten teachers in the district are kindergarten directors.

On June 30, 1932, the particular kind of service rendered by assistant and associate kindergarten directors was discontinued.

[1] It may be conceded that there was some evidence in conflict with some of the foregoing statements. However, it must also be conceded that there was evidence supporting each of said statements and that all of said statements are substantially in the language

of the findings of the trial court. Under these circumstances the findings may not be ignored by this court.

[2] The plaintiff asserts that she was wrongfully dismissed and she cites and relies on Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042, and other cases following the doctrine of that case. However, both parties concede that the exact question before us has never before been decided. The defendants claim they acted within the clear terms of the statute. School Code, § 5.710. They quote as follows: "It is hereby provided that whenever it becomes necessary to decrease the number of permanent employees in a school district * * * on account of the *discontinuance of a particular kind of service* in such district, the governing board may dismiss such employee at the close of the school year." The defendants call attention to the words which we have italicized. They claim that what they did was clearly within the terms of the statute. They specially call our attention to the ordinary meanings of each of the words as defined in Webster's Dictionary. We think their argument is sound. Furthermore, other provisions of the statute throw much light on the subject. The maintenance of the kindergarten department is optional in every district. To some extent the teaching of certain subjects is mandatory, the teaching of other subjects is optional. "Part-time teaching or supervision" is also recognized by the statute. School Code, § 5.880. "Discontinuance" of services or teaching is also recognized by the statute. School Code, §§ 3.140 and 5.710. The word "serve" and the word "service" are used many times in the statute. Sections 3.32, 5.710, 5.712, 5.730, 5.731, 5.772, 5.734, 5.744, 5.890, 5.900, 5.773, 5.800, 5.801, 5.810, 5.811, 5.812, 5.814, 5.820, 5.831, 5.832, 5.840, 5.882, 5.892, 5.893, 5.895, 5.902, 5.903, 5.904, 5.885. An examination of such passages shows that "to teach" is "to serve" and vice versa, and that "services" of the teacher are "teaching" and "teaching" is "services." * * * Under the facts recited above it is plain that the plaintiff was a helper only and acting under the direction of certain superiors. At the end of the school year, having complied with the various provisions of the law, the defendants were clearly within their rights in limiting their employees to directors each teaching a full day instead of employing associates or assistants who taught only a half day and then under the direction of the director.

The judgment is affirmed.

[3] The plaintiff insists that, assuming the kindergarten service rendered by her was discontinued, she was nevertheless entitled to an assignment to teach in the primary grades in accordance with her certificate. This could be so only in the event she had been improperly dismissed. If section 5.710 of the School Code means anything, it must be taken to mean that when a particular kind of service is discontinued, the teacher employed in that service may be dismissed and no obligation devolves upon the district to retain her or to re-employ her except in accordance with section 5.712 of the School Code. That section provides that if the discontinued service is re-established within one year, the dismissed employee shall have the preferred right to reappointment. Under these circumstances, the offer of counsel for the plaintiff to produce further evidence that probationary teachers have been employed to teach classes to which the plaintiff claims to be entitled to an assignment as a permanent employee would be unavailing.

The plaintiff further insists that all of the decisions upon which she relies have not been considered in arriving at the conclusion that she was rendering a "particular kind of service." None of the cases thus far touching the question present facts or conclusions thereon which are helpful or controlling in the case at bar. Of necessity, each case must be determined upon its own particular facts. It is urged that inasmuch as the employment involved here was kindergarten teaching and kindergarten teaching is still a service being performed in the school district, the service performed by the plaintiff has not been discontinued. But the particular kind of kindergarten service which the plaintiff was employed to render has been discontinued. That more than one kind of kindergarten service, viz., three kinds or classes of such service, were established in the district prior to the plaintiff's dismissal is fully supported by the record here presented, and no showing is made that the action of the board was not taken in good faith.

The judgment is affirmed.

LANGDON, Justice.

I dissent. I think that the foregoing opinion misinterprets the provisions of the statute, and sanctions a device which may in hostile hands destroy the system of teachers' tenure. That system has raised immeasurably the dignity and professional competency of our teachers, and the legislative act which es-

tablished it requires an interpretation which carries out, and not one which defeats its purpose.

The classification of kindergarten teachers as "directors," "associates," and "assistants" is ingenious but dangerous. Why not directors, associates, and assistants of first grade, fifth grade, eighth grade teaching? Why not the same classifications in the high schools? There is nothing to prevent it, under this opinion. And once a group of teachers is classified in these convenient but useless brackets, what is easier than to cut off the appendages and terminate the employment of the teachers so classified?

There are three permissible grounds for dismissal of permanent employees under the statute: Misconduct or unfitness, decrease in the number of pupils attending the schools, and discontinuance of a particular kind of service. School Code, §§ 5.661, 5.710. Economies may be effected where the attendance has fallen off, but such was not the case here. It is the last ground, discontinuance of the service, which is relied upon to justify the action taken by the board. The meaning of the statutory language, "discontinuance of a particular kind of service," seems reasonably clear. In Martin v. Fisher, 108 Cal. App. 34, 41, 291 P. 276, 278, it was paraphrased as the "discontinuance of a course of instruction in which the teacher is engaged." A teacher who teaches kindergarten in rendering the same service whether called a director, associate, or assistant. Aside from immaterial clerical duties assumed by a director, the service performed, the teaching, was exactly the same. How can it sensibly be said that plaintiff, a kindergarten teacher, has been dismissed because of a discontinuance of the service when others remain to teach the same thing in the same way? The sole purpose and effect of the arbitrary classification of so-called services in this case was to do what the law forbids—permit the discharge of a permanent teacher whose subject was still taught.

I am further of the opinion that the majority of the court have failed to give adequate weight to the fact that plaintiff also was qualified by her certificate to teach the first, second, and third grade, and that even though the entire kindergarten had been abolished, would still be entitled to a position in accordance with her certificate and her priority of service. The record shows that when plaintiff was dismissed, a probationary teacher was teaching the third grade in the Cragmont school. Why was not plaintiff entitled to that assignment? The opinion does not, and I think that it cannot satisfactorily answer that question.

I concur: CURTIS, J.

On Petition for Rehearing.

PER CURIAM.

[4, 5] On petition for rehearing great apprehension is expressed by the petitioner lest the whole teachers' tenure system be upset if the decision stand. This fear is without foundation under the facts in the case. Under the School Code, the board is authorized to classify the service and under section 5.710 the board is authorized to discontinue particular kinds of service provided the same be done in good faith. Under the School Code, the maintenance of a kindergarten department is optional. In some districts it may be more expansive than in others. The board necessarily has the discretion to classify the services in that department and it is authorized under section 5.710 to discontinue a particular kind of service in that department, provided the same be done in good faith, which connotes without subterfuge. If there are permanent teachers in the discontinued service, they may be dismissed, subject to their right to re-employment in the event the discontinued service be re-established. The question of the good faith of the board in taking the challenged action was an issue in the trial court, was determined against the petitioner on sufficient evidence, and may not here again be litigated for the purpose of reversing the judgment.

The petitioner insists that inasmuch as at the time of the discontinuance of the classes of service involved, a probationary teacher was teaching in the third grade of the Cragmont school, the petitioner had the right to be appointed to teach that grade in the place of the probationary teacher. The claim of the petitioner is that, because she had established tenure in the discontinued class of service from which she had been dismissed, and because she also possessed a certificate qualifying her to teach in some other class of service, she had a right under the teachers' tenure system to be appointed to a position to teach in such other class of service for which she was also certificated and which was then held by a probationary teacher. It may be assumed that the general purposes and objects of the teachers' tenure system contemplate that whenever possible teachers who possess permanent tenure at the time of their dismissal under the particular section involved shall be preferred in employ-

ment in other classes of service to teachers who had not established tenure, and it is not intended by the decision to disturb any custom or policy, adopted in recognition of the purposes and objects of the system, to appoint such dismissed teachers to positions in other classes of service held by probationary teachers. But the only right to re-employment which may be said to become here the subject of compulsory action on the part of the board in an appropriate proceeding is the right expressly conferred by section 5.712 to reappointment should the discontinued service be re-established. No preference rights are expressly declared by section 5.710, which sections 5.711 and 5.712 do expressly declare a preference in cases of which this is not one. The reason for the failure of the Legislature to provide expressly for the preference right claimed by the petitioner may be said to be indicated by the incongruous situation resulting from the fact that nine teachers, including the petitioner, were dismissed when the particular classes of service here involved were discontinued and that those nine teachers might be supposed to have the right to the position held by the third grade probationary teacher.

The petition for rehearing is denied.

We dissent: CURTIS and LANGDON, JJ.



2 Cal.2d 770

DAVIS v. BERKELEY SCHOOL DIST. OF ALAMEDA COUNTY et al.

S. F. 15078.

Supreme Court of California.

Dec. 27, 1934.

Rehearing Denied Jan. 25, 1935.

Schools and school districts ⇨141(2)

Dismissal at close of school year of expert art teacher, who traveled from school to school teaching pupils and classroom teachers, pursuant to arrangement to have art taught by departmental teachers and supervisor of art *held* within powers of school directors.

LANGDON and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Mandamus by Mary Stewart Davis against Berkeley County School District of Alameda County, state of California, etc., and others, to compel defendants to reinstate plaintiff as a traveling teacher in art. From a judgment for defendants, plaintiff appeals.

Rehearing denied; Curtis and Langdon, JJ., dissenting.

Affirmed.

Prior opinion, 27 P.(2d) 111.

Frank M. Carr, of Oakland (W. W. Laidley, of Oakland, of counsel), for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Agnes R. Polsdorfer, Deputy Dist. Atty., all of Oakland, for respondents.

PER CURIAM.

The plaintiff appealed from a judgment that she was not entitled to a writ of mandate to compel her reinstatement as an employee of the defendant Berkeley school district of Alameda county.

The plaintiff was performing service as a traveling teacher in art. Three such teachers were employed by the district as experts to go from school to school and give instruction in that subject to certain classes and to the regular classroom teacher, who also gave instruction in the subject. The service performed by these so-called traveling teachers in the subject of art was discontinued at the end of the school year 1931–1932, of which the plaintiff was given due notice. The subject was thereafter taught only by the regular departmental teachers and by the supervisor of art who had theretofore also taught that subject.

The disposition of this appeal is governed by the principles involved in the case of Fuller v. Berkeley School District of Alameda County (Cal. Sup.) 40 P.(2d) 831, this day decided. From the facts presented herein, the same conclusions must be drawn. On the authority of that case, the judgment is affirmed.

LANGDON, Justice.

I dissent, for the reasons expressed in my dissenting opinion in the case of Fuller v. Berkeley School District (Cal. Sup.) 40 P.(2d) 831.

I concur: CURTIS, J.

4 Cal.App.2d 308

In re JOHNSON.

JOHNSON v. WILSON.

Civ. 9096.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1935.

Newspapers ⇐3(5)

Newspaper having approximately 200 on its subscription list, and 150 paying subscribers, all located within city and county of publication, *held* "newspaper of general circulation," and authorized to publish legal notices (Pol. Code, § 4460).

[Ed. Note.—For other definitions of "Newspaper of General Circulation," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Application of Rodney Johnson, attorney, to have the status of the Herald of North Los Angeles, city of Los Angeles, Cal., established as a newspaper of general circulation under section 4460 of the Political Code of California, contested by E. Wilson. From the judgment so establishing the status of the paper, contestant appeals.

Affirmed.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for appellant.

Rodney Johnson, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

Under appropriate proceedings the superior court made the following adjudication: "It is ordered, adjudged and Decreed: That petitioning newspaper. 'The Herald' is a newspaper of general circulation as that term is defined in section 4460 of the California Political Code; that all the requirements of sections 4460 and 4462 Political Code of California have been met and followed by said petitioning newspaper; and that said petitioning newspaper is competent to print and publish all legal notices required by law, or permitted by law to be printed and/or published in a newspaper of general circulation printed, published and distributed in the City of Los Angeles, County of Los Angeles, State of California."

Mr. E. Wilson contested such adjudication and appeals on the judgment roll supplemented through stipulation by a stipulation of fact that was used below. This stipulation does not purport to constitute all of the facts submitted to the superior court.

There is nothing in this stipulation of fact that would justify our reversing the conclusions reached below, unless it is that the Herald had approximately 200 on its subscription list, and 150 paying subscribers, 90 per cent. of which paid circulation was within the San Fernando valley of the city of Los Angeles and 10 per cent. without such city, all within the county of Los Angeles. We are justified, we think, in assuming that this recital of circulation was the best the Herald could or did support with testimony.

We do not wish our conclusions to be understood to express our own opinions as to the efficacy of such a paper as a notice-carrying publication, but we do think the testimony supports the findings and judgment under the requirements of section 4460 of the Political Code.

The judgment is affirmed.

I concur: CRAIL, J.



4 Cal.App.2d 421

PEOPLE v. PARKER.

Cr. 2665.

District Court of Appeal, Second District, Division 2, California.

Feb. 7, 1935.

Hearing Denied by Supreme Court March 7, 1935.

1. Homicide ⇐244(1)

Evidence *held* to support conviction of second-degree murder as against defense of self-defense.

2. Criminal law ⇐388

Reception or rejection of evidence of experiments lies largely within discretion of trial court, with limitation thereon that it must be shown that substantially same conditions existed and further that evidence shall be of such character as to aid rather than confuse triers of fact with collateral matters.

3. Criminal law ⇐388

In murder prosecution, evidence of experiment involving attempt to imitate different voices of individuals from a distance of some 90 feet during accompaniment of bark-

ing of dogs *held* properly excluded for failure to substantially reproduce same conditions, particularly where evidence would be cumulative and was offered to impeach witness.

4. Homicide ⇐191, 339

In murder prosecution in which defendant claimed self-defense, evidence that police had been called earlier on evening of homicide to quell disturbance made by deceased at another place and not in presence of or made known to defendant was properly excluded; and exclusion was not prejudicial in view of full disclosure of previous aggressive acts and conduct of deceased.

5. Homicide ⇐188(4)

In homicide cases where plea of self-defense is interposed and evidence leaves it doubtful whether deceased was aggressor or whether defendant was justified in believing himself in imminent danger at hands of deceased, evidence of deceased's bad reputation in respect to being quarrelsome or dangerous is admissible.

6. Criminal law ⇐448(2), 670

In murder prosecution in which defendant claimed self-defense, exclusion of testimony whether witness knew whether deceased was dangerous man, and whether witness knew anything about deceased's reputation, *held* not error, since first question asked for personal opinion and second was preliminary and in itself incomplete and inquiry was not pursued.

7. Homicide ⇐319

Affidavit in support of motion for new trial, in murder prosecution, referring to threat to "beat up" defendant, made shortly before affray, did not warrant new trial where it was only cumulative as proof of who was aggressor.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Dan H. Parker was convicted of murder in the second degree, and he appeals.

Affirmed.

Curtis C. Taylor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John O. Palstine, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

This is an appeal from a judgment and from an order denying motion for new trial. Appellant was charged with the crime of murder, was tried before the court without a jury, and found guilty of murder in the second degree. He presents two general issues of law for decision on this appeal, namely, insufficiency of the evidence to sustain the decision and judgment, and errors in refusing admission of evidence.

[1] On September 8, 1934, at about 7:30 in the evening, defendant from within his own home heard deceased calling him in loud and profane language to come out. Deceased was at that time outside defendant's yard, near a gate entering the same, which gate was closed. Defendant and his wife went out close to the gate, the defendant having secured from his bedroom and placed in his pocket a loaded revolver. At the gate words were passed between the parties concerning a 50-cent debt, the deceased making threats to fight and efforts to enter the gate, but being prevented by defendant's wife. During the progress of this altercation, while deceased was outside the fence and defendant inside thereof, the latter fired a shot from the revolver at deceased, which resulted in his death a few minutes later. At the trial defendant claimed self-defense as justification of the shooting, and urges here that the evidence supports such defense and is therefore insufficient to sustain the judgment of guilt. It is unnecessary to repeat herein the items of evidence adduced at the trial. We have carefully examined the same as contained in the reporter's transcript and find therein ample support for the decision of the court and for a negation of the claim of self-defense.

[2, 3] During the trial a witness testified that she saw defendant and his wife and deceased during the altercation and heard certain words spoken by them. Defendant sought and offered to prove by evidence of experiments as to audibility of voices, subsequently made, that the witness could not have heard what she said she heard. Objection to such evidence was sustained, of which ruling appellant complains. To render evidence of experiments admissible there must be a possibility of reproducing substantially the same conditions which existed when the original occurrence took place. The reception or rejection of such evidence lies largely within the discretion of the trial court with the limitation thereon that it must be shown that substantially the same conditions existed: and further that the evidence shall be of such a character as to aid rather than to confuse the triers of fact with collateral matters. People v. Woon Tuck Wo, 120 Cal. 294, 52 P. 833; People v. Ely, 203 Cal. 628, 265 P. 818.

We are satisfied that in this case no substantial reproduction of the same conditions could be made. The experiment involved an attempt to imitate different voices of individuals from a distance of some 90 feet, during an accompaniment of the barking of four dogs within the same zone. The impracticability of accomplishing this experiment with substantial conformity to the original episode would seem to require the trial court, in its exercise of discretion, to refuse admission of the evidence thereof. Furthermore, it is clear that this evidence was not offered to establish any substantial fact, but to impeach the witness in respect to testimony to the effect that she heard certain words spoken concerning a 50-cent debt. Both defendant and his wife testified that such 50-cent debt was spoken of by each of the parties during the altercation, and the testimony sought to be introduced would be cumulative upon an incident rather than the act constituting the crime.

[4] Evidence tending to show that the police had been called earlier on the evening of the homicide to come and quell a disturbance made by deceased at another place, and not in the presence of or made known to defendant, was offered by defendant and refused admission. There was no error in this ruling. Such evidence was offered to show that deceased was "on a rampage." It was not offered as evidence to show who was the aggressor in the affray some time later between deceased and defendant; and upon the face of the record we cannot say that the rejection of this evidence prejudiced the rights of appellant. Had it been so offered and rejected, we would still be bound to hold that no prejudice resulted, in view of the full disclosure of the previous aggressive acts and conduct of the deceased and the evidence which showed that he was "on a rampage" on the occasion at the gate.

[5, 6] The following question was asked a witness: "Now, Mr. White, did you know whether or not Jones was a man that was a dangerous man?" Objection thereto was sustained. He was then asked: "Did you know anything about the reputation of Jones?" Objection to which was also sustained. Counsel for defendant then stated his purpose was to show deceased's character. It is the rule in homicide cases, where the plea of self-defense is interposed and the evidence already in leaves it in doubt whether deceased was the aggressor, or where the circumstances attending the homicide render it doubtful or equivocal whether the defendant was justified in believing himself in imminent danger at the hands of deceased, that evidence of the bad reputation of the deceased in respect to being quarrelsome or dangerous is admissible. People v. Lamar, 148 Cal. 564, 83 P. 993; People v. Smith, 48 Cal. App. 776, 192 P. 321. Appellant suffered no prejudice by the rulings complained of. The first question clearly asked for a personal opinion and was improper. The second question was preliminary, and in itself insufficient and incomplete, and the inquiry was not pursued. No offer to prove bad reputation of deceased in respect to being quarrelsome or dangerous was made.

[7] A motion for new trial was heard and denied by the trial judge. He heard and observed witnesses and had opportunity to test the truth of their statements as well as those of defendant, and was in a situation peculiarly favorable to weigh the same and determine the facts. We find no basis in the record warranting the substitution of the discretion of this court for that of the trial court. On the question of sufficiency of the evidence to sustain the decision, the second decision thereon by the trial judge, when he denied the motion for new trial, is persuasive. The affidavit in support of the motion, referring to a threat to "beat up" the defendant, made shortly before the affray, adds nothing to the case sufficient to warrant a new trial, as it was only cumulative as proof of who was the aggressor.

Finding no error in the record, and it appearing that appellant had a fair trial, the judgment and order denying the motion for new trial are, and each of them is, affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

4 Cal.App.2d 143

McLEOD v. REYES et al.

Civ. 5250.

District Court of Appeal, Third District, California.

Jan. 25, 1935.

1. Navigable waters ⇐37(4)

Where United States patent included southerly limits of rancho to high-tide line of ocean, and supplemental pleading in partition proceeding called for partition of the patented premises, interlocutory decree ordering partition of premises set forth in complaint and containing description following that of patent *held* to cover everything covered by the patent, whether inside or outside of meander line run by United States surveyors.

2. Partition ⇐95

Decrees in partition proceedings must be read in light of relief sought in complaint as originally filed and as added thereto by supplemental pleadings, as respects question whether allotment included that portion of littoral lands lying between meander line as run by United States surveyors and high-tide line.

3. Navigable waters ⇐37(4)

Partition decree covering littoral lands comprised within United States patent and Mexican grant *held* to include, within allotment in question, lands lying between meander line as run by United States surveyors and line of high tide, since a meander line is run to determine acreage having value and not to establish boundary (Code Civ. Proc. § 764).

4. Partition ⇐95

Partition decree allotting littoral lands *held* not required to describe specifically by metes and bounds the small strip of beach land, not valuable at the time, between meander line run by government surveyors and high-tide line, since, in absence of contrary intent appearing in instrument, a grantee of upland bordering on tidewater takes to ordinary high-water mark, and court in making partition, as well as parties, must be presumed to have acted with knowledge of such statutory rule (Civ. Code, § 830; Code Civ. Proc. § 764).

5. Partition ⇐73, 95

That interlocutory and final partition decrees covering littoral lands did not include within description by metes and bounds beach land not valuable at the time between meander line run by government surveyors and high-tide line *held* not to render decrees uncertain or void (Code Civ. Proc. § 764; Civ. Code, § 830).

6. Boundaries ⇐3(3)

Where natural objects are referred to as limit of boundary of grant, such objects will be controlling.

7. Partition ⇐73

Interlocutory partition decree describing one of courses as running along coast of ocean *held* to indicate intent to partition lands having boundary line coincident with high-tide line of ocean, thus including beach land between high-tide line and meander line run by government surveyors.

8. Boundaries ⇐13

"Meander line," whether state or national, is not considered boundary line, but is used only for determining acreage for which charge should be made when title is transferred to private parties, as well as for convenience.

[Ed. Note.—For other definitions of "Meander Line," see Words & Phrases.]

9. Navigable waters ⇐37(4)

Rule that, unless different intent is shown by instrument of conveyance, a grant of tidewater lands between private parties conveys to high-tide line applies, notwithstanding meander line run by government surveyors (Civ. Code, § 830).

10. Partition ⇐92

Where beach land between meander line run by government surveyors and high-tide line was of no appreciable value at time of partition, fact that value thereof increased subsequently and that surveyor and referees figured respective allotments down to small fraction of acre, but did not include beach land in the acreage, *held* without bearing in determining, in quiet title action, whether beach land was included in allotment on principle that grant of upland carries title to high-tide line (Civ. Code, § 830).

11. Partition ⇐92

In proceeding to partition large rancho covered by United States patent, beach land between meander line and high-tide line *held* negligible quantity as compared to entire tract, and hence was properly omitted by referees in determining values in making respective allotments (Code Civ. Proc. § 764).

12. Adverse possession ⇐75

When possession was taken by original grantees of any portion of upland conveyed by government, and subsequently when possession was taken of any portion of such upland by allottees in partition proceeding, such possession constituted taking possession under color of title of entire parcel, including strip between meander line of survey and high-tide line of ocean, so that actual pedis possessio of every part of the strip was not

necessary to constitute adverse possession by such allottees or grantees.

This was true, since, when land was conveyed by government to original grantees, conveyance of upland carried title to line of high tide and gave color of title, not only to the upland, but also to strip between meander line of survey and high-tide line of ocean.

13. Adverse possession ⇐85(3)

Evidence showing that summer cabins were erected which were rented during summer, that premises were rented to campers and moving picture concerns, and that sand and gravel were sold, etc., *held* to show such exercise of dominion over, and possession of, disputed strip of beach land as to sustain finding of title by adverse possession.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Stuart A. McLeod against Ysidro Reyes, Leonard Slert, the Title Insurance & Trust Company, the Los Angeles Mountain Park Company, the Castellammare Beach Corporation, and others, in which named corporations filed a cross-complaint against Leonard Slert and others. From a judgment quieting the title of the named corporations to certain lands, Leonard Slert and others, defendants and cross-defendants, appeal.

Affirmed.

Harold E. Thomas, Byron D. Seaver, Harry M. Irwin, and John C. Packard, all of Los Angeles, for appellants.

Flint & MacKay, Hunsaker, Britt & Cosgrove, Cosgrove & O'Neil, and Overton, Lyman & Plumb, all of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the defendants, cross-complainants, and respondents Title Insurance & Trust Company, a corporation, Los Angeles Mountain Park Company, a corporation, and Castellammare Beach Corporation, a corporation, had judgment quieting title to the lands and premises claimed by them, acquired by mesne conveyances from former owners of the tracts claimed by the respective corporations, to whom the respective lots or tracts had been allotted in a partition suit prosecuted to final judgment in the district court (now superior court) of Los Angeles county. From this judgment certain of the defendants have appealed.

The action as originally begun involved title to a strip of land bordering the Pacific Ocean, approximately 5 miles in length, and, if we accept the offer to prove the average width thereof at 75 feet, included a trifle more than 45 acres. Upon this appeal only that portion of the lots fronting on the Pacific Ocean, the ownership of which was found to be in the corporations just named, is involved. The tract in dispute lies between the meander line, as run by the United States surveyors, and the Pacific Ocean. There is no controversy, however, that the United States patent carried ownership to the line of high tide, and that the survey line running along the Pacific Ocean was only a meander line, and not intended as the true boundary.

The lots of land of which the corporations above named are the respective owners is a portion of a larger tract known as the "Rancho Boca de Santa Monica," a Spanish grant made by the Mexican government in 1839 to Francisco Marquez and Ysidro Reyes.

Pursuant to the treaty entered into between Mexico and the United States, after the conclusion of the Mexican War proceedings were instituted in 1851 to secure confirmation of title to this land. Pending the securing of a United States patent and a patent from the state of California, partition proceedings were instituted, and, upon the issuance of the patents referred to, supplemental pleadings were filed in the action just referred to, and partition had of the lands included in the Mexican grant.

Omitting courses and distances, the following excerpts from the United States patent sufficiently describe the rancho as patented by the United States government:

"Beginning at a bluff, a sharp hill which divides a canada overgrown with tule near the sea at the place known as 'Topango' Point, running thence easterly along the beach seven thousand five hundred varas to a gulch which opens in the wall or precipice formed by the sea; thence northerly four thousand varas to the point where the line passes the path leading down to the Canada de la Iglesia in a line with a small red bluff of the same canada; thence westerly along the Sierra and parallel with the coast to a point opposite the place of beginning; thence southerly to the place of beginning, containing one and one-half square leagues of land. * * *

"Beginning at a sand stone thirty-seven by twenty-five by four inches marked 'B-1,' set eighteen inches deep in earth and surrounded by a mound of earth and stone eighteen inches high on the point of a sandy bluff about ten feet above high water mark to Point 'Topango' of the juridical possession, from which stone the corner of the United States Coast Survey Signal Station bears north fifteen degrees and forty-five minutes west twenty-six chains and thirty-two links distant, and the line of the coast to the west bears north seventy-one degrees west, and running thence according to the true meridian the variation of the magnetic needle being fourteen degrees and thirty minutes east, along the coast of the Pacific Ocean."

The estimated number of acres included within the grant was 6,656.93. This estimate is less by some 73 acres found to be included within the patent, according to the survey made for the purposes of partition. According to the field notes of the survey and the specific description of the lots contained both in the interlocutory and final decree of partition, the meander line along the coast of the Pacific Ocean appears to have been followed, which gives rise to the present controversy urged by appellants that the meander line was adopted and became the boundary line of the premises distributed to the grantors of the parties to whom judgment was awarded in this action, and that no partition was made of the lands lying between such meander line and the line limiting the high tide of the Pacific Ocean.

It must be borne in mind the partition was ordered in 1883, at a time when the beach land was of no practical value, and therefore in making partition could not have reasonably been taken into consideration in determining the values of the respective allotments in order to make an equitable partition of the rancho.

We may also here add that, while innumerable objections have been raised as to the correctness of the findings and judgment of the trial court, which have all been considered, only those deemed vital to a decision in this cause will be set forth herein.

Briefly, the determination of one question is decisive of this cause, to wit: Did the final decree of partition heretofore referred to distribute to the allottees, grantors of the respondents herein, the lands lying between the meander line as run by the United States government and the line of high tide of the Pacific Ocean? If so, the appellants have no right thereto.

As a secondary question, the respondents claim title by adverse possession.

[1] As a preliminary statement of facts upon which the complaint in partition was based, the supplemental pleadings set forth the issuance of a patent in 1881, as shown by the official records of the county of Los Angeles, reference to which was specifically made for a particular description of the premises in which the exterior boundaries of said rancho were finally established and determined; the parties praying that the lands and premises so patented be partitioned.

No issue is presented questioning the fact that the United States patent carried the southerly limits of the rancho to the high tide of the Pacific Ocean. The prayer of the supplemental pleading to which we have referred calls for a partition of the patented premises, which means premises having a southern boundary coincident with the high-tide line of the Pacific Ocean.

The interlocutory decree following the hearing had upon the petition for partition contains an order from which we quote the following: "It is hereby ordered and adjudged that the rights and interests of the several parties to this action in and to the lands described and sought to be partitioned in the complaint herein are as follows," etc. "It is further ordered and adjudged that partition be made of the land and premises mentioned and set forth in the complaint in this action and hereinafter described." The description follows the patent issued by the United States government. The interlocutory decree further ordered, as a reference thereto clearly shows, that the referees should make partition of the rancho so that each allottee would receive his fraction of the whole of said lands and premises. This language certainly would include every acre of the rancho covered by the United States patent, whether it lay inside or outside of the meander line run by the United States surveyors. Direction was also contained in the order that the referee should make provision for rights of way, etc.

We do not need to follow either the surveyor's report or the reports of the referees further than to state that the referees had the exterior lines of the rancho resurveyed and subdivided into section lots of 640 acres, as nearly as possible; that they found that the rancho contained 73.93 acres of land in excess of the quantity mentioned in the patent. Whether the calculations made by the United States surveyor or the survey of

the referees is correct, is wholly immaterial to any issue involved herein. The survey and the report of the referees show that the starting point for making the respective allotments was station No. 17 in the survey of the exterior boundaries of the rancho, fixed by the United States surveyor as the southwest corner. This corner is just a few feet above high tide of the Pacific Ocean. This fact is shown by the following excerpt found in the partition survey, to wit: "Beginning at a sand stone 37x25x4 marked 'B–1,' set 18 inches deep in earth and surrounded by a mound of earth and stone 18 inches high on the point of a sandy bluff about 10 feet above high water mark." Courses and distances were run therefrom around the rancho following and along the southerly portion thereof bordering the Pacific Ocean; the line run by the surveyor corresponding with the meander line heretofore run by the United States surveyor.

[2, 3] Notwithstanding the fact that the pleadings, and also the decrees, both interlocutory and final in the partition proceedings, refer to the maps and plats and the United States survey showing the boundaries of the rancho, it is nevertheless insisted by the appellants, who are heirs of the original allottees, that the southerly boundary line of the premises involved is the meander line, and not the high-tide line of the Pacific Ocean. This contention is specifically set forth in the opinion filed by the learned trial judge, to wit: "In support of that contention it is argued that there is an irreconcilable conflict between that portion of the final decree, wherein the courses and distances of the various allotments are specified, and the balance of said decree. Accordingly, it is claimed that, under such circumstances, the courses and distances are controlling, and hence it is insisted that by confining the parcels allotted to the area embraced within the courses and distances specified in the final decree, there will be found to have been omitted from said allotments a strip of land extending the entire length of said rancho along the shore of the Pacific Ocean, and which strip originally constituted the entire beach frontage of said rancho."

No question appears to be made that the pleadings in the action sought partition of the entire rancho, and we think all the subsequent decrees must be read in the light of the relief sought in the complaint, both as originally filed and as added thereto by supplemental pleadings.

As against this purpose shown by the pleadings, the contention appears to be made that the actual partition included only that portion of the rancho lying within the exterior boundaries called for in computing the acreage, which would embrace no part of the beach or sand land lying between the meander line running from point 1, the beginning place for the United States survey, and station 17, the end of the meander line along the course of the Pacific Ocean, and the actual high-tide line of the ocean. The courses, distances, and measurements, as we have stated, for the survey made in preparation for partition, start from station 17 at an elevation of 10 feet above high tide, and in the concluding portion of the survey running along the southerly line of the rancho follows substantially the meander line run by the United States surveyor. It may here be stated that meander lines are run from station to station, and do not pretend to follow all the sinuosities or curvatures of the shore line bordering a body of water.

While the patents issued in this case describe the shore line of the Pacific Ocean as the southern boundary of the tract, the meander line follows the course of the ocean for the purpose, as we shall hereinafter show, not to establish the actual boundary line of the rancho, but for the purpose of determining the actual acreage within the grant, and we think the same rule applies in partition proceedings where it is sought to partition lands among several owners so that each may have a parcel thereof corresponding in value with each and every parcel distributed to other allottees. The general government, as we shall hereinafter show, while always granting, by its patent, where navigable waters are involved, all the land lying between that which is considered of value and the high-tide line of the navigable waters, such strip is never included for the purpose of determining the amount of money to be charged for the premises conveyed.

The general course of the shore line of the ocean does not appear to have been explained directly by any witness testifying in this case, yet the general course is readily ascertained by a study of the meander line running from station No. 1 to station No. 17 of the United States survey, being generally from the west to the east, delineating the southern boundary of the Mexican grant and the premises included in the United States patent. It is contended by the appellants,

that the measurements of the different tracts allotted must start from a station on the meander line instead of from the high-tide line of the Pacific Ocean, in order that the lines run by the respective surveyors may be made to meet, and that, unless the meander line is considered as the true boundary, the whole allotment is thrown into confusion, and therefore the final decree of partition is void. In behalf of this contention, a very lengthy argument is presented and numerous cases cited to support the position assumed that, where an instrument is uncertain in its descriptions, and cannot be reconciled, it must be held void. In other words, it is argued that, if the high-tide line of the ocean is considered as a southern boundary, then and in that case none of the calls in the survey setting out the different allotments can be made to meet or describe the boundaries of any of the several tracts allotted.

The same argument, if well taken, would lead to the conclusion that the United States patent also is void, and that the land lying between the meander line and the high-tide land of the Pacific Ocean never was conveyed by the Mexican grant or the United States government to the original owners through whom all the parties to this action assert title.

We may mention here that it is conceded by all of the parties hereto that the United States patent and the Mexican grant conveyed title to the disputed premises to the original Mexican grantees. In no case which has been called to our attention, and which we have been able to discover, has it been held that a United States meander line along either a stream or a navigable body of water constituted the boundary line of the premises conveyed by a United States patent, save and except where the omitted lands were of such large proportions as to indicate a fraudulent act on the part of the surveyor. Nothing of that kind appears in this case.

Assuming as correct the appellants' offer to prove the average width of the strip as 75 feet, a mathematical calculation which we have made shows that the entire 5-mile strip includes only a fraction over 45 acres, as we have hereinbefore stated. This of course establishes beyond peradventure the good faith of the respective surveys along the shore line of the Pacific Ocean and the fact that the meander line was run as nearly as practicable to the shore line of the ocean.

[4] While some contention is made as to the manner in which the boundary lines should be extended so as to show the respective portions of the sand tracts to which the respective allottees whose tracts bordering on the ocean should be drawn, that question is not before us, and we do not need to give any attention to the three or four methods of drawing such lines. That is an issue which could only be presented if a controversy should arise between the respective owners whose premises border on the ocean.

Again, we think it was unnecessary for the decree of partition to specifically describe by metes and bounds the small strip of beach land to which each allottee would be entitled by reason of his allotment bordering upon the Pacific Ocean, for the reason that section 830 of the Civil Code supplies such omission. That section reads: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The court, in making partition, as well as all of the parties thereto, must be presumed to have acted with a knowledge of the provisions of this section. Thus, when the particular lots were awarded to the grantees of the respondents herein, it carried with the award that portion of the premises in dispute, held by the trial court to belong to the respondents.

[5] Without further elaboration, what we have said we think shows conclusively that neither the interlocutory nor the final decree of partition, making partition of Rancho Boca de Santa Monica, entered in action No. 2405, one on the 6th day of July, 1882, and the other on the 4th day of June, 1883, is either uncertain or void for any of the reasons suggested by the appellants. In making this statement, we are not overlooking any of the requirements of section 764 of the Code of Civil Procedure which requires the referees to divide the property and allot the several portions thereof to the respective parties, quantity and quality relatively considered, so that each allottee may have an equitable portion thereof, designating the several portions by proper landmarks, etc. The landmarks in this case, as shown by the field notes of the surveyor and the report of the referee, are all designated, starting from a point on the meander line

of the survey made by the United States government, and not from the high-tide line, as actually constituting the southern boundary of the rancho as conveyed by the United States patent. The survey and the stakes set by the surveyor and the allotments made by the referees are in strict accordance with the provisions of the law regarding the line run from station No. 1 to station No. 17, only as a meander line and not as an established boundary line; those points and the meander line being used for the purpose of making allotments just as was used by the United States government, and as likewise used by the United States government in selling public lands to ascertain the acreage for which a price should be charged.

In the instant case, the survey and the allotments are made of lands and premises for which the general government would charge a price, and therefore could only be considered in determining the relative values of the tracts allotted.

By the provisions of section 830 of the Civil Code, supra, the small parcels of land lying between the meander line and the high tide of the ocean went to the allottees named in the tracts, bordering the ocean as a matter of course.

No question is presented, nor can any question be presented, that any fraud was committed in the allotments, or that, at the time the allotments were made, the respective parties were not given tracts of land equal in value, as directed by the order of the court. While several cases are called to our attention by the appellants of surveys or patents for land bordering on streams where the boundary line has been held to be coincident with the bank of the stream, and not the middle of the stream, a careful examination of those cases reveals that in each instance there appears in the description a clear and distinct limit of the boundary of the land conveyed. Thus, again, applies the provisions of section 830 of the Civil Code, supra. In those cases, as we have said, a different intent appears in the grant from the intent which would carry the conveyance to the middle of the stream.

We do not find that the respondents' question that, where an intent appears from the grant to limit the boundary to the bank of a stream, such intent will be enforced and the boundary line held to be coincident with the bank of the stream, and not the middle of the stream bordering the land conveyed.

[6, 7] Again, if natural objects are referred to as being the limit of the boundary of the grant, those natural objects will be controlling. Here, however, there is nothing to indicate a different intent than that the high tide of the Pacific Ocean should be considered as one of the boundary lines. The interlocutory decree to which we have referred sets forth, among other things, under the caption "The Premises of which Partition is hereby Ordered are described as follows, to-wit: * * * and running thence according to the true meridian, the variation of the magnetic needle being 14 degrees 30 minutes east along the coast of the Pacific Ocean." Instead of a contrary intent, here is a direct and explicit statement indicating that the intent of the court was to partition lands having a boundary line coincident with the high-tide line of the Pacific Ocean. Enforcing this quotation, we may also refer to the fact that stations No. 1 and No. 17, from which, and to which, the meander line is drawn, are both practically on the line of the high tide of the ocean.

[8, 9] In the recent case of Anderson v. Trotter, 213 Cal. 414, 2 P.(2d) 373, 375, practically all of the cases cited by the appellants and respondents are collected and analyzed. In the opinion in that case the court quoted from 9 C. J. pp. 181, 189, as follows: " 'Grants by the United States of its public lands bounded on streams or other waters, navigable or nonnavigable, made without reservation or restriction, are to be construed according to their effect and according to the law of the state in which the land lies.' 'The general rule adopted by both state and federal courts is that meander lines are not run as boundaries of the tract surveyed, but for the purpose of defining the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey. The stream, or other body of water, and not the meander line as actually run on the ground, is the boundary, the purpose of meander lines being merely for the benefit of the government in ascertaining the quantity of land in the survey for which it requires payment; and the rules adopted in the various states as to the extent of the title of the owner of land bounded on rivers and other bodies of water apply in the case of land bounded on meandered waters.' "

This opinion may be shortened by referring to the opinion in Anderson v. Trotter, supra, for an analysis of all of the cases necessary to be reviewed in order to reach a correct conclusion upon the questions here being considered. The analysis there set

forth establishes beyond controversy that a meander line, whether state or national, is not considered a boundary line, but is used only for the purposes of determining the acreage for which a charge should be made when the title is being transferred from the state or general government to private parties, and also that a like rule prevails when private parties, conveying lands bordering upon streams or navigable waters, convey to the middle of the stream or to high tide, unless a different intent is shown by the instrument of conveyance.

The cases cited in Anderson v. Trotter, supra, also show that meander lines are really run for convenience, that is, to avoid the difficulties that would be encountered, and we may say in many instances almost insurmountable objects that would be encountered if the sinuosities of shore lines must be indicated by the field notes and included in the survey, instead of running an accessible meander line and blanketing in the omitted inaccessible strip by defining the boundary line as running along the high tide of the adjacent body of water. In the instant case we have the meander line, and we also have the statement that the premises to be partitioned have a boundary line "running along the coast of the Pacific ocean."

Some question has been raised as to the referees not having provided means of ingress and egress to and from the allotted premises. This, however, we think is covered by the reference to highways mentioned in the allotments, and also the fact, as pointed out by respondents, that the traveled portion of the beach, when it has been traveled, has been along the land covered by the ebbing tide, and that during high tide no travel was possible in many places.

[10, 11] There is another reason why measurements should be taken from a meander line, and not from a line coincident with the high tide of the ocean at any particular time. The wash of the ocean and the shifting sands constantly change the line of high tide. While the rise and fall of the tides may be accurately measured, just how far the flood tides will encroach upon the sand beach at any particular place, at any specified time, we understand cannot be either correctly measured or accurately predicted. This is rendered true by reason of the fact that the ocean is ever at work casting up and taking away portions of the abutting sand beach. Thus a high-tide line, if it had been established by a United States surveyor preceding the issuance of a United States patent in 1881, we may safely assume would not mark, with any degree of accuracy, the high-tide line at the date of the trial of this action in 1930. The meander line established, as herein stated, is reasonably definite and certain as such a line, while the high-tide line along the same premises is at all times a variable quantity. Even if the contour line of the ocean should have remained absolutely fixed from the time of the issuance of the United States patent down to the date of the trial, the omitted tract, as compared with the size of the entire tract conveyed, is so insignificant as to cause it to properly fall within the term, "a negligible quantity," and, as we have stated, properly omitted by the referees in determining values in making the respective allotments.

The fact that the surveyor and the referees figured the respective allotments as shown by the survey made under the direction of the referees down to a small fraction of an acre has no bearing upon the application of the legal principle which carried with the grant of the upland the high-tide line of a bordering navigable body of water. At best, all that is exhibited is the exceeding carefulness of the surveyors and referees in making equitable partition by not taking into consideration a sand beach which at the time of the entry of the final decree of partition was of no appreciable value. Its increase in value in subsequent years has no controlling influence, any more than a discovery by one allottee that his land was more susceptible of producing a certain valuable crop than the lands awarded to a different allottee would impugn either the motives or the justness of the acts of the referees when making partition. So far as conditions are concerned, they must be judged as of 1881-1883, and not as of 1930 or 1934.

[12] As a further ground upon which the respondents base their right to the premises involved, it is claimed that title thereto has been acquired by prescription. As against this claim, appellants' first contention is that the respondents must show actual pedis possessio of every particle of the lands in dispute, as the respondents did not take possession under color of title. In view of what we have said in the foregoing, this contention on the part of the appellants is untenable. When the land was conveyed by the government to the original grantees, the conveyance of the upland carried title to the line of high tide, and gave color of title, not only to the upland, but also to the strip be-

tween the meander line of the survey and the high-tide line of the Pacific Ocean. Thus, if our views heretofore expressed state the law correctly as to the issues involved herein, whenever possession was taken of any portion of the grant by the original grantees, and also when possession was taken of any portion of the allotments by the respective allottees upon partition, that possession was taken of the entire parcel of land which the law would hold as covered by a grant of the upland, and would constitute taking possession under color of title.

[13] The respondents, however, introduced considerable testimony showing actual occupation, possession, and dominion exercised over the premises in controversy. The trial court found that the respective respondents had exercised open, notorious, and adverse possession of the parcels claimed by the respondents, respectively, and that their acts had complied with the law giving title by adverse possession.

The photographs introduced in testimony show that a number of cabins or summer houses had been erected by the respondents, and the testimony, in addition to the photographs, shows that during the summer season cabins were rented to different persons; also that the premises were rented to campers. At times the premises were rented to moving picture concerns, sand and gravel sold from the premises, and, without setting forth the testimony in detail, we think it is sufficient to support the findings of the trial court in relation to possession, and that the testimony shows that the respondents exercised such dominion and possession of the premises, and use and occupation thereof, as is ordinarily made of such lands and premises, and to which uses and purposes they are reasonably adapted.

The rules which are applicable here are well stated in the case of Weyse v. Fiedebach, 86 Cal. App. 712, 261 P. 1086, 1090, as follows: "The rule is well established in California that the use and occupation requisite to adverse possession do not always require 'constant' use. Myers v. Berven, 166 Cal. 484, 137 P. 260. It is enough that the property be devoted to the ordinary use of the occupant, and temporary abandonments or periods of vacancy which evince no intention of abandonment of possession do not interrupt the possession. Montgomery & Mullen L. Co. v. Quimby, 164 Cal. 250, 128 P. 402; Botsford v. Eyraud, 148 Cal. 431, 83 P. 1008; Goodrich v. Mortimer, 44 Cal. App. 576, 186 P. 844. Furthermore, any visible act which clearly demonstrates an intention to claim ownership and possession, and either puts the legal owner upon inquiry or conveys actual notice, is sufficient. Franz v. Mendonca, 131 Cal. 205, 63 P. 361. It is not necessary that one claiming by adverse possession be in personal occupation. Possession by tenant inures to his benefit. Lloyd v. Mills, 68 W. Va. 241, 69 S. E. 1094, 32 L. R. A. (N. S.) 702; Sutton v. Whetstone, 21 S. D. 341, 112 N. W. 850; Alabama State Land Co. v. Hogue, 164 Ala. 657, 51 So. 320; Wright v. Giles, 60 Tex. Civ. App. 550, 129 S. W. 1163."

By stipulation of counsel and the order of this court proceedings were had in accordance with section 956a of the Code of Civil Procedure, and certified copies of deeds introduced covering a defect in the chain of title pointed out by the appellants, which renders unnecessary consideration of any alleged error of the court in relation thereto.

The judgment as to each of the respondents is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



4 Cal.App.2d 242

CALIFORNIA GRAPE CONTROL BOARD, Limited, v. CALIFORNIA PRODUCE CORPORATION, Limited, et al.

Civ. 9615.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1935.

1. Appeal and error ⇐544(2)

On appeal on judgment roll alone, single inquiry is whether judgment is against law.

2. Injunction ⇐63

Co-operative marketing association alleging that competitor was inducing growers to breach contracts with association *held* entitled to enjoin competitor, where court found that association would suffer irreparable damage and had no adequate legal remedy, and statute governing actions between contracting parties to prevent breach of contract was inapplicable (Civ. Code, § 3423).

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action by the California Grape Control Board, Limited, against the California Produce Corporation, Limited, A. P. Tarantino, Frank Tarantino, and another. Judgment for plaintiff, and defendants named appeal.

Affirmed.

Frank P. Webster, of San Francisco, for appellants.

Agnew & Boekel, of San Francisco (John D. Gallaher, of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

The plaintiff, which is a co-operative marketing association, held contracts with the defendant Singh and many other growers of grapes in the state of California whereby said growers agreed to deliver to the plaintiff's agents all grapes produced by them during specified periods and to pay a stabilization fee of $1.50 per ton; each contract and the agreed stabilization fee therein mentioned being pledged to the government of the United States to secure loans made for the purpose of marketing such products. The defendant California Produce Corporation was an independent concern which was engaged in the marketing of grapes in competition with the plaintiff. The complaint alleged, and the trial court found, that the defendant California Produce Corporation and its agents, knowing the existence of the contracts with the plaintiff, were soliciting grower signatories to breach their contracts and to deliver the grapes grown by them to the defendants. It was further alleged that these defendants threatened to continue to induce the signatories to breach their contracts, and that some had delivered quantities of grapes to the defendants contrary to the terms of their contracts, and that the injury to the plaintiff arising from such acts would be great and irreparable and could not be compensated for in damages.

[1] The trial court granted a temporary restraining order which, after a full hearing, was made permanent. Findings of fact covering every issue raised in the complaint preceded the judgment. The appeal from the judgment is presented on the judgment roll alone, and hence we are confined to the inquiry whether the judgment is against law.

[2] Appellant states the single question involved on the appeal as follows: "Can an injunction be granted contrary to Section 3423 of the Civil Code in favor of a cooperative marketing corporation, and against a third party to prevent the breach of a contract with a non-member, or non-stockholder, of such an association or corporation?" This is not an accurate statement of the real question involved. In so far as the defendant Singh is concerned, the action may have been one to prevent the breach of a contract within the terms of section 3423. But the defendant Singh did not appear at the trial and has not appealed from the judgment. In so far as the only appellants are concerned, the single question involved in their appeal is whether one of the contracting parties may enjoin a stranger to the contract from unlawfully interfering with his business or his rights under the contract if the remedy at law is not adequate and complete. This presents a situation wholly foreign to that arising in an action brought by one of the contracting parties against another party to the contract "to prevent the breach of a contract" which is covered in section 3423 of the Civil Code. Here the respondent bases its action on the simple principle that its right to carry on its business without obstruction under the contract pleaded is a property right with which the appellants threaten to illegally interfere. In its demand for injunctive relief the respondent pleaded, and the trial court found, that the acts complained of would result in irreparable damage for which the respondent had no adequate remedy at law.

Under such circumstances the great weight of authority compels an affirmance of the judgment; the rule applicable being well stated in Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817, 821, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, as follows: "Where the plaintiff proves that the defendant unlawfully interferes or threatens to interfere with his business or his rights under a contract, and further makes out in proof that damages will not afford an adequate remedy, equity will issue an injunction." See, also, 32 Cor. Jur. pp. 155 and 228; 14 R. C. L. p. 390; 15 R. C. L. p. 64; Alcazar Am. Co. v. Mudd & Colley Am. Co., 204 Ala. 509, 86 So. 209; Northern Wis. C. T. P. v. Bekkedal, 182 Wis. 571, 197 N. W. 936; Fort v. People ex rel. Co-op. Farmers' Ex., 81 Colo. 431, 256 P. 319; Phez Co. v. Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A. L. R. 1090.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

4 Cal.App.2d 34

PEOPLE v. AGULLANA.

Cr. 177.

District Court of Appeal, Fourth District, California.

Jan. 21, 1935.

1. Infants ⇐20

Whether accused was guilty of committing lewd and lascivious acts on twelve year old girl *held* for jury.

2. Infants ⇐20

In prosecution for lewd and lascivious conduct with infant, conflicts in testimony were for jury.

3. Indictment and Information ⇐192

That evidence would support conviction of attempt to commit rape *held* not to invalidate conviction of committing lewd and lascivious acts on twelve year old girl where evidence tended to prove commission of such offense.

4. Criminal law ⇐507(7)

In prosecution for committing lewd and lascivious acts on twelve year old girl, prosecuting witness *held* not "accomplice" so as to require her testimony to be corroborated.

[Ed. Note.—For other definitions of "Accomplice," see Words & Phrases.]

5. Criminal law ⇐1170(3)
Witnesses ⇐405(1)

Disallowing witnesses to answer questions propounded on cross-examination *held* not error where questions were asked for purpose of impeaching witnesses on immaterial matter, and fact sought to be brought out by questions was fully and completely disclosed by other evidence.

6. Witnesses ⇐396(1)

In prosecution for lewd and lascivious conduct where on cross-examination of complaining witness it was brought out that witness had made statement at preliminary hearing which was contrary to statement made at trial, disallowing witness to answer as to what caused her to answer opposite way before jury *held* not error where reason for discrepancy was immaterial, and failure to explain inconsistency would react to benefit of accused (Code Civ. Proc. § 2052).

7. Criminal law ⇐696(3), 1168(4)

Refusal to strike out portion of witness' answer *held* not error where proper ground was not stated in asking statement to be stricken out and matter could not have affected verdict.

8. Criminal law ⇐785(6)

In prosecution for lewd and lascivious conduct with infant, refusal to instruct that jury should carefully scan testimony of prosecuting witness and view testimony with caution *held* not error, especially where prosecuting witness' testimony was corroborated.

9. Criminal law ⇐829(16)

In prosecution for lewd and lascivious conduct, refusal to instruct jurors that "you and each of you" should carefully scan testimony of prosecuting witness *held* not error where court instructed on duty of jurors as judges of facts and that each juror must decide case for himself after full consideration of all testimony and without surrendering his honest convictions in order to agree with opinion of other jurors.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Frank Agullana was convicted of lewd and lascivious conduct, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

U. S. Webb, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of lewd and lascivious conduct alleged to have been committed upon and with a girl twelve years of age. According to the evidence received, the offense charged in the first count of the information was committed at the home of the mother of the girl on or about September 14, 1934, and the one charged in the second count occurred in an automobile parked on a lonely road on or about September 2, 1934. A jury found the defendant guilty on both counts, and from the judgment which followed this appeal is taken.

[1, 2] The first point raised is that the evidence is not sufficient to support the judgment. It is unnecessary to review the evidence, but the story told by the prosecuting witness, if believed by the jury, was amply sufficient to sustain the verdict as to each count. Her testimony as to what occurred on September 14 was fully corroborated by the testimony of her father, who testified that he observed the incriminating acts while looking in at a window, having gone on that occasion to the home of his estranged wife for the purpose of seeing what was going on there. The main attack on the sufficiency of the evidence, in so far as the offense charged in the first count is concerned, is directed to its claimed inherent improbability, since the mother of the child was in the house at the

time. There is evidence that the mother was in the kitchen of the home for a considerable part of the time in question and it fully appears that during the time she was in the kitchen it was physically impossible for her to see what occurred at the point where, according to the evidence, the offense took place. It is also urged that certain testimony to the effect that the father of the girl had told the witness that he would swear to anything in order to send the defendant to San Quentin demonstrates that the entire case was a frame-up. The witness who gave this testimony was rather effectively impeached, and the making of the statement was denied by the father. While the usual conflict appears, the entire question was one of fact for the jury.

[3] In connection with the evidence, it is further argued that if the story told by the prosecuting witness be accepted as true, the appellant was guilty of an attempt to commit rape and not of the offense with which he was charged. This contention relates only to the offense involved in the second count of the information and only to a part of the testimony of the prosecuting witness relating thereto. In making this contention, other portions of her evidence which support the charge here made are entirely disregarded. The fact that the appellant may have been guilty of still another offense is certainly no defense to the charge upon which he was tried. People v. Meyer, 94 Cal. App. 696, 271 P. 751; People v. Piburn, 138 Cal. App. 56, 31 P.(2d) 470.

[4] Some contention is made that the prosecuting witness was an accomplice and that sufficient corroboration does not appear. Not only was the prosecuting witness not an accomplice within the meaning of the statute relied upon [People v. Vaughan, 131 Cal. App. 265, 21 P.(2d) 438; People v. Johnson, 115 Cal. App. 704, 2 P.(2d) 216], but there was ample corroboration in so far as the first count is concerned and some corroboration as to the offense charged in the second count.

[5-7] Several points are raised with respect to rulings on the admission of evidence. It is said that the court erred in sustaining objections to two questions asked of witnesses on cross-examination. Both of these questions were asked for the purpose of impeaching the witness on an immaterial matter, and the fact sought to be brought out by each was fully and completely disclosed by other evidence. In another instance, it was brought out in cross-examination that the prosecuting witness had made a statement at the preliminary hearing which was contrary to a statement made by her at the trial. She was then asked what caused her "to answer the opposite way before the jury today," and an objection was sustained. It is now claimed that this ruling was error under section 2052 of the Code of Civil Procedure. That section permits an impeachment by a showing that inconsistent statements had been made, which was done here. The appellant had the benefit of this, and the reason why the discrepancy occurred is neither material nor essential. Any failure to explain the inconsistency would react to the benefit of the appellant, and no prejudice could result. Complaint is also made of the refusal of the trial court to strike out a portion of the answer of one witness to a question asked of him. While we think the matter might better have been eliminated, the proper ground was not stated in asking that it go out and in any event the matter was so trivial that it could not have affected the verdict.

[8, 9] The appellant's final contention is that the court erred in refusing to give two instructions asked for by him. The first of these is to the effect that in a case of this character a jury should carefully scan the testimony of the prosecuting witness and view the same with caution. The second instruction is very similar but contains the further charge that "you and each of you" should carefully scan such testimony. In People v. Anthony, 185 Cal. 152, 196 P. 47, after pointing out that it has been said in some cases of this character that a court may properly instruct the jury that they should carefully scan the testimony of the prosecuting witness before reaching a conclusion that the defendant is guilty, the court holds that error cannot be predicated upon a refusal to give such an instruction. This is peculiarly true in a case such as the one now before us where the story of the prosecuting witness is corroborated by other testimony. It further appears that, in addition to all of the usual and general instructions on the duty of jurors as judges of the facts, the jury was here particularly instructed that each juror must decide the case for himself after a full consideration of all of the testimony and without surrendering his honest convictions in order to agree with the opinion of other jurors.

After a careful examination of the entire record, we find no reversible error therein. The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

4 Cal.App.2d 232

SCOTT v. CALIFORNIA FARMING CO. et al.

CALIFORNIA FARMING CO. v. HAMMONDS et al.

MILLER & LUX, Inc., v. CALIFORNIA FARMING CO. et al.

Civ. 1285.

District Court of Appeal, Fourth District, California.

Jan. 28, 1935.

1. **Vendor and purchaser** ⇐194

In action between conditional vendor and holder of mortgage on crops given by conditional purchasers of land, where purchasers remained in possession after conditional sales contract had been terminated and were in possession at time of harvest, crop mortgagee *held* entitled to proceeds, since purchasers were holding as tenants adverse to owners.

2. **Vendor and purchaser** ⇐194

Vendor, who waived forfeiture of conditional contract to sell land by accepting an assignment of purchaser's interest in the land with knowledge that purchasers had executed a mortgage on the crops to another, *held* not entitled to proceeds of crops as against crop mortgagee.

3. **Vendor and purchaser** ⇐187

Provision in conditional sales contract to convey land making time of payment the essence *held* waived, where vendor after default entered into negotiations with purchasers to secure payment of default and accepted assignment of purchasers' interest in property.

4. **Vendor and purchaser** ⇐187

Where conditional vendor in land contract has waived provision making time of payment essence of the contract, conditional purchasers are entitled to a reasonable time to make payments and cure the default.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by H. Georgie Scott against the California Farming Company and others, wherein W. J. Hammonds and another intervened, and wherein a cross-complaint was filed by the California Farming Company and others against W. J. Hammonds and others, and by Miller & Lux, Incorporated, against the California Farming Company and others. From a judgment, Miller & Lux, Incorporated, and others appeal.

Affirmed.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for appellants.

Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondent Schuler-O'Connell Grain Co.

Sutherland, Dearing & Jertberg, of Fresno, for respondents California Farming Co. and Davidson Bros.

ALLYN, Justice pro tem.

Davidson Bros. bought, under a conditional sales contract from Miller & Lux, Inc., a substantial acreage of grain and cotton land. The California Farming Company, the vendees' operating company, owned and controlled by them, leased the entire property and carried on all farming operations. Davidson Bros. defaulted in their payments of principal, interest, taxes, and assessments, and over a period of several months negotiations were had with Miller & Lux concerning these defaults and the possible rearrangement of the defaulted and future payments under the contract. While these negotiations were under way, the Schuler-O'Connell Grain Company loaned the California Farming Company substantial sums of money for the purpose of making the grain crop on the land, and took as security a crop mortgage thereon. The negotiations with regard to the modification of the contract and curing of the vendees' defaults failed, and after the grain crop had been planted and was merely awaiting the annual seasonal development to be ready for harvest, Miller & Lux served upon Davidson Bros. a notice of default, giving to them 30 days within which to meet the payments provided for by the contract, and upon the expiration of this time gave formal notice of the termination of said contract.

From this point there is considerable conflict in the testimony as to what actually transpired. It is admitted, however, that the Davidsons assigned their vendees' interest in the contract of sale to Miller & Lux. The Davidsons testified to the effect that this assignment was given upon the vendor's assurance that they would be given a lease for the balance of the crop season, and witnesses for the vendor stated that while the matter of the lease was discussed, it was not a condition of, nor the consideration for, the assignment. Officials of Miller & Lux came upon

the land at the time of the assignment and insisted that operations for planting cotton cease; that all labor claims be paid to that date; and that all tools and equipment be either moved from the property or brought in and stored at a central place to be removed within 30 days' time. Arrangements were also made for the renting of certain of the farming tools and the purchase of cotton seed from the lessee. The lessee was paid by Miller & Lux for these items. The testimony of the Davidsons is to the effect that they considered all of these transactions formalities connected with the assignment and preliminary to giving them the lease on the property. At any rate negotiations for the lease failed and the property was sold to Hammonds & Edwards under a conditional sales contract whereby Miller & Lux undertook to protect the new purchasers against the crop mortgagee's claim.

The new purchasers moved into the dwelling house on the premises and continued with some of the farming operations, although there is testimony that the California Farming Company and the Davidson brothers continued to exercise some supervision and control over the place, and when the grain harvest was started we find two harvesting outfits in the same grain field, one manned by Hammonds & Edwards and the other by the crew of the California Farming Company. This impossible situation was solved by the appointment of a receiver, who took charge, completed the harvest, and sold the crop. The money now in the receiver's hands is the sole remaining subject of this litigation, and since it is not sufficient to pay off the first crop mortgage, and since the vendees under the new contract were protected against loss by Miller & Lux, the sole question is whether or not the Schuler-O'Connell Grain Company, crop mortgagee, or Miller & Lux, vendor, is entitled to the proceeds of the crop. The trial court found on all material issues for the former, and we believe correctly ordered the receiver to pay over to it the crop proceeds.

The appellants, Miller & Lux and Hammonds & Edwards, submit that they are entitled to the proceeds of this crop on the theory that the Davidson contract was terminated because of the latter's default; that they surrendered the contract; and that Miller & Lux took actual and physical possession of the land and were in possession and harvesting the crop when dispossessed by the receiver. It is further submitted that the finding of the trial court, that the California Farming Company remained in possession, is not supported by the evidence.

Appellant's first proposition might well be accepted if the uncontradicted facts supported it, but the trial court found upon conflicting evidence that the vendor had waived the "time of the essence" provisions of the contract; that there was no restoration thereof; and that the attempted restoration, whereby vendees were given 30 days within which to pay almost $46,000 then in default, was unreasonable; and further that the attempted restoration and forfeiture was waived by the vendor. There is ample evidence to support these findings and the further express finding that the vendor waived the attempted forfeiture by further negotiations with the vendees and by accepting from them an assignment of their vendees' interest in return for vendor's unkept promise to give them a lease on the property; and that vendor wholly failed and refused to carry out its part of the agreement pursuant to which the assignment was made. There is a further finding that the vendor accepted the assignment with knowledge of the grain company's mortgage claims against the crop.

As to the further point of the appellants, there is conflicting evidence in the record as to who was in possession of the property. It cannot be said that the testimony supporting the finding is so slight or so inherently improbable as to be insufficient to create a conflict. The grain crop was in need of no further care at the time of the alleged change of possession. There is testimony that the lessee did some work in connection with the cotton planting, and it is undisputed that the lessee was attempting to harvest the grain when the receiver stepped in. The trial court resolved all of these conflicts against the appellant and all parties are bound thereby on appeal.

[1, 2] The judgment can be sustained upon either or both of two theories: First, if Davidson Bros. personally or through their lessee remained in possession, as found by the trial court, they were by authority of California Delta Farms, Inc., v. Chinese American Farms, 204 Cal. 524, 269 P. 443, and Grossman v. Yip Wing, 62 Cal. App. 121, 128, 216 P. 634, owners of the crop as bona fide adverse tenants, and hence their crop mortgagee would be entitled to the money in the receiver's hands. On the other hand, if, for the purpose of argument, the findings as to possession cannot be sustained, the appellants are faced with the finding that the ven-

dor's attempted forfeiture was of no effect and was waived by the acceptance of an assignment of the Davidsons' vendees' interest, which they took with knowledge of the outstanding crop mortgage of the grain company.

[3, 4] The provision of the contract making time of the essence thereof and providing that a waiver of any breach should not be deemed a waiver of this term of the contract, as to the performance of other covenants, or of the making of other or future payments, does not alter the situation because there was clearly a waiver of the time requirement and no violation or default of other covenants or failure to make other payments is made the basis of the attempted restoration and forfeiture. There being ample evidence to sustain the finding that there was a waiver of this term of the agreement, the vendees were entitled to a time sufficiently advanced to give them a reasonable opportunity to make the payments and cure the default. Stevinson v. Joy, 164 Cal. 279, 128 P. 751; City of Los Angeles v. Kurtz, 170 Cal. 344, 149 P. 580.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 413

CENTRAL CONST. CO. v. STANSBURY CONTRACTING CO. et al.

Civ. 9228.

District Court of Appeal, First District, Division 2, California.

Feb. 6, 1935.

Hearing Denied by Supreme Court April 5, 1935.

Licenses ⇐39

Transferees of stock originally issued contrary to corporation commissioner's permit *held* not liable for corporate debts, and were not estopped to deny ownership of stock, as against contention that in legal effect commissioner's orders permitting transfers validated void issues; orders being expressly limited to transfers of stock issued, and not purporting to authorize original issues.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by the Central Construction Company against the Stansbury Contracting Company, Laura Finnell, and others. Judgment for plaintiff, and defendants named appeal.

Reversed.

Miller & Ellis and W. A. Alderson, all of Los Angeles, and Shelton, Gray & McWilliams, of San Francisco, for appellant Stansbury Contracting Co.

A. Terkel and A. D. Moffat, both of San Francisco, for appellant Laura Finnell.

Sterling Carr and Francis P. Walsh, both of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover from defendants certain sums on their liabilities as stockholders the trial court made findings in favor of the plaintiff and from the judgment entered thereon two of the defendants have appealed.

The defendants make one point. They assert that one in whose name corporate stock certificates are issued is not liable for the debts of the issuing corporation when the stock was originally issued to the alleged stockholder in violation of the permit of the commissioner of corporations to issue stock. In that connection they set forth the following facts: Heretofore Capuchino Golf Corporation was incorporated under the laws of the state of California. It was organized with an authorized capital stock of 100,000 shares having a par value of $10 each. On May 26, 1926, the commissioner of corporations issued to the corporation a permit which, among others, contained the following provisions:

"Capuchino Golf Corporation a California corporation, is hereby authorized to sell and issue 20,000 shares of its capital stock as herein below set forth:

"1st: To sell and issue to the persons named in its application, not exceeding to each, any or all of them, 10,000 shares of its capital stock, at par for cash, lawful money of the United States, or for 40% in cash, the balance to be evidenced by the promissory note or notes of subscribers payable in six equal monthly installments, without interest, for the uses and purposes recited in its application and so as to net applicant the full amount of the selling price thereof.

"2nd: Whenever and as often as a share or shares of its capital stock are sold and issued under paragraph 1st hereof, to issue a like number of shares to Bush Finnell and H.

A. Willard, not exceeding in the aggregate to either or both of them, 10,000 shares of its capital stock as partial consideration for promotion services rendered by them to applicant, subject to their right to receive additional shares, as final consideration, when and as authorized by the Commissioner of Corporations.

"(a) * * *

"(b) That, when issued, all certificates evidencing any of the shares authorized herein, in paragraph 2nd to be issued shall be forthwith deposited with a depositary, to be selected by said permit holder and approved by the Commissioner of Corporations, to be held as an escrow pending the further order of said Commissioner; that the receipt of such depositary for such certificates shall be filed with said Commissioner of Corporations; and, that the owner or persons entitled to said shares shall not sell, or offer for sale, or otherwise transfer, or agree to sell, or transfer such shares or any interest therein or right thereto, until the written consent of said Commissioner shall have been obtained so to do, or said shares shall have been released from escrow."

On June 17, 1926, the commissioner issued to the corporation an "Amended and Supplemental Permit." It made no change in the original permit material to the issues involved in this action. On February 28, 1927, there was issued to Bush Finnell certificate No. 58 for 3,000 shares and certificate No. 59 for 5,000 shares. On March 9, 1927, certificate No. 62 was issued to Laura Finnell and an entry in the stock book was made, "Escrowed from No. 58." On March 3, 1927, certificate No. 61 was issued to Stansbury Contracting Company for 5,000 shares and an entry in the stock book was made, "Escrowed from No. 59." The stock involved in this action is that represented by certificates No. 61 and No. 62. Orders, all in the same form, were made by the commissioner permitting transfers in escrow. One of those orders, dated March 2, 1927, was as follows: "I expressly consent to the transfer of 5000 shares of the capital stock of Capuchino Golf Corporation to be effected in the following manner: From Bush Finnell to Stansbury Contracting Company 5000 shares upon the condition, that, when issued, the new certificates evidencing any of the shares herein authorized to be transferred shall be forthwith deposited with Crocker First Federal Trust Company of San Francisco, California, to be held as an escrow in accordance with the condition of the permit issued to Capuchino Golf Corporation on May 26, 1926." The defendants call our attention to the foregoing facts as shown by the record and continuing they assert: "By February 28, 1927, before Certificates Nos. 58 and 59 were issued, Certificates Nos. 1 to 57, inclusive, had been issued representing in gross 12,530 shares but of these 3,535 shares were re-issues, so that the net number of shares issued as shown by the certificate book was then 8995 shares and of these 6,875 were issued in noncompliance with the Corporation Commissioner's permits, so that before Certificate No. 58 was issued the number of shares issued in compliance with the Corporation Commissioner's permits was 2,120. * * * If appellant was not the owner of and had not subscribed for 5,701 shares of the capital stock of Golf Corporation it follows that the findings with regard to the proportion of stock owned by appellant, with regard to the proportion of the debt owing by appellant, and with regard to the amount of the debt of appellant, and with regard to the amount of the debt of appellant to respondent, are not any of them supported by the evidence."

Assuming that the defendants have correctly stated the facts, their contentions must be sustained. Regan v. Albin, 219 Cal. 357, 360, 26 P.(2d) 475.

The plaintiff states that the facts are substantially as stated in the briefs of the defendants, but it contends that the orders consenting to transfers were in legal effect authorizations for the issuance of the amount of stock designated in such orders and validated the void issues. This contention finds no support when one reads and compares the permit and the orders consenting to transfers. The latter orders were carefully drawn and were limited expressly to transfers of stock that had already been issued. They did not purport to authorize original issues.

In its next reply the plaintiff asserts: "The appellant, as the registered owner of 5000 shares of Capuchino Golf Corporation as of the date of issuance of the permit consenting to the transfer, is liable for the debts of the corporation contracted subsequent to that date." This reply assumes facts contrary to the record. The order permitting a transfer from Bush Finnell to the Stansbury Contracting Company was made on March 2, 1927. There is no evidence that prior to that date the Stansbury Contracting Company was the "registered owner" of, or had any interest whatever in, the 5,000 shares mentioned in the permit. Therefore the plaintiff's point is not well founded. But under this same head-

ing it contends that, because the transfer was made to the Stansbury Contracting Company by Bush Finnell after a permit was obtained from the corporation commissioner authorizing the transfer, therefore it was a valid issue. Such contention is but another method of presenting the first contention made by the plaintiff and which we have already discussed.

The last reply made by the plaintiff is that the defendants are estopped to deny ownership of their stock. But the plaintiff did not plead nor prove any set of facts which in law would constitute an estoppel. Regan v. Albin, 219 Cal. 357, 359, 26 P.(2d) 475.

In what we have said above we have addressed ourselves principally to certificate No. 59 which was transferred to the Stansbury Contracting Company. However, certificate No. 58, which was afterwards transferred to Laura Finnell, differs only in the figures used and the name of the transferee. The liability of the transferee rests on the same principles.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.



4 Cal.App.2d 65

GOODMAN et al. v. PASADENA CITY HIGH SCHOOL DIST. et al.

Civ. 8555.

District Court of Appeal, Second District, Division 2, California.

Jan. 23, 1935.

Rehearing Denied Feb. 20, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Schools and school districts ⇐89

Recovery could be had for injuries sustained by pupil in school machine shop when piece of metal flew into pupil's eye, by proving existence in shop of danger known to authorities, who neglected to guard pupils against it, or existence of unknown peril, which by exercise of reasonable care under same circumstances a reasonably prudent person would have discovered (School Code, § 2.801, as amended by St. 1931, p. 2487, § 1).

2. Schools and school districts ⇐89

Recovery could not be had by pupil and father for injuries sustained by pupil in school machine shop when piece of metal flew into pupil's eye, in absence of substantial evidence that danger existed, which was known or ought to have been known to authorities, of possible injury from flying particles of hammered metal (School Code, § 2.801, as amended by St. 1931, p. 2487, § 1).

3. Schools and school districts ⇐89

School districts are not insurers of safety of pupils at play or elsewhere (School Code, § 2.801, as amended by St. 1931, p. 2487, § 1).

Appeal from Superior Court, Los Angeles County; Francis J. Heney, Judge.

Action by Le Roy Goodman, a minor, by his guardian ad litem, Lovell Goodman, and another against the Pasadena City High School District and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, both of Los Angeles, for appellants.

Samuel A. Rosenthal, of Los Angeles, for respondents.

MOORE, Justice pro tem.

The plaintiffs are father and son. They obtained verdicts against defendants for the sum of $15,000 for injuries received by Le Roy, and in the sum of $2,000 for damages suffered by the father by reason of said injuries to the son. The action arose out of an accident which occurred in the mechanics shop of the McKinley Junior High School of the Pasadena City school district March 25, 1930, when the child was thirteen years and nine months of age.

The shop was a spacious, well-lighted room. It was occupied by lathes, a forge, and furnace, and equipment for melting metals, tables, benches, old chassis, and sundry apparatus. It had been inspected by the safety engineer of the California Industrial Accident Commission, and, with all of its contents, it satisfied every reasonable safety requirement. In this room Le Roy had been directed by his teacher to "write up" his lesson, and was assigned to a seat in a corner distant from others engaged in experimental work. The instructor, Francis Appleton, had received a course in technical training in the University of California, had taught mechanics for nine years and had been with the Pasadena schools for ten years, and in all had acquired over fifteen years of practical experience.

Le Roy had attended the auto mechanics class for more than one semester, and had been liberally instructed concerning the use of metals as well as the dangers attendant upon the use of tools and the handling of materials. Just prior to the accident, the boy had been within the room half an hour. At the same time about twenty youths were there engaged in their several tasks. Upon completing his assignment, instead of observing the order of the instructor to report to him, Le Roy approached a position about twelve feet from a vise where three boys were engaged in pounding aluminum. In that position he had stood about three minutes when a piece of metal entered his eyeball, which ultimately resulted in its destruction. He had had some experience in breaking aluminum, but had never seen any fragments fly.

The record discloses no proof that any school authority knew that aluminum shatters when pounded, although the pupils had been advised with reference to the striking together of steel implements. The students had all been advised to wear goggles when working around the emery wheel, but at no other work in the shop was it deemed advantageous to wear goggles for the protection of one's eyes. It is not shown that any instructor knew that goggles were necessary for the safety of a spectator within the shop.

Upon the trial of the action, plaintiffs proceeded upon the theory that under the pounding of the aluminum by his fellow students a fragment thereof entered Le Roy's eye, and that this could have been prevented had Le Roy been required to wear goggles while in the shop. The exact character of the metal was never definitely established, but from the rust stain upon the blue iris of the boy's eye it is indicated that the metal penetrating the cornea contained iron.

On this appeal appellants urge that no agent of the district was negligent, that respondent Le Roy Goodman was negligent, and that his costudents caused the injury.

The complaint charges that on or about the 25th day of March, 1930, defendants negligently maintained and supervised a certain machine shop of said school, and the equipment and supplies used therein by the students, and negligently allowed said minor to be in and about said machine shop without providing for said student a safe place to work in; and failed to provide for him safe surroundings and to "protect him from injury at the hands of his costudents who were then and there engaged in work in and about said machine shop, whereby and because whereof a piece of metal was caused to penetrate the right eye of said minor, which piece of metal came from a certain metallic substance which was then and there being used and worked on by the costudents of said minor plaintiff in said machine shop." The action is based upon section 2.801 of the School Code, as amended by St. 1931, p. 2487, § 1, which reads as follows: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees." This section is an explicit authorization to sue a school district for injuries arising from negligence.

[1-3] In the instant case plaintiffs could recover by proving either that there existed in the machine shop a danger that was known to the authorities, who neglected to guard the pupils against it, or that there was an unknown peril which by the exercise of reasonable care under the same circumstances a reasonably prudent person would have discovered. The negligence suggested by plaintiffs was the failure to require the pupils to wear goggles in the presence of the possible injury from flying particles of hammered metal. However, the record discloses no substantial evidence that there existed such danger which was known, or ought to have been known, to the authorities. "The law does not make school districts insurers of the safety of the pupils at play or elsewhere, and no liability is imposed upon a district under the above-mentioned section, in the absence of negligence on the part of the district, its officers or employees." Underhill v. Alameda Elementary School District, 133 Cal. App. 733, 24 P.(2d) 849, 851; Ellis v. Burns Valley School District, 128 Cal. App. 550, 18 P.(2d) 79. "The fact that the students were attempting to carry out certain requests made by their instructor * * * does not change the rule. In conducting classwork a teacher must frequently give directions. While carrying out such directions, the students may, in many ways, act without due care. But for their negligence in such matters the statutes have not gone to the extent of imposing a liability on the school district." McCloy v. Huntington Park Union High School (Cal. App.) 33 P.(2d) 882; Hack v. Sacramento City Junior College District, 131 Cal. App. 444, 21 P.(2d) 477; Ellis v. Burns Valley School District, 128 Cal. App. 550, 18 P.(2d) 79.

For the reasons indicated, we think the judgment must be reversed and that no particular advantage would result by going into other phases of the briefs.

Judgment reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 237

LILLIBRIDGE et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1544.

District Court of Appeal, Fourth District, California.

Jan. 28, 1935.

Hearing Denied by Supreme Court March 28, 1935.

1. Master and servant ⊂=367

"Independent contractor" is one who in rendering service exercises independent employment or occupation, and represents his employer only as to results of his work and not as to means of accomplishment.

[Ed. Note.—For other definitions of "Independent Contractor," see Words & Phrases.]

2. Master and servant ⊂=367

Real test whether person is "employee" or "independent contractor" is whether he is subject to employer's orders and control and is liable to be discharged for disobedience or misconduct, and fact that certain amount of freedom of action is inherent in nature of work does not change character of employment where employer has general supervision and control over work.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

3. Master and servant ⊂=367

Well driller employed by farmers *held* "independent contractor" and not "employee" within Workmen's Compensation Act, where drilling equipment was loaned to farmers on understanding that driller should have entire charge of operation, driller chose location for well disregarding farmer's suggestion, work called for expert ability, and driller was to receive a cow at least in part payment, though it was disputed whether he was to have regular wages for anything over value of cow.

4. Master and servant ⊂=367

Manner of paying for work, while a circumstance to be considered in determining whether person is employee or independent contractor, is not necessarily controlling, since independent contractor may be paid on per diem basis.

Proceeding under the Workmen's Compensation Act by Hattie Sutter and another, claimants, for the death of Paul Sutter, opposed by C. E. Lillibridge and others, individually and as a copartnership doing business under the firm name and style of C. E. Lillibridge & Sons. To review an award of the Industrial Accident Commission in favor of claimants, defendants bring certiorari.

Award annulled.

Head, Wellington & Jacobs, of Santa Ana, for petitioners.

Everett A. Corten and Emmet J. Seawell, both of San Francisco, for respondents.

BARNARD, Presiding Justice.

The petitioners seek to annul an award made by the respondent commission in favor of the other respondents based upon the death of one Paul Sutter.

The petitioners were operating a farm and Paul Sutter, whose general occupation was that of a well driller, agreed to drill for them a well which was to be used for irrigation purposes. It appears without dispute that the petitioners sought to obtain the use of a well-drilling outfit which was owned by a casing company; that this owner informed them that he would loan the outfit only if the same were placed in charge of a competent driller; that the petitioners stated they expected to have the well drilled by Sutter which was satisfactory to the owner of the outfit; that they then interviewed Sutter and he agreed to drill the well; that under this agreement Sutter was to drill the well and the petitioners were to furnish all casing and other materials and also were to furnish any additional help Sutter might require; that Sutter was then working three days a week for the "C. W. A." and it was agreed that he might continue this work and that he would drill the well at times when he was not otherwise employed; that he was to receive a cow, either in part or in full payment, for his services; that Sutter assisted in bringing the drilling outfit to the petitioners' premises; that some two weeks later, assisted by some of the petitioners, Sutter was placing the outfit in position to drill the well at a spot which he had himself selected; that while the outfit was being placed in position, one

of the petitioners asked Sutter if the position chosen was not too close to some electric wires which were overhead; that Sutter replied to the effect that there was plenty of clearance; and that while Sutter was raising the rig into position he was electrocuted through a portion of the rig coming into contact with the electric wires.

There is a conflict in the evidence as to how the work in question was to have been paid for. Two of the petitioners testified to a conversation between them and the deceased in which Sutter stated he would do the work for a cow, and that he was then told there would be "no wages in it." On the other hand Sutter's widow testified as follows with reference to what her husband said immediately after the conversation referred to: "He came in, and he was still working for the C. W. A. at the time, and he said Mr. Lillibridge wanted him to drill a well, and I asked him what he was getting, and he said he was getting a cow, * * * and I asked him how long it would take him to drill the well, and he said about three or four weeks, and I said, 'Your cow will come pretty expensive, wouldn't it?' and he said 'Well, I took the cow and what there is over, I will have money at driller's wages, six dollars a day.'"

The commission found that Sutter met his death while acting as an employee of these petitioners; that the injury which caused his death arose out of, and occurred in, the course of his employment; and that he was not an independent contractor. A petition for a rehearing was denied and this proceeding followed.

[1, 2] The main question presented is whether the evidence is sufficient to sustain the findings that the deceased was an employee and not an independent contractor. The general rules applicable to such a question are thoroughly settled. In May v. Farrell, 94 Cal. App. 703, 271 P. 789, 792, the court said: "An independent contractor is one who in rendering service exercises an independent employment or occupation, and represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished (Green v. Soule, 145 Cal. 96, 78 P. 337; Moody v. Industrial Acc. Com., 204 Cal. 668, 269 P. 542 [60 A. L. R. 299]); and when the essential object of the employment is the performance of the work the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the work shall be done (Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721). As was held in Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390, the real test is to ascertain whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it." In Hillen v. Industrial Accident Commission, 199 Cal. 577, 250 P. 570, 571, it is said: "One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor, and a servant or agent. Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385, 399, 158 N. W. 875, Ann. Cas. 1918C, 664. It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to act. Carleton v. Foundry & Machine Prod. Co., 199 Mich. 148, 152, 165 N. W. 816, 19 A. L. R. 1141. * * * Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control."

[3, 4] The respondents argue that the petitioners have not met the burden of proof which rests upon them. And while it is admitted that the petitioners had exercised no control over Sutter up to the time of the accident, it is claimed that there is no direct proof of the fact that they did not have the right to control the method in which he should do the work. It does appear, however, that the petitioners were unable to obtain the use of the well-drilling outfit unless the same were placed in the charge of a competent well driller; that the owners were satisfied with Sutter's competency; and that the outfit was obtained on the understanding that he should have charge of its operation.

The only inference reasonably to be drawn from these facts is that the petitioners were not to have the right to control the use of the machine or, in other words, the method in which Sutter should do the work. There could be no object in insisting that a machine be placed in charge of a competent well driller if an inexperienced man was to retain

control over the manner in which it should be operated. There was also testimony that when the agreement was made the petitioners told Sutter that "he would have to take charge before we could get the rig," and that "he was to have full charge" of the work of drilling the well. This evidence is borne out by the fact that Sutter chose the location for the well and disregarded the suggestion made by one of the petitioners with respect to moving the outfit away from the wires, and by the general nature of the work to be done which called for an expert in that line, one in which an ordinary farmer would hardly be expected to be able to direct the operations. We think it sufficiently appears that Sutter was in full control of the method of doing this work and that no right of control, within the meaning of the rule, rested in the petitioners.

In support of their contention that Sutter was merely an employee, the respondents rely mainly upon the testimony of his widow to the effect that he told her that he was to have regular wages for anything over the value of the cow. Aside from the unsatisfactory nature of this evidence, it is not conclusive in any event. While the manner of paying for work is a circumstance to be taken into consideration in determining the nature of the relationship between the parties, it is not necessarily controlling. An independent contractor may be paid on a per diem basis. Flickenger v. Ind Acc. Comm., 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150.

The admitted fact that Sutter was to receive a cow, at least in part payment, is important as bearing upon another test which is frequently applied in such cases, namely, whether either of the parties had the right to terminate the relationship at any time. While there is a dispute here as to whether this cow was to be taken in full payment for the work, there is no question that it was to be taken as part payment, at least, and no question that Sutter agreed to drill the well. The deceased followed an independent employment or occupation and he was here engaged to do a certain job in that line, and not merely to work until he was told to stop or until he decided to quit. A contract was made for a specific result which differs materially from any contract of employment which leaves the parties free to terminate the same at any time. If he did not complete the well he would not be entitled to the cow, or to anything in lieu thereof, and, on the other hand, the petitioners could not discharge him at any time without incurring a liability therefor.

Regardless of whether the deceased was to have received anything in addition to the cow for the work he was to do, we think this is peculiarly a case where the petitioners were interested in the result and not in the method of performing the work and that the only conclusion possible from the evidence is that Sutter was an independent contractor and not an employee.

For the reasons given, the award is annulled.

We concur: MARKS, J.; JENNINGS, J.



4 Cal.App.2d 315

SOUTHWEST FINANCE CO. OF CALIFORNIA v. ADKISSON et al.

Civ. 9045.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1935.

Rehearing Denied March 2, 1935.

1. Appeal and error ⇐931(1)

Appellate court has duty to consider evidence in light most favorable to respondent.

2. Bills and notes ⇐452(3)

Doctrines of laches and estoppel were inapplicable to time within which defense of total failure of consideration might be interposed to action at law upon note, since limits of time for presentation of defense was governed by statute of limitations.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Southwest Finance Company of California against Arthur P. Adkisson and the Pacific National Company, in which the defendants filed a cross-complaint. From a judgment for defendants upon both the original action and the cross-complaint, plaintiff appeals.

Affirmed.

Black, Hammack & Black, of Los Angeles, for appellant.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for respondents.

CRAIL, Justice.

This is an appeal by the plaintiff (appellant) from a judgment in an action upon a promissory note. The defendants answered that there was a total failure of consideration; that the transaction in consideration of which the note was given was never completed. The trial court found the facts to be as alleged by the defendants, and entered judgment for the defendants. In a cross-complaint the defendants also sued for certain interest payments which the defendants had made to the plaintiff on the note during the time they believed the transaction would finally be completed, and for interest thereon, and the court gave judgment in favor of the defendants on this cross-complaint.

[1] The first contention of the appellant is that the undisputed evidence shows a valuable consideration passing from the plaintiff or its predecessor in interest to the defendants. Upon appeal it is the duty of this court to take the evidence in the light most favorable to the respondent. We have reviewed the evidence, keeping in mind this rule, and there is substantial evidence to support all of the trial court's findings.

Appellant's second contention is based upon the theory that there was at least a partial consideration, and that therefore the respondent sought the wrong remedy; that the defendants should have alleged fraud and rescission and sought equitable relief. This contention falls with appellant's first contention and our conclusions thereon.

[2] Appellant's next contention is that respondent is barred by the doctrines both of laches and of estoppel. However, this was an action at law. The complaint sought a money judgment on a promissory note and the answer set up a total failure of consideration. There was no issue of fraud nor any other equitable issue which required diligence on the part of the defendants. The statute of limitations was the law which governed the limits of time in which defendants might present their defense. The doctrines of laches and estoppel did not enter into the case. Jackson v. Meinhardt, 99 Cal. App. 283, 278 P. 462; Anzar v. Miller, 90 Cal. 342, 27 P. 299; San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 239 P. 319.

Appellant's final contention is that the respondent ratified the contract by making monthly payments of dues to a third party for approximately a year. The trial court, after listening to the evidence and the explanations of the defendants with regard to these payments, determined the facts and the issue of ratification adversely to the appellant, and it is sufficient for us to say that there was substantial evidence to support the findings. In a closing brief the appellant complains of the judgment on the cross-complaint, but we find no errors therein.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 408

SHUEY v. BUNNEY et al.

Civ. 1526.

District Court of Appeal, Fourth District, California.

Feb. 5, 1935.

1. Appeal and error ⇐518(6)

Copies of motion to strike out cross-complaint and of minute order denying such motion contained in judgment roll could not be considered on appeal, since they were not parts of judgment roll (Code Civ. Proc. § 670).

2. Appeal and error ⇐931(1)

All presumptions are in favor of judgment appealed from.

3. Appeal and error ⇐682

Assignment that court erred in denying motion to strike out cross-complaint could not be considered on appeal where judgment roll proper and bill of exceptions contained nothing relating to the matter (Code Civ. Proc. § 670).

4. Principal and surety ⇐97

Supplemental agreement increasing principals' obligation to obligee nearly $6,000 *held* to have released principals' surety (Civ. Code, §§ 2819, 2840).

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by George R. Shuey against Ivan W. Bunney and others, wherein the defendant U. G. Clark filed a cross-complaint. From a judgment for cross-complainant, plaintiff appeals.

Affirmed.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

John F. Kunz, of Reno, Nev., for appellant.

Randall & Bartlett, George Francis and Kenneth W. Kearney, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

On July 1, 1925, the plaintiff, as first party, entered into a contract with the defendants Bunney, as second parties, whereby the latter were to care for and handle certain cattle to be turned over to them by the first party. It was agreed that the second parties were to take charge of 429 head of cattle then owned by the first party, of 275 more if the first party should purchase and deliver the same, and of any additional number which might be turned over to them by the first party, together with any increase from all of said cattle. The first party was to loan to the second parties a sufficient sum of money to fence their "claim," to purchase two windmills, and to pay the cost of extending a certain tunnel for water purposes. It was further agreed that the second parties were to care for the cattle on their range, situated partly in California and partly in Nevada, and that they might sell certain of the stock as time went on, provided the number in the herd should at no time be reduced below 424; that all stock so disposed of should be sold in the name of the first party and all checks made payable to him; that the first party might retain from such proceeds a sufficient sum to cover all money advanced by him with interest, all taxes paid by him, and interest at 6 per cent. on the value of all cattle furnished by him at an agreed price per head; and that the second parties should pay the first party $30 per head for any cattle not returned to him at the end of five years.

On May 7, 1928, these parties entered into a supplemental agreement which recited that whereas the first party had furnished labor, material, and money for the improvement and equipment of the ranch and range controlled by the second parties and for the purchase of cattle which had been added to the number theretofore delivered to the second parties under the terms of this agreement, and in consideration of the foregoing and for the purpose of repaying the first party at the expiration of the agreement, the second parties agreed to add 100 head of cattle to the number covered by the agreement, making a total number of 825 head then owned by the first party and held by the second parties under the agreement. It was then provided that in the event the second parties exercised their option to purchase the cattle, the price should be changed to $33 a head.

The original agreement provided that the second parties were to furnish to the first party a bond in the sum of $5,000 conditioned upon their faithful performance of the terms of the agreement. Pursuant thereto, a bond was furnished in that amount, and thus conditioned, signed by the second parties to the contract and by the defendant Clark as surety.

After the expiration of the 5-year period provided in the contract, this action was brought. The complaint set forth copies of the contracts and bond above referred to and alleged that pursuant to the agreement the plaintiff had delivered to the defendants Bunney 823 head of cattle; that these defendants had not sold any cattle in the name of the plaintiff or accounted to him for any except that there had been surrendered to him 364 head; and that these defendants had not purchased any of the cattle or made any settlement for the remaining 459 head, but, on the contrary, had refused to pay for the same. Judgment was prayed for against the defendants Bunney for the value of the 459 head of cattle at $30 each, and against the defendant Clark, upon the bond, in the amount of $5,000.

The defendant Clark filed an answer containing various denials, together with certain affirmative defenses in which it was set up that the original agreement had been so altered by the parties thereto as to release him from liability on the bond. In addition, he filed a cross-complaint seeking to recover judgment against the plaintiff on a $500 note executed by the plaintiff and on an unpaid portion of a judgment against the plaintiff rendered in a court in Nevada.

The defendants Bunney did not appear and the plaintiff failed to answer the cross-complaint above referred to. When the matter came on for hearing, the plaintiff moved to strike out the cross-complaint, which motion was denied. The defendant Clark moved for judgment on the pleadings as to the plaintiff's cause of action on the ground that the complaint did not state facts sufficient to constitute a cause of action against him, which motion was granted. The court then heard evidence in support of the cross-complaint, and entered judgment to the effect that the plaintiff take nothing against the defendant Clark and that Clark recover from the plaintiff the amount sought in the cross-complaint. From this judgment, the plain-

tiff has appealed upon the judgment roll and a bill of exceptions.

[1-3] The first point raised is that the court erred in denying the appellant's motion to strike from the files the cross-complaint filed by the respondent Clark. Nothing is set forth in the bill of exceptions concerning this matter, except the statement that the court erred in this respect. So far as this point is concerned, then, the appeal rests entirely upon what appears in the judgment roll. The judgment roll, as such, is not set forth in the transcript which, however, contains copies of various papers filed in the clerk's office, some of which are properly a part of the judgment roll and some not. Among the latter is a copy of the motion to strike the cross-complaint from the files and a copy of the minute order denying such motion. These papers are not a part of the judgment roll. Section 670, Code Civ. Proc. Matters which are not a part of the judgment roll cannot be considered on appeal unless they are otherwise made a part of the record. Stoltenberg v. Harveston, 219 Cal. 406, 26 P.(2d) 833. All presumptions are in favor of the judgment, and the evidence, which is not before us, may have disclosed that the matters upon which the cross-complaint was based related to the transaction and property involved in the complaint. Since the bill of exceptions, as settled, contains nothing to support the point raised, the matter cannot be here considered.

The second point raised is that the court erred in entering a judgment on the pleadings with respect to the original complaint. In support of this contention, it is argued that the original contract provided that the second parties therein should take charge of the 424 head of cattle then owned by the first party, of 275 more which the first party expected to procure and turn over to the second parties, and of any additional number which might be furnished by the first party to the second parties. It is then argued that the supplemental agreement made no material change in this arrangement, but that the same amounts to a mere statement that 825 head of cattle had been furnished by the first party up to that time.

The original contract provided only that the second parties were to take charge of such stock as was furnished by the first party; that the first party was to advance to the second parties money for a few named things only; and that at the expiration of the period the second parties might retain the stock by paying for the same at $30 a head. From the supplemental contract, it appears that the second parties agreed to and did furnish 100 head of stock which was not provided for in the original contract, and that this was done by way of repaying the first party for advancements made by him in addition to those required of him by the first contract. The supplemental contract further increased the price per head at which it was agreed that the second parties would account to the first party for any cattle not returned to him at the expiration of the period named.

It thus appears that in this action the appellant is attempting to hold the surety on the bond not only for a failure, on the part of his principals, to account for what was furnished under the terms of the agreement, but also for what had been furnished in addition to and beyond the terms of the original contract. Incidentally, it is sought to hold the surety for moneys advanced by the appellant in addition to the sums he was required to advance under the terms of the agreement.

[4] The supplemental agreement changed the price of the cattle in the event the second parties desired to exercise their option to purchase the cattle. While the appellant argues that this change in price was of no effect since the complaint sought to recover the value of the cattle at the price named in the original agreement, the fact remains that it was a change in the contract and we think such a change as comes within the provisions of the Code sections by which a surety is released. Civ. Code, §§ 2819, 2840. This change was both important and material, as under the changed price it would have taken $2,475 more for the second parties to have purchased the cattle referred to in the supplemental contract. A further consideration is that the supplemental contract, by adding 100 head of cattle which were neither authorized nor contemplated by the original agreement, added another $3,300 to the obligations of the second parties. These facts alone may account for the failure of the second parties to either exercise their option or pay for the cattle, and it cannot be said that the changes made did not affect the rights of the surety on the bond.

The motion for judgment on the pleadings was properly granted, since it sufficiently appears therefrom that the appellant could not recover on the complaint filed.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

4 Cal.App.2d 326

PACIFIC NAT. CO. v. SOUTHWEST FINANCE CO. OF CALIFORNIA et al.

Civ. 9313.

District Court of Appeal, Second District, Division 2, California.

Feb. 1, 1935.

1. Malicious prosecution ⇐56

Burden was on plaintiff, in action for malicious attachment, to establish lack of probable cause and malice.

2. Malicious prosecution ⇐71(2, 3)

What constitutes probable cause for attachment is law question for court in action for malicious attachment, while malice is fact question for jury.

3 Malicious prosecution ⇐71(2)

Court, believing that undisputed facts on which defendants in action for malicious attachment acted constituted probable cause, will order nonsuit or direct verdict for defendants or submit other issues to jury, but cannot leave question of probable cause to jury, which must be instructed on such subject in concrete, not abstractly, and directed to find verdict in accordance with court's determination of question, if they find certain facts, which evidence tends to prove.

4. Appeal and error ⇐931(1)

Appellant is presumed to have had fair trial, and every intendment and presumption, not contradicted by or inconsistent with record, must be indulged in favor of lower court's judgment.

5. Malicious prosecution ⇐38

Actions for damages for malicious attachment are discouraged, and defendant in attachment suit cannot set up claim for such damages in same action.

6. Malicious prosecution ⇐25(1)

While malice may be inferred from proof of want of probable cause in action for malicious attachment, want of probable cause cannot be inferred from malice.

7. Malicious prosecution ⇐59(1)

Proof of malice merely is incompetent and irrelevant on issue of want of probable cause in action for malicious attachment.

8. Malicious prosecution ⇐71(2)

Where there is no evidence of want of probable cause in action for malicious attachment and court can say as matter of law on undisputed facts and view of disputed facts most favorable to plaintiff that there was probable cause, court should not submit any question to jury, but should grant nonsuit or direct verdict for defendant.

9. Trial ⇐139(1)

Nonsuit is proper when court, viewing plaintiff's evidence in aspect most favorable to him, believes that evidence will not support verdict for plaintiff.

10. Malicious prosecution ⇐71(2)

Where plaintiff in action for malicious attachment prepared and entered into written stipulation, admitting that it had no further evidence on issue of lack of probable cause, as to which evidence was insufficient to warrant verdict for plaintiff, court properly granted nonsuit.

Appeal from Superior Court, Los Angeles County; Charles L. Bogue, Judge.

Action by the Pacific National Company against the Southwest Finance Company of California and another. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, for appellant.

Black, Hammack & McWilliams and Alfred L. Black, Jr., all of Los Angeles, for respondents.

CRAIL, Justice.

[1-3] This is an appeal by plaintiff (appellant) from a judgment of nonsuit entered in an action for damages for malicious attachment. In order to prevail, the burden was on the plaintiff to establish (1) a lack of probable cause, and (2) malice. It is the contention of appellant that the trial court erred in its rulings on the issue of probable cause. "In actions of this character, what constitutes probable cause is always a question of law for the court. As said in Ball v. Rawles, 93 Cal. 222, 28 P. 937 [27 Am. St. Rep. 174]: 'Malice is always a question of fact for the jury, but whether the defendant had or had not probable cause for instituting the prosecution is always a matter of law to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues to the jury; but, whether admitted or disputed, the question is still one of law to be determined by the court from the facts established in the case. If the facts are controverted, they must be passed upon by the jury before the court can determine the issue of probable cause; but the question of probable

cause can never be left to the determination of the jury. * * * It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly.'" Holliday v. Holliday, 123 Cal. 26, 55 P. 703, 705. The above rule, often quoted, is difficult to understand and hard to follow by a trial judge who suddenly finds himself presiding over a tempestuous legal battle involving the issue of want of probable cause.

In attempting to follow the decisions of our courts on the question of want of probable cause, the trial judge seems to have concluded that he would direct the conduct of the trial with regard to the introduction of evidence in such fashion that the plaintiff first would be required to prove the facts which it depended upon to establish lack of probable cause; the court contemplating that, when all the plaintiff's proofs were in on that phase of the case, the trial court would consider and rule as a matter of law whether there was a lack of probable cause, and upon such determination would rest the decision as to whether the case would further proceed.

It is the contention of the appellant that "the court definitely took the position that the question of the lack of probable cause was solely a question for the trial court as a matter of law, and that the jury as triers of fact had no interest whatsoever in any phase of the question of probable cause. Proceeding on such erroneous assumption, the trial court prescribed the limitations of proofs to be made by the plaintiff, and issued its admonition that nothing should be submitted in evidence excepting only those things which plaintiff would designate to be matters pertaining solely to the question of probable cause." Many pages of appellant's brief are devoted to this contention, and citation after citation to the reporter's transcript is given to prove the contention. We have examined them carefully, and after such examination state that the court did not limit the proof to matters pertaining solely to the question of probable cause. The court did direct the order of proof so as to require appellant in the first instance to marshal all its evidence pertaining to the question of probable cause, and the court excluded evidence which bore solely on the question of malice, but the court did not exclude evidence which bore upon malice or any other question of fact, provided it bore also on the question of probable cause.

[4-7] In the peculiar circumstances of this case we must look to three lamps for light to guide our faltering feet: (1) The appellant is presumed to have had a fair trial, and every intendment and presumption not contradicted by or inconsistent with the record must be indulged in favor of the judgment of the superior court; (2) while in other jurisdictions attachments are by law made difficult to obtain, a bond in three times the amount of plaintiff's claim being required, and a plaintiff therein suing out such a writ at the peril of a cross-complaint for damages in the same action, in California by statute attachments are permitted in actions upon contract for the direct payment of money almost as a matter of course, only a proportionately small bond being required, and actions for damages for malicious attachment are frowned upon and discouraged, the defendant in the attachment suit not being permitted to set up a claim for damages for malicious attachment in the same action; (3) while malice may be inferred from proof of want of probable cause, nevertheless the want of probable cause may not be inferred from malice (Randleman v. Boeres, 93 Cal. App. 745, 270 P. 374), and therefore whatever the proof of malice, if it prove malice merely, it would be incompetent and irrelevant on the issue of want of probable cause.

[8-10] While ordinarily it would be unwise for the trial court to proceed in a malicious attachment suit as it did in this case, nevertheless, we have come to the conclusion after an examination of the record that, under the circumstances as they developed at the trial, the court's rulings resulted in no prejudicial error. "The burden of proving affirmatively the negative fact of want of probable cause is on the plaintiff." 16 Cal. Jur. 748; Franzen v. Shenk, 192 Cal. 572, 221 P. 932; Burke v. Watts, 188 Cal. 118, 204 P. 578; Lee v. Levison, 173 Cal. 166, 159 P. 438. "Where there is no evidence of want of probable cause, or where, upon the undisputed facts and the view of the disputed facts most favorable to the plaintiff, the court can say as a matter of law that there was probable cause, the court should not submit any question to the jury, but should grant a nonsuit or direct a verdict for the defendant." 16 Cal. Jur. 753. A nonsuit is proper also when, viewing the evidence of the plaintiff in its most favorable

aspect for him, the court is of the opinion that the evidence will not support a verdict in his favor. In re Estate of Bemmerly, 110 Cal. App. 550, 294 P. 33; 9 Cal. Jur. 557. In this connection it also should be said the appellant prepared in writing and entered into what it called a "fair stipulation" which in effect was an admission on the appellant's part that it had no further evidence on the issue of lack of probable cause, and that the court might then and there pass on the issue of probable cause. The evidence on the issue of probable cause being all before the court, it was the opinion of the court that the evidence was legally insufficient to warrant a verdict for the plaintiff on the issue of probable cause. With this view of the evidence we agree. This being so, the trial court did not err in granting a nonsuit, and hence it turned out that there was no occasion for the court to submit to the jury the question of what the facts were.

Judgment affirmed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 486

FILCHER v. COX.

Civ. 8505.

District Court of Appeal, Second District, Division 1, California.

Feb. 11, 1935.

Insurance ⇐587

Under agreement of partners who had made partnership the beneficiary of their life policies of which their executors, administrators, or assigns were the designated beneficiaries by assigning policies to partnership, that firm no longer required insurance and that each partner was free to do as he pleased with his policy, surviving partner held proceeds of deceased partner's policy in trust for executrix of deceased partner, notwithstanding that deceased partner did not execute any written change of beneficiary.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by Kathryn E. Filcher, as executrix of the estate of R. E. Filcher, deceased, against Edwin E. Cox. From the judgment, defendant appeals.

Affirmed.

Finlayson, Bennett & Morrow, of Los Angeles, for appellant.

LeRoy M. Edwards and Oscar C. Sattinger, both of Los Angeles, for respondent.

YORK, Justice.

The main question involved in this appeal is stated by appellant on the first page of his opening brief as follows:

"Statement of question involved. Pursuant to agreement, each of two partners takes out insurance on his life designating his 'executors, administrators or assigns' as the beneficiaries; each then assigns his policy and all 'Benefits' thereunder to the partnership, thus making the partnership the beneficiary. Later, the partners agree that the firm no longer requires the insurance and that each is free to do as he pleases with the policy so taken out on his life.

"Query: Does the latter agreement ipso facto revive the original status of each policy, so as to restore the 'executors, administrators and assigns' as the beneficiaries, or does the partnership continue to be the beneficiary unless and until a change of beneficiary shall be effected in the manner prescribed in each of the policies?"

The defendant, Cox, collected from the insurance company the whole amount of insurance due on the policy here involved by reason of the death of R. E. Filcher, turning over to the plaintiff, as executrix, one-half thereof, and claiming the other one-half as his own by reason of the partnership existing between said decedent and said defendant, Cox, up to the time of the death of said decedent. There is no question but that the points raised by appellant would be good, if raised by the insurance company itself. The cases cited by appellant hold that insurance companies are not required to look farther than the face of the policy and any assignments or transfers appearing in their records. However, in the instant case, the facts found by the court upon the evidence introduced showed that there had been a mutual agreement between said deceased and said defendant that the partnership was to have no further interest in or to the policies on the lives of said decedent and said defendant, since they were made in favor of the partnership solely for the purpose of covering certain obligations or possible indebtedness of the part-

nership, and that it was no longer necessary to carry such protection for the partnership. Defendant, Cox, attended to the assignment of his policy to the beneficiary he desired, but decedent failed to execute any written change of beneficiary.

The court found that the whole of the proceeds of the policy on the life of decedent were held in trust by said defendant for plaintiff, who is the executrix of the estate of R. E. Filcher, deceased.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

BLODGETT et al. v. B. H. DYAS CO.*
Civ. 8713.

District Court of Appeal, Second District, Division 1, California.
Feb. 4, 1935.

1. Negligence ⇐67
Pedestrian who, in broad daylight, stepped into a store entry in which there was a stairway leading to the basement and fell down stairs, while she was looking at a show window and was paying no attention to where she was going, *held* contributorily negligent as a matter of law.

2. Negligence ⇐32(1)
Property owner, not being an insurer of invitee's safety, must only use reasonable care to keep premises in reasonably safe condition and give warning of latent or concealed perils, but is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed by invitee.

3. Negligence ⇐52
Storekeeper is under no duty to give warning in daytime to pedestrians of presence of stairway opening on street, since person walking through the streets is charged with knowledge that there are many open stairways leading to basements of mercantile establishments.

4. Negligence ⇐44
Failure of store owner to comply with ordinance requiring center handrail in stairway *held* not to authorize recovery for injuries by pedestrian falling down stairway, where lack of handrail was not the cause of pedestrian's fall into stairway.

5. Negligence ⇐136(26)
Store owner's failure to comply with ordinance requiring center handrail in stairway, which negligence was not the proximate cause of pedestrian's fall, *held* not to preclude court from finding pedestrian guilty of contributory negligence as a matter of law.

HOUSER, J., dissents.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Anna Blodgett and another against the B. H. Dyas Company. From judgment of nonsuit, plaintiffs appeal.

Affirmed.

F. E. Blodgett and Edward Fitzpatrick, both of Los Angeles, for appellants.

Joe Crider, Jr., of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Plaintiff appeals from a judgment of nonsuit rendered against her in an action for personal injuries.

At the time of the accident she was walking east on Seventh street in downtown Los Angeles, looking into the show windows of the building occupied by the defendant. Somewhere near the center of this building on the Seventh street side there was a recess from which a stairway led to the basement. This recess from a point about five feet from the sidewalk which was immediately adjacent to the building was almost entirely occupied by the stairway, which was ten feet in width.

Plaintiff, intent upon a suit of clothes in the window, walked around the corner of the show window on Seventh street into the entry and stepped into the stairway, receiving injuries for which she claims damages. She testified that she did not look down at the pavement on which she was walking; that she did not see the stairway nor know it was there. Her entire attention was fixed upon the suit in the window.

[1] The evidence shows without conflict that plaintiff heedlessly walked into an open stairway in broad daylight. She was a pedestrian on a busy street, paying no attention whatever to where she was walking. The trial court properly granted defendant's motion for a nonsuit.

*For subsequent opinion see 50 P.2d 801.

[2] The owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76.

[3] A person walking through the busy streets of a large city is charged with the knowledge that there are many open stairways leading to basements of mercantile establishments. There is no duty to give any warning in broad daylight of the presence of a stairway, and persons must use their eyes to protect themselves from such obvious dangers. Woolworth & Co. v. Conboy (C. C. A.) 170 F. 934, 23 L. R. A. (N. S.) 743; Hunnewell v. Haskell, 174 Mass. 557, 55 N. E. 320.

The case of Murphy v. Broadway Improvement Co., 189 App. Div. 692, 178 N. Y. S. 860, upon which appellant chiefly relies, is not determinative of her case. The accident in that case occurred at night, in a stairway not in general use and eighteen inches inside the building line. It was held that the sufficiency of the lighting was a question of fact for the jury, the defendant owing the duty to maintain the entrance to the building passageway and lights, so that they were reasonably safe for all persons using the premises and themselves exercising due care. In the present case, as has been stated, plaintiff by her own testimony showed an entire lack of care for her own safety.

[4, 5] The trial court received in evidence over the objection of the defendant, an ordinance of the city of Los Angeles requiring a center handrail in stairways more than seven feet in width. The stairway into which plaintiff fell did not have such a rail. Plaintiff insists that by the violation of such ordinance defendant was guilty of negligence as a matter of law, and that she is therefore entitled to recover.

The evidence shows that the lack of the handrail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial. Even if the defendant was negligent in the violation of the ordinance, that fact would not preclude the court from finding that plaintiff was guilty of contributory negligence as a matter of law. Davis v. John Breuner Co., 167 Cal. 683, 140 P. 586; Wagy v. Brave, 133 Cal. App. 413, 24 P.(2d) 209. The undisputed evidence showing a lack of due caution on the part of the plaintiff precludes her right to recover. Bence v. Teddy's Taxi, 101 Cal. App. 748, 282 P. 392, 283 P. 86.

The judgment is affirmed.

I concur: CONREY, P. J.

I dissent: HOUSER, J.



4 Cal.App.2d 331

BORUM v. GRAHAM et al.

Civ. 9116.

District Court of Appeal, Second District, Division 2, California.

Feb. 1, 1935.

1. Limitation of actions ⇐127(5)

Where original complaint charged motorist in general terms with operation of automobile so as to collide with pedestrian while walking across street within safety zone for pedestrians, amended complaint, filed more than one year after accident, adding, "sometimes called and described as pedestrian cross walk, pedestrian zone and pedestrian crossing," *held* not to state new cause of action barred by limitations.

2. Automobiles ⇐245(6)

In pedestrian's action for injuries sustained in collision with automobile, conflicting evidence of motorist's negligence in passing another automobile going in same direction at intersection in violation of statute *held* to require submission of issue to jury (St. 1923, p. 557, § 125 (c).

3. Evidence ⇐83(2)

Under ordinance authorizing police chief to create crosswalks for pedestrians subject to approval of city manager, approval of city manager must be deemed to have been proven, in absence of evidence to the contrary, in view of presumption that official duty has been performed by officer charged therewith (Code Civ. Proc. § 1963, subd. 15).

4. Municipal corporations ⇐591

Ordinance authorizing police chief to mark crosswalks for pedestrians *held* not invalid as delegation of legislative power to police chief, since function of chief was administrative, not legislative.

5. Municipal corporations ⇐591

In proper enforcement of its ordinance, city legislative body may delegate a power to an officer to determine some fact or state of things upon which the ordinance makes its own action depend.

6. Automobiles ⇐9

Where the field of traffic regulation is occupied by the Legislature, a municipality may not enact regulations conflicting therewith, but when Legislature has assumed to regulate a given course of conduct by prohibiting enactments, municipality with subordinate power to act may make additional regulations in furtherance of the general law and which are not in conflict with it.

7. Automobiles ⇐9

California Vehicle Act reflects Legislature's occupation in field of traffic regulation, and is intended to cover the whole field, and any local ordinance on that subject in conflict with its provisions is unconstitutional (St. 1931, p. 2127, § 131½; Const. art. 11, §§ 6, 11).

8. Automobiles ⇐9

Ordinance making it unlawful to drive automobile into crosswalk for pedestrians as designated by police chief *held* not invalid as in conflict with the general law, since ordinance constituted an additional regulation in aid of the general law which at that time contained no regulations affecting use of public highways by pedestrians nor any regulations for marking pedestrian crosswalks on such highways (St. 1931, p. 2127, § 131½; Const. art. 11, §§ 6, 11).

9. Automobiles ⇐9

Ordinance making it unlawful to drive a vehicle into crosswalk for pedestrians as designated by police chief *held* not invalid as in violation of general law requiring motorist to drive across intersection at speed not in excess of 15 miles per hour (St. 1927, p. 1436, § 113).

Appeal from Superior Court, Los Angeles County; K. Van Zante, Judge.

Action by May W. Borum against H. S. Graham and the Mortgage Deposit Company. Judgment for plaintiff, and second named defendant appeals.

Affirmed.

Lasher B. Gallagher, of Los Angeles (Frank M. Gunter, of Los Angeles, of counsel), for appellant.

Arthur E. Schifferman, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The appeal herein is from the judgment after verdict by a jury, from an order denying a motion for judgment notwithstanding the verdict, and from an order denying a motion for new trial. The appeal from the latter order, being unauthorized, will be dismissed.

Appellant assigns as error orders overruling a demurrer, denying motions for nonsuit and directed verdict, and the admission of certain evidence, and refusing to strike the same, and contends that the evidence is insufficient to sustain the verdict.

Respondent was injured by contact with the side of a Studebaker automobile while she was crossing northward on Colorado street from the southeast corner of its intersection with South Broadway in Pasadena, about 10 o'clock in the morning of December 10, 1928. The automobile was being operated by defendant Graham as agent and employee of appellant. Respondent at the time of injury was in a pedestrian crosswalk, marked on the surface of Colorado street under authority of a city ordinance. As a result of her injuries, she possessed no memory of the circumstances of the accident, and could give no testimony thereon.

[1] In her first complaint, filed within the year after the accident, she charged defendants with negligence in general terms in operating the automobile so as to collide with her while she was walking across Colorado street "within the safety zone for pedestrians, duly provided and marked for pedestrians" by the city of Pasadena. By her amended complaints, filed more than one year after the accident, she added to the words "within the safety zone for pedestrians" the following: "Sometimes called and described as 'pedestrian cross walk,' 'pedestrian zone' and 'pedestrian crossing.'" This change in the language of the complaint did not operate to state a new or different cause of action. The complaint would state a cause of action without the quoted words; hence the demurrer was properly overruled, and there was no error in the decision that the action was not barred by the statute of limitations pleaded.

[2] We deem it unnecessary to state the testimony. It will suffice to say that, upon examination of the transcript thereof, it appears that the case was tried and submitted to the jury on evidence and instructions which embraced two distinct theories of liability based on different bases of law—the

one founded on negligence in operating the automobile across a pedestrian crosswalk established by municipal ordinance while there was therein on the same half of the street a pedestrian seeking to cross the highway, such negligence being predicated on violation of a city ordinance making it unlawful so to do; the other theory being founded on negligence in operating the automobile so as to pass another vehicle going in the same direction within the street intersection, in violation of the provisions of section 125, subd. (c), of the California Vehicle Act (St. 1923, p. 557), as it then existed. The evidence relating to the first theory is undisputed, and, if it be determined that the ordinance sections on which it was founded are valid enactments, it must follow that the verdict is fully supported. The evidence relating to and affecting the second theory was in sharp conflict. There was substantial evidence which, if believed, would support the implied finding that defendant Graham operated his automobile so as to pass an automobile bus going in the same direction within the intersection, proximately resulting in a collision with the body of respondent, who was without fault in attempting to cross the highway. In view of this conflict, it was incumbent on the trial court to submit the solution thereof to the jury. This alone required denial of the motion for nonsuit and the motions for directed verdict and for judgment notwithstanding the verdict; and the conclusion of the jury thereon is binding on this court, and it may not be said that the verdict is unsupported by the evidence.

[3-5] This leaves for determination the contention that the court erred in admitting into evidence sections 5 and 8 of the Pasadena city ordinance, and in giving instructions based thereon. Since it cannot be determined from the record on which of the two theories the verdict was founded, if the ordinance provisions in question were invalid, the admission thereof and the instructions thereon would clearly be erroneous and prejudicial.

Section 8 of the ordinance made it unlawful for the operator of any vehicle to drive into any crosswalk marked as provided in section 5 thereof, while there was in such crosswalk, on the side of the highway on which the vehicle was traveling, any pedestrian engaged in crossing the roadway, until the pedestrian shall have passed beyond the path of said vehicle. Section 5 provided that the chief of police, subject to the approval of the city manager, was authorized to mark crosswalks equal in width to the adjacent sidewalks, by appropriate devices, marks, or white lines on the surface of the roadway at all intersections where in his opinion there is particular danger to pedestrians crossing the roadway. Pursuant to this section, the chief of police had marked pedestrian crosswalk white lines across Colorado street at its intersection with South Broadway, but greater in width than the adjacent sidewalk, which excess of width we deem immaterial herein. There was some question raised by appellant as to failure of proof of the securing of approval thereof by the city manager. Such approval must be deemed proven, in the absence of evidence to the contrary, by the presumption of law that official duty has been performed by the officer charged therewith. Section 1963, subd. 15, Code Civ. Proc. Appellant also claims that section 5 of the ordinance contained a delegation of legislative power to the chief of police. The function of the chief of police was administrative, not legislative. For the proper enforcement of its ordinance, the city legislative body may delegate a power to an officer to determine some fact or state of things upon which the ordinance makes or intends to make its own action depend. In re McLain, 190 Cal. 376, 212 P. 620. We conclude, therefore, that section 5 of the ordinance was a valid enactment. The real problem is: Did the city have power to make it unlawful to drive a vehicle into such crosswalk as provided in section 8?

[6, 7] Under its police power conferred by the Constitution (section 11, art. 11) a municipal corporation may enact regulations not in conflict with general law. On all subjects which are strictly municipal affairs, its power is paramount over general laws. Section 6, art. 11. But it has been held that the regulation of traffic upon the streets of a city has ceased to be a matter of local concern and is not a municipal affair within the meaning of the Constitution, and that the power of the municipality to adopt regulations respecting the manner of operating vehicles upon its public streets may be exercised only in the absence of affirmative action by the Legislature of the state. Where the field of traffic regulation is occupied by the Legislature, a municipality may not enact regulations which conflict therewith. Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172; In re Murphy, 190 Cal. 286, 212 P. 30; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334. But when the Legislature has assumed to regulate a given course of conduct by prohibiting enactments, a municipality, with subordinate power to act in

the manner, may make new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in conflict with general law. Mann v. Scott, 180 Cal. 550, 556, 182 P. 281. The California Vehicle Act reflects the Legislature's occupation of the field of traffic regulation, and, being intended to cover the whole of such field, any local ordinance on that subject in conflict with its provisions would be unconstitutional and void. In re Murphy, supra.

[8, 9] In the light of these rules, upon examination of the provisions of the ordinance in question, along with the regulations in the California Vehicle Act as it existed in 1928 when the accident herein occurred, we fail to find any conflict between the two enactments, but rather a new and additional regulation in aid and furtherance of the purpose of the general law. The general law at that time contained no regulations affecting the use of public highways by pedestrians as such, nor any regulations providing for or affecting the marking of pedestrian crosswalks on such highways. It was not until the session of 1931 that the Legislature assumed to regulate vehicles and pedestrians at marked crosswalks. Section 131½, California Vehicle Act (St. 1923, p. 517, § 131½, as added by St. 1931, p. 2127). There being no legislative regulations governing or affecting pedestrian crosswalks or the operation of vehicles into or over them at the time of the accident herein, it follows that the sections of the ordinance relating thereto are not in contravention of or in conflict with general law, unless it can be said that to require the operator of a vehicle to stop and not enter a pedestrian crosswalk while there is thereon on the same half of the highway a pedestrian seeking to cross is in conflict with the provisions of section 113 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1927, p. 1436), wherein it is provided that, subject to the requirement to drive at a careful and prudent speed so as not to endanger life, it is lawful for the operator of a vehicle to drive across an intersection at a speed not in excess of fifteen miles per hour. We are well satisfied that such cannot be said, for there is no conflict. Nothing in the legislative regulation is changed, and nothing is taken therefrom. The provisions of section 113 prescribe generally the exercise of a constant, careful, and prudent speed and maximum lawful speed at intersections. This in effect would require the operator of a vehicle to stop in an intersection if necessary to avoid danger to others lawfully using the highway. The ordinance in question made it obligatory to stop if a pedestrian were in such marked crosswalk on the same side of the street.

We conclude, therefore, that, when the Legislature extended the operation of the Vehicle Act to traffic upon city streets as a part of the public highways of the state for the greater protection of all users thereof, it did not thereby intend to prohibit the enactment by municipalities of new and additional police regulations in furtherance of such purpose as might appear reasonable and proper in a given locality, and that section 8 of the ordinance here in question is of such character and is not in conflict with nor in contravention of the provisions or purpose of the California Vehicle Act. In this conclusion we find direct support and persuasive authority in the cases of Mann v. Scott, supra, and Flynn v. Bledsoe Co., 92 Cal. App. 145, 267 P. 887. There was accordingly no error in admitting the sections of the ordinance into evidence, nor in giving the instructions based thereon.

We have examined the instructions given at plaintiff's request and complained of by appellant, and find therein no prejudicial error nor any tendency to mislead or confuse the jury. As in all too many cases tried before a jury, a plethora of instructions was requested and given herein, when a much less quantity would have sufficed; but we find nothing in the quality thereof which reveals any error of statement of law, or which departs from the theories on which the cause was tried.

The appeal from the order denying the motion for new trial is dismissed. The order denying the motion for judgment notwithstanding the verdict and the judgment are, and each of them is, affirmed.

WILLIS, J., pro tem.

We concur: STEPHENS, P. J.; CRAIL, J.

4 Cal.App.2d 389

Ex parte MORALES.

Cr. 1837.

District Court of Appeal, First District, Division 1, California.

Feb. 5, 1935.

Habeas corpus ⇐21

Habeas corpus *held* to lie to discharge petitioner, where there was no evidence to support charge upon which petitioner was being held in custody and none from which a reasonable inference of guilt could be drawn, and district attorney did not oppose granting of petition.

Habeas corpus proceeding by one Morales.

Petitioner discharged.

Philip M. Zwerin, of San Francisco, for petitioner.

Leo A. Cunningham, of San Francisco, for respondent W. J. Fitzgerald, Sheriff of City and County of San Francisco.

PER CURIAM.

It appearing that there is no testimony of any kind or character to support the charge upon which the petitioner in the above-entitled matter is being held in custody, and none from which a reasonable inference of guilt can be drawn, and the district attorney of the city and county of San Francisco not having opposed the granting of the petition herein, it is ordered that the petitioner be and he is hereby discharged.

4 Cal.App.2d 214

PEOPLE v. TAYLOR et al.

Cr. 2600.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1935.

1. Burglary ⇐42(1)

Possession of stolen property, while not sufficient to connect defendant with perpetration of burglary, is circumstance which may be considered by jury in connection with other evidence.

2. Burglary ⇐42(1)

To warrant conviction of burglary, there must be corroborating circumstances in addition to possession of fruits of crime by defendant shortly after commission thereof.

3. Burglary ⇐42(4)

Accused's failure to account for possession of stolen property on theory inconsistent with his guilt, or to show that his possession was honestly obtained, is circumstance tending to show guilt of burglary corroborating possession of stolen property.

4. Burglary ⇐45

In burglary prosecution, truth of defendant's explanation as to manner in which he came into possession of stolen property is for jury.

5. Burglary ⇐42(3)

Evidence that tools and parts stolen from automobile supply shop were found in defendants' automobiles parked near each other at 4 a. m., 10 days after burglary, under circumstances which defendants failed to explain, *held* to support conviction of burglary.

6. Burglary ⇐9(½)

Crime of "burglary" is complete when entry of structure defined in Code has been completed, with accompanying intent to commit larceny or any felony (Pen. Code, § 459).

[Ed. Note.—For other definitions of "Burglary," see Words & Phrases.]

7. Receiving stolen goods ⇐1

Person may not be adjudged guilty of both burglary and receiving stolen property, where receiving of stolen property is embraced in its caption and asportation.

8. Receiving stolen goods ⇐1

Defendants could not be convicted of receiving stolen property which they took as part of burglarious entry.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

La Verne Rance Taylor and Wayne Taylor were convicted of burglary and receiving stolen property, and they appeal.

Judgments of conviction of burglary affirmed, and judgments of conviction of receiving stolen property reversed.

La Verne Rance Taylor and Wayne Taylor, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

By two counts of an information the appellants, together with their brother Aubrey

S. Taylor, were charged in separate counts with burglary and receiving stolen property. Upon the trial before a jury Aubrey S. Taylor was acquitted of the charge of burglary, but found guilty of the charge of receiving stolen property, while appellants were each found guilty on both counts. From the judgments entered, the latter bring this appeal.

Appellants contend: (1) That the evidence is insufficient to sustain the verdicts; (2) that a lawful conviction cannot be sustained of both the crime of burglary and that of receiving stolen property where the property received was that which was stolen at the time of the burglary; and (3) that error was committed in the giving of certain instructions.

The evidence reveals that on Saturday night, March 3, 1934, an automobile wrecking and supply shop on Santa Monica boulevard in West Hollywood was burglarized and certain articles including tools and tires and a generator were stolen. On March 13, 1934, at Alhambra, a Ford automobile and a Dodge automobile were found by an officer parked near each other at a highway curb, at about 4 o'clock in the morning. It was admitted at the trial that the Ford belonged to Wayne Taylor, and the Dodge was shown by proof to belong to La Verne Taylor. In the Ford there were found two cold chisels, three punches, and a star drill, and on the wheels two tires identified by witnesses as having been in the shop when burglarized. In the Dodge car there were found a sledge-hammer, a crowbar, and cold chisel, identified by witnesses as property which was in the burglarized shop at the time it was entered. Appellant Wayne Taylor was found on the sidewalk near the Ford automobile at about 4 a. m. of March 13th by an officer, and, in answer to questions, gave his name as Rex Valeton, and said he had been driven out to Alhambra by a lady friend in a Plymouth coupé, and was down there visiting a friend whose name and address he said he did not know. Other evidence tended to prove he had driven the Ford in question to Alhambra with a lady and a man friend accompanying him. He stated to the officers that he did not know where the tires on the Ford came from, and that the tools had been placed in the Ford by some one else—he did not know by whom. He stated he was buying the Ford from La Verne Taylor. The latter, whose place or time of arrest does not appear, told the officers in a separate conversation about 9 o'clock of the same morning that he did not know where the tires or the tools came from. He stated that he had purchased the Dodge car from an insurance company on Venice boulevard in Los Angeles and had sold it to one Ray Snyder, whose address he could not give. In the possession of Aubrey S. Taylor, on another Ford automobile, there was found, on March 14, 1934, a tire and the generator which were identified as having been stolen at the time of the burglary in question. Aubrey stated to officers and testified that he had purchased these from a man whom he knew to be working in a tire shop in Hollywood.

The foregoing comprises substantially all the evidence tending to connect appellants with the burglary of the shop on March 3d. No evidence of association or presence of appellants or of Aubrey S. Taylor at the scene of that crime was presented. The sole connecting link between the burglary and appellants consists in possession of some of the fruits of the burglary ten days afterwards, in and on automobiles shown to belong to appellants, parked near each other at the unusual hour of 4 o'clock in the morning, under circumstances which appellants failed to explain.

[1-5] While it is true that the mere possession of stolen property is not sufficient to connect a defendant with the perpetration of the burglary in which the property was taken, it is a circumstance which may be considered by the jury in connection with the other evidence. There must be, however, corroborating circumstances—acts, conduct, or declarations of the defendant tending to show guilt—in addition to possession of the fruits of a burglary by the defendant shortly after the commission of the crime, to warrant the conclusion that the accused is guilty thereof. The failure of the accused to account for such possession upon a theory inconsistent with his guilt of the offense charged, or to show that the possession was honestly obtained is itself a circumstance tending to show guilt. This corroborating evidence need be but slight, provided it is convincing. Flight, false statements showing consciousness of guilt or as to how the property came into defendant's possession, assuming a false name, inability to find the person from whom defendant claimed to have received the property, have each in turn been held to be sufficient to connect the accused with the crime when proven in connection with possession of the stolen property. People v. Russell, 120 Cal. App. 622, 8 P.(2d) 209; People v. King, 122 Cal. App. 50, 10 P.(2d) 89. And when

defendant makes an explanation as to the manner in which he came into possession of such stolen property, the question as to whether he is telling the truth in that regard rests solely with the jury. People v. McClain, 115 Cal. App. 505, 1 P.(2d) 1085; People v. McClain, 115 Cal. App. 512, 1 P.(2d) 1023. In People v. Lang, 142 Cal. 482, 76 P. 232, the court held that recent possession, unexplained, of stolen property, is a very strong circumstance as evidence of guilt, when taken in connection with other circumstances that point to guilt.

Under the facts of this case as they appear in the record, a condensed statement of which is here above given, and in the light of the law as above stated, it is clear that the verdict of the jury under count 1 charging burglary is supported.

Count 2 of the information charges appellants with the crime of receiving stolen property. The evidence shows that the property described in the count is the identical property stolen at the time of the burglary. There is a total lack of any evidence that appellants received this property from any other person or persons. The evidence and the verdict of the jury on the burglary count support the conclusion that appellants took the property from the owner's dominion during and as part of a burglarious entry. The verdict of guilty of burglary herein can be sustained on no other ground than that appellants took and asported the property found later in their possession in connection with a burglarious entry of the place where it had been kept.

[6, 7] The crime of burglary is complete when entry of the structure defined in the Code (Pen. Code, § 459) has been completed, with the accompanying intent to commit larceny or any felony. Thereafter the person thus entering may commit the larceny or any felony which he intended to commit when entering, or he may change his purpose and commit another and different felony and be amenable to prosecution and conviction of both burglary and the larceny or other felony thus committed. In such case he has committed two crimes, for both of which he may be convicted. People v. Devlin, 143 Cal. 128, 76 P. 900; People v. Shaffer, 81 Cal. App. 752, 254 P. 666. Thus, where a larceny has been committed in conjunction with the crime of burglary, the perpetrator may be adjudged guilty of both burglary and larceny, but the principal thereof, the one who alone is guilty of the actual caption and asportation, cannot be adjudged guilty of criminally receiving the thing stolen. The actual thief cannot receive from himself the fruits of his larceny. However, a principal or accessory who does not personally participate in the caption and asportation with the actual thief may be adjudged guilty of both the burglary and receiving the stolen property which the latter has taken. But this rule does not apply where the receiving of the stolen property is embraced in its caption and asportation. Adams v. State, 60 Fla. 1, 53 So. 451, Ann. Cas. 1912B, 1209, and authorities therein cited; 17 R. C. L. 84; People v. Day, 30 Cal. App. 762, 159 P. 457.

[8] From these rules it follows that, in an information charging burglary in one count and receiving stolen property in a second count, there can be no lawful adjudication of guilt of the latter crime where the evidence shows that the property described in the latter count was the identical property taken and asported by the accused during the burglarious entry. For therein the essential element of reception is absent; the spirit and purport of the law implying the necessity of two actors to complete the act of receiving. While it is proper to charge in separate counts both burglary and receiving stolen property, upon the conclusion of the introduction of evidence the jury should be given appropriate instructions defining and distinguishing the rules applicable, so as to avoid the mistake of finding the accused guilty of receiving from himself property stolen by him during the commission of a burglary.

We find no error in the instructions complained of. That relating to the effect of possession of stolen property as evidence of guilt is in form and words several times approved by our appellate courts. People v. Haack, 86 Cal. App. 390, 399, 260 P. 913; People v. McGowan, 127 Cal. App. 98, 104, 15 P.(2d) 516.

The judgments entered on count 1 are affirmed. The judgments entered on count 2 are reversed.

We concur: STEPHENS, P. J.; CRAIL, J.

BIDDLECOMB v. HAYDON.

Civ. 8721.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1935.

Rehearing Denied Feb. 23, 1935.

Hearing Denied by Supreme Court April 4, 1935.

1. Negligence ⇐121(2)

Res ipsa loquitur rule is inapplicable, unless instrumentality causing injury was under exclusive control or management of one sought to be charged with responsibility.

2. Negligence ⇐121(2)

Res ipsa loquitur rule is inapplicable, where cause of accident is unexplained and might have been one of several things, for some of which defendant is not responsible.

3. Explosives ⇐10

Res ipsa loquitur doctrine *held* inapplicable in action for injuries by explosion in building occupied by defendant after escape of ammonia from refrigeration system when flange broke, in view of plaintiff's evidence that machinery causing injury was not in defendant's exclusive control and failure to show how escape of ammonia could cause explosion.

4. Explosives ⇐10

Ice cream manufacturer *held* not liable for injuries caused by explosion after escape of ammonia from refrigeration system as alleged result of negligence of independent contractor's employee in repairing valve.

5. Explosives ⇐10

Ice cream manufacturer *held* not liable for injuries caused by explosion after escape of ammonia from refrigeration system when flange broke, where refrigeration machinery expert testified without contradiction that system had all safety devices commonly used and that no safety device would have prevented break and there was no evidence of how accident could have been prevented in ordinary use of machinery.

6. Negligence ⇐117

Defendant's plea of plaintiff's contributory negligence is not admission of defendant's negligence.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Dailey S. Stafford, Judge.

Action by Milton Biddlecomb, a minor, by his guardian ad litem, Albert W. Biddlecomb, against W. E. Haydon. Judgment for plaintiff, and defendant appeals.

Reversed.

Mathes & Sheppard, Gene G. Curry, and Robert A. Cushman, all of Los Angeles, for appellant.

C. Ibeson Sweet, of Los Angeles, for respondent.

EDMONDS, Justice pro tem.

Defendant appeals from a judgment in favor of plaintiff for personal injuries sustained as the result of an explosion occurring in the building occupied by the defendant. At the time of the injury, plaintiff, who was a minor, was standing outside the building. He testified that all he knew of the accident was that there was a great explosion.

The defendant operated an ice cream factory in the building where the explosion occurred. An ammonia refrigeration system was a part of the machinery used in the business. In connection with the compressor, there was a valve for the purpose of shutting off the flow of ammonia when the temperature in the freezing box rose to a certain point. This valve was controlled by a thermostat in the freezing box, and had given more or less trouble from time to time. On the day of the accident, an employee of the defendant called the Pacific Scientific Company and asked them to send some one to make repairs. In response to the call, a repairman by the name of Johnson appeared and went to work on the valve. After working for some two or three hours on the valve, Johnson put it into the line for test in order to see if the connections were tight. While this test was going on a part of the valve broke, allowing ammonia to escape into the room.

Three of the employees of the defendant, including one Larson, in charge of manufacturing operations for the defendant, were standing near Johnson watching him make the test. According to them, a snap was heard and ammonia commenced coming out of the pipe into the room. They thereupon got out of the building. One of them put on an ammonia mask and attempted to go inside to shut off the receiving valve or king valve, but the ammonia was so strong it burned his body and he came out. The fire department was called, and, while waiting for the firemen, Johnson, Larson, and some others were standing in front of the door on Regent street, which is referred to as the

factory entrance. The explosion occurred after the arrival of the firemen and between five and ten minutes after Larson left the building on account of the escaping fumes.

The building in which defendant's business was carried on is on the southwest corner of Regent and Market streets in Inglewood. The refrigeration machinery occupied the southwest corner of the building. On the north front of the building and about ten feet from its westerly wall there was a door leading to the portion in which the machinery was located. From this door known as the factory entrance, one entered the factory portion of the building. The valve which caused the difficulty was about thirty-five feet from this door.

Plaintiff at the time of the explosion was standing on the sidewalk on the north side of the building about twenty feet from the factory entrance. He testified that the explosion occurred about five minutes after he reached there, and that during that time he saw only one man, other than a bus driver he was talking with, outside the building. This man, whom plaintiff did not know, was looking into the building near the factory entrance. Mr. Larson testified that he saw the bus driver near the building some time after the firemen arrived, but did not recall seeing the plaintiff before the explosion.

Plaintiff charged negligence in general terms, and at the trial replied entirely upon the doctrine of res ipsa loquitur. At the conclusion of plaintiff's case, defendant, Haydon, moved for a judgment of nonsuit upon the grounds that the evidence showed no negligence upon his part. He asserts upon appeal that his motion should have been granted and that the evidence is insufficient to support the finding of the trial court that the explosion occurred as a result of defendant Haydon's negligence.

[1, 2] The nonsuit should have been granted. The rule of res ipsa loquitur does not apply unless the instrumentality causing the injury is shown to have been under the exclusive control or management of the one sought to be charged with responsibility therefor. Neither does it apply where the cause of the accident is unexplained and might have been due to one of several causes for some of which the defendant is not responsible. Brown v. Board of Trustees, 41 Cal. App. 100, 182 P. 316; Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A. L. R. 129. In Scellars v. Universal Service, 68 Cal. App. 252, 228 P. 879, 880, the court quotes with approval from the case of Lucid v. E. I. Du Pont, etc., Powder Co., 199 F. 377, 118 C. C. A. 61, L. R. A. 1917E, 182, where the court said: "The doctrine of res ipsa loquitur involves an exception to the general rule that negligence must be affirmatively shown, and is not to be inferred, and the doctrine is to be applied only when the nature of the accident itself, not only supports the inference of the defendant's negligence, but excludes all others." See, also, Gritsch v. Pickwick Stages System, 131 Cal. App. 774, 22 P.(2d) 554.

[3] Here plaintiff, by the evidence he himself introduced, showed that the machinery causing the injury was not in the exclusive control of the defendant at the time of the accident and the cause of the accident was not fixed. True, the flange broke and allowed ammonia to escape. But the record does not show how ammonia escaping from the system could cause an explosion. The cause of the explosion is a matter of conjecture from the evidence introduced by the plaintiff, but, if explained at all, was brought about by the act of an independent contractor, for which defendant is not liable.

[4] But aside from the application of the doctrine of res ipsa loquitur, there is no evidence in the entire record showing any negligence on the part of the defendant. The evidence which he introduced presented in more detail the same story of the accident as offered by plaintiff. It showed without contradiction that the Pacific Scientific Company, whose employee was repairing the valve, was an independent contractor. Defendant did not have any one in his organization who repaired the valves used in his system. When the valves did not operate properly, he secured the services of an organization specializing in that work. Neither the defendant nor his employees directed Johnson how to proceed nor what to do. Johnson was there because his firm represented that they could make the repairs which the defendant's employees did not know how to make. Under such circumstances, the defendant was not liable for the negligence of Johnson, assuming that the accident was caused by such negligence. In the early case of Bennett v. Truebody, 66 Cal. 509, 6 P. 329, 331, 56 Am. Rep. 117 it was said: "The plumber was left to produce the desired result in his own way. If that did not constitute him an independent contractor we do not know what would. There was no stipulation as to the amount to be paid for the work; but that is an immaterial circumstance in this case." This rule has been con-

sistently followed since. Flickenger v. Industrial Accident Com., 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150; Hedge v. Williams, 131 Cal. 455, 63 P. 721, 64 P. 106, 82 Am. St. Rep. 366; Brown v. Board of Trustees, 41 Cal. App. 100, 182 P. 316.

[5] There is also no evidence whatever of any lack of proper care by the defendant. An expert on refrigeration machinery testified without contradiction that the system in use by the defendant at the time of the accident had all of the safety devices which were at the time commonly used. He also stated that no safety device would prevent a break such as the one which occurred. How the accident could have been prevented in the ordinary use of the machinery is not shown.

[6] Defendant's plea of the contributory negligence of the plaintiff was not an admission that defendant was negligent. Hoffman v. Southern Pacific Co., 84 Cal. App. 337, 258 P. 397; Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540; Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71.

The judgment is reversed.

I concur: CONREY, P. J.

I dissent: HOUSER, J.

HARNISCHFEGER SALES CORPORATION v. COATS. *

Civ. 5154.

District Court of Appeal, Third District, California.

Jan. 30, 1935.

Rehearing Denied March 1, 1935.

Hearing Granted by Supreme Court March 29, 1935.

1. Evidence ⇐434(11)

Where seller or his agent, with power to complete the sale, procures by false representations a written conditional sales contract, parol evidence is admissible to show such fraud, notwithstanding provision in contract that it contains all the representations and agreements of the parties, but parol evidence is not admissible to show fraud where agent is without power to complete the contract, buyer has notice of agent's lack of power, and seller has no notice of any false representations.

2. Evidence ⇐434(11)

Provision in written conditional sales contract, procured by agent, that contract contained all the terms thereof and that no statements or representations not therein contained had been made as an inducement to its execution is sufficient notice to buyer of agent's lack of authority to make representations not so included, so as to exclude parol evidence by buyer to show fraudulent representations by agent.

3. Evidence ⇐434(11)

Where agent, without power to complete sale, procured buyer's signature to written conditional sales contract, and seller in another state accepted contract without notice of any representations or agreements other than those contained in contract, which recited that no other representations had been made, parol evidence was inadmissible to show that agent had procured contract by false representations.

4. Sales ⇐479(15)

Where conditional sales contract provided that in case of action thereon by seller buyer should pay reasonable attorney's fee if allowed by law, seller was not entitled to attorney's fee in action to recover balance of purchase price, since no attorney's fee was allowed by California law.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Harnischfeger Sales Corporation, a Delaware corporation, against E. C. Coats, who filed a counterclaim. From a judgment for plaintiff, notwithstanding the verdict for defendant on his counterclaim, defendant appeals.

Modified and affirmed.

Gerald M. Desmond and Ralph H. Lewis, both of Sacramento, for appellant.

Clyde C. Sherwood, of Oakland, and Albert E. Sheets, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Defendant appeals from a judgment against him, notwithstanding the verdict of a jury theretofore rendered in his favor upon a counterclaim. The action was brought by plaintiff, a corporation, to recover a balance due upon a conditional sales contract for the sale of a certain power shovel. A portion of the original sales price was paid in cash, the deferred payments being evidenced by a series of promissory notes, exe-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

* For subsequent opinion see 48 P.2d 662.

cuted contemporaneously with a conditional sales agreement, which remained unpaid.

The answer admitted the allegations of the complaint except as to the reasonable amount of an attorney fee. By special defense and counterclaim appellant asserted he was induced to enter into the written contract by fraudulent representations of plaintiff.

The principal point raised on appeal, as stated by appellant, is whether or not a provision in a conditional sales contract to the effect that no representations had been made that were not incorporated in the contract, precluded the defense of fraud.

The conditional sales contract contained the following provision: "This agreement shall not be considered as executed and shall not become effective until accepted by the vendee and executed and approved by the President or Vice President or Secretary of the vendor, and it is hereby further declared agreed and understood that there are no prior writings, verbal negotiations, understandings, representations or agreements between the parties not herein expressed; that same shall not be at any time modified, nor the instalment payments and notes be extended except in writing, executed by the vendee and approved by someone of the aforesaid executive officers of said vendor."

Counsel have at great pains collected all of the California cases wherein fraud and misrepresentation were practiced by an agent of the vendor. Among these cases is cited and discussed Clancy v. Becker-Arbuckle-Wright Corp., 137 Cal. App. 43, 29 P.(2d) 868; Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922; Campbell v. Title Guarantee, etc., Co., 121 Cal. App. 374, 9 P.(2d) 264; Gridley v. Tilson, 202 Cal. 748, 262 P. 322; Munn v. Earle C. Anthony Inc., 36 Cal. App. 312, 171 P. 1082; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906. It is the contention of appellant that the only exception to the rule that the fraud of an agent might not be relied upon as a defense is where the contract provides notice to the prospective vendee that the agent's authority is limited, and that in the instant case the contract does not purport to limit the agent's authority to make representations, but limits the authority of the agent only as to modification of the contract after execution.

Upon the granting of the motion for judgment notwithstanding the verdict, the able trial jurist, Judge Shields, analyzed the law and the facts here involved very fully and completely, and we adopt that portion of his opinion wherein he discusses that phase of the case:

"The contract for the sale of the shovel involved in this action contained, among others, a provision as follows: 'This agreement shall not be considered as executed, and shall not become effective until accepted by the vendee, and executed and approved by the president, or vice-president, or secretary of the vendor, and it is hereby further declared, agreed and understood that there are no prior writings, verbal negotiations, understandings, representations or agreements between the parties, not herein expressed.'

[1] "The contract was negotiated by the agent of the vendor who signed it and forwarded it to the vendee. The vendee later signed the contract after which it was sent to the vendors at their eastern office, where it was duly executed by the corporation, on behalf of the plaintiff vendor, and a copy of it later returned to the vendee. In this action to recover the balance of the purchase price of the machine, the vendee over the objection of the vendor, introduced evidence of fraudulent representations, not included in the contract, which he claimed were made to him by the agent of the plaintiff for the purpose of inducing him to enter into the contract of the purchase of the machine, and which he claimed did so induce him, to his damage. The contract was otherwise admitted as correct, and subject to such deductions as might be made on account of the alleged fraud, the sum sued for was not disputed by the defendant vendee. The jury found for the defendant on his claim of fraud and under stipulation of counsel the judgment, if the verdict is to stand, is to be for the plaintiff for the amount sued for, less the damage to defendant assessed by the jury. The matter before me is a motion, made upon the reading of the verdict, for judgment for plaintiff, notwithstanding the verdict; the plaintiff contending that under the provisions of the contract no evidence should have been allowed of representations or statements alleged to have been made by the agent of plaintiff and not communicated to it or included in the contract. The law on this question is now extremely clear. If the seller himself negotiates the contract, or if the contract is negotiated by an agent with power to make and complete the sale, clauses of the kind above mentioned are of no avail to protect the seller from the consequence of having made fraudulent representations, not included in the contract, but which were made for the

purpose of inducing the buyer to enter into the contract. If fraud is committed at the inception of the contract it vitiates the contract, including all provisions in it attempting to or designed to relieve the guilty party from liability for any such fraud.

"No one who negotiates a contract either personally or through an agent with authority to complete it, can avoid the consequences of fraud in its procurement, either by himself or his agent by any provisions in the contract of the kind contained in the contract before us. The earlier cases in California held to the contrary. But when the matter came before the Supreme Court in Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922, the court disregarded these cases and adopting the more equitable rule that 'parol evidence is always admissible to prove fraud,' applied it to the facts of that case.

"This was said with equal definiteness in Gridley v. Tilson, 202 Cal. 748, 262 P. 322, 323, where Mr. Justice Shenk says: 'While the Civil Code, § 1625, provides that a written contract supersedes all negotiations and stipulations concerning the matter between the parties, it has always been the law that fraud in the inducement of a contract may be shown.'

"But it will be observed that this rule is limited to cases where the party who made the representations made the contract. The seller who makes his own contract cannot escape this rule. If he procures the contract through an agent, with power to act, he is likewise subject to it. But there is a well-settled exception to this rule. It arises where the party seeking to rely on fraudulent representations of an agent had notice of the agent's lack of authority to make such representations. 'Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further.' Gridley v. Tilson, 202 Cal. 748, 262 P. 322, 323. In the case before us there is no direct statement in the contract that the agent had no such authority, but there is a definite limitation upon the power of plaintiffs' salesman to either execute the contract, or to make it effective and a statement that that power was reserved to certain executive officers of the absent and nonresident plaintiff. Then the buyer, defendant, certified to such absent persons who are to accept or reject the contract, 'that there are no prior writings, verbal negotiations, understandings, representations or agreements between the parties not herein expressed.'

"The buyer who alone could have heard the representations or been influenced by them states to the seller that there were none; and the seller, who knew of none, accepts his statement. Who then can be heard to claim their existence? The seller in effect says, 'with the understanding that my agent has made no verbal representations I approve this contract.' Does he need to say that his agent had no power or authority to make inducing recommendations when he declares there were none, and asks the purchaser to assure him that none were made, before he approves the contract?

[2] "Undoubtedly the provision in a contract that it contains all of the terms thereof, and that no statements or representations not therein contained were or had been made as an inducement to its execution, does not have to state, in terms, that no agent had authority to make any such representations. No such statement was made in the provision involved in Campbell v. Title Guarantee & Trust Co., 121 Cal. App. 374, 9 P.(2d) 264. This case goes much further than Gridley v. Tilson, and unless we conclude that the Realty Service Corporation, the selling agent of the defendant, had no power in the matter, except merely to bring the parties together, the case is in conflict with Mooney v. Cyriacks, 185 Cal. 71, 195 P. 922. Otherwise Campbell v. Title Guarantee & Trust Co. goes back to the earlier cases of Munn v. Earle C. Anthony, Inc., 36 Cal. App. 315, 171 P. 1082; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906, and Pease v. Fitzgerald, 31 Cal. App. 727, 161 P. 506.

[3] These cases hold that a clause in a contract such as the one under discussion does protect from charges of fraud the principal who negotiates the contract in his own behalf or through his fully authorized agent. Mooney v. Cyriacks rejected this doctrine, and held the seller liable notwithstanding this exonerating provision. It adopts the policy that one who directly perpetrates a fraud cannot in this way escape responsibility for it. The decision in Mooney v. Cyriacks is based directly upon the fact that the evidence showed that the principal knew of the fraud in the sale involved, and more particularly upon the ground that the agent who made the sale had full authority in the matter. The opinion states, page 80 of 185 Cal., 195 P. 922, 926, in reference to the principal's knowledge that it must be presumed that

just prior to the sale the principal went over the representations that had been made by his agent Graves, and that 'Graves detailed the facts of the transaction faithfully to him.' On the question of the agent's authority the opinion is equally positive. 'As to the question of agency, it is sufficient to point out that the evidence we have set forth shows that Graves had full authority to negotiate the sale for his principal.' And again the appellant will not now be heard to question the authority of Graves. This is as far as the cases have gone in denying the operation of provisions of the kind we are discussing. In the case before us the principal is not shown to have had any knowledge of the alleged fraudulent representations, and the agent, unlike Graves, did not have power to make the sale. This case, accordingly, does not come within the liberal rule of Mooney v. Cyriacks, and as a consequence the evidence of alleged representations made by the salesman to the purchaser of the power shovel should not have been received. Without such evidence plaintiff's right to recover is unquestioned. Other causes advanced in support of this motion need not be considered. Judgment for plaintiff as prayed for will therefore be given, and an attorney fee of $600.00 will be allowed."

The remaining question is as to the propriety of awarding attorney fees to respondent. The agreement contained the provision: "The vendee agrees that he will pay to the vendor all costs, charges, expenses and disbursements including reasonable attorney's fees (if allowed by law) incurred by vendor. * * *"

Plaintiff alleged in its answer that $1,200 was a reasonable attorney's fee, and the answer denied that that sum or any other sum was a reasonable amount to be fixed by the court.

[4] It is urged by appellant that the proof introduced at the trial was not sufficient to justify any award. Respondent, for the express purpose of having an attorney fee allowed, introduced all of the papers, records, pleadings, and files in the case, and alleged in its verified complaint, which was not denied, that it had incurred an obligation in the sum of $1,200 therefor. This undoubtedly was sufficient proof to raise the issue under the circumstances. However, the vendee became liable for an attorney fee only if allowed by law. No attorney fee is, under the laws of California, allowed by law in an action of this nature. It is entirely a matter of contract. Respondent apparently seeks to interpret these words as meaning "if permitted by law," but we cannot read that construction into the contract. The language used is not ambiguous, but if it were, the rules of construction would require that its meaning be construed most strictly against the author of the agreement, the respondent herein. We also believe, that in the absence of a definite stipulation withdrawing the issue of an attorney fee from the jury, the jury should have determined the amount thereof as a special finding. This they failed to do.

The judgment is therefore modified by striking therefrom any allowance to respondent as an attorney's fee, but in all other particulars the judgment is affirmed; the respondent to recover costs.

We concur: THOMPSON, J.; PLUMMER, J.



4 Cal.App.2d 164

KLENZENDORF et al. v. SHASTA UNION HIGH SCHOOL DIST et al.

Civ. 4851.

District Court of Appeal, Third District, California.

Jan. 25, 1935.

1. Schools and school districts ⇐121

In action for injuries to high school manual training student cutting off finger tips in jointer, testimony that instructions in operation of jointer had been given by teacher *held* admissible without showing that student was present, since whether student was in class and heard teacher's instructions was for jury.

2. Trial ⇐62(2)

In action for injuries to high school manual training student cutting off finger tips in jointer, testimony that teacher had given instructions in use of jointer *held* admissible without showing that student was present, as proper rebuttal, where plaintiffs' witness testified that no instruction was given.

3. Negligence ⇐121(2)

One relying on res ipsa loquitur doctrine must allege merely general acts of negligence, and pleading alleging specific acts of negligence refutes theory of res ipsa loquitur.

4. Negligence ⇐121(2)

Hypothesis of doctrine of "res ipsa loquitur" is that plaintiff has no knowledge of just what caused accident, and that, since instrumentality is solely within defendants' control, negligence will be inferred on proof of prima facie case in absence of adequate explanation by defendant.

[Ed. Note.—For other definitions of "Res Ipsa Loquitur," see Words & Phrases.]

5. Schools and school districts ⇐122

In action for injuries to high school manual training student cutting off finger tips in jointer, instruction on res ipsa loquitur doctrine was not required where complaint alleged that article with which student was working was jerked from his hands by jointer and his right hand was thrown into jointer blades and that defendants negligently failed to provide jointer with proper blade guards, and accident was fully explained in evidence offered by plaintiffs.

6. Negligence ⇐121(2)

Instrumentality must be under defendants' exclusive control to invoke res ipsa loquitur doctrine.

7. Schools and school districts ⇐121

In action against school district for injuries to high school manual training student cutting off finger tips in jointer, res ipsa loquitur doctrine was not applicable, since school district could not have exclusive control of equipment used by members of class.

8. Trial ⇐260(8)

In action for injuries to high school manual training student cutting off finger tips in jointer, requested instruction on question of negligence of officers and employees of school district was properly refused as covered in formula instructions requiring finding for plaintiffs under certain circumstances (School Code, § 2.801).

9. Trial ⇐295(8)

In action for injuries to high school manual training student cutting off finger tips in jointer, formula instructions failing to state that plaintiff's lack of care must be found to have proximately or directly contributed to injury to bar recovery, and requiring finding for defendants if certain facts were found, and taking from jury right to determine whether hypothetical facts recited constituted negligence, *held* not error where jury were fully and fairly instructed as a whole (Const. art. 6, § 4½).

10. Trial ⇐295(1)

Instructions must be considered in their entirety, and if they state law of case fairly and clearly, they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to criticism (Const. art. 6, § 4½).

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Everett Klenzendorf, a minor, by and through Warren Klenzendorf, his guardian ad litem, and another against the Shasta Union High School District, a political subdivision of the state of California, and others. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Jesse W. Carter, of Redding (Dallas L. Barrett, of Redding, of counsel), for appellants.

Albert F. Ross, L. C. Smith, and Hiram R. Baker, all of Redding, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

Everett Klenzendorf, a minor of the age of sixteen years, was a student regularly enrolled at the Shasta Union High School. Among other courses in the curriculum which he was taking was one in manual training, for which purpose the school conducted a workshop, and, as part of the equipment therein, maintained a machine known as a hand jointer. Klenzendorf, as such student in the shop course, operated the jointer as a part of his work in the class. This machine resembles a bench or table with an open slot, beneath which revolve steel blades operated by means of an electric motor. The blades rapidly rotate, and, as a piece of wood is passed along the surface of the bench, the blades are raised and come in contact with the wood, planing off the surface to the designated thickness.

At the time of the injury, the jointer was protected by a wooden blade guard, which had, prior to the accident, been substituted for an iron guard which had been supplied by the manufacturer of the jointer as part of the original equipment.

Upon the day in question, Everett Klenzendorf was in the act of passing a cylindrically-shaped piece of wood, approximately five inches in diameter and three inches in length, through the jointer, when suddenly the piece of wood slipped, throwing the right hand of the boy forward, bringing it in contact with the blades, resulting in the loss of a portion

of his second, third, and little fingers and permanently injuring the index finger.

A jury returned a verdict in favor of defendant, whereupon plaintiff, the father of the injured youth, in his own behalf and as guardian ad litem, now prosecutes this appeal.

[1] The first point urged by appellants is that the trial court erred in admitting the testimony of several students in the shop study course that instructions in the operation of the jointer had been given by the teacher, without any showing being made, however, that plaintiff Everett Klenzendorf was present at such times. Some nine witnesses in the shop course, students and classmates of plaintiff Everett Klenzendorf, were called and asked what instructions, if any, were given by the teacher to the class with reference to use of the jointer. To this question counsel for plaintiffs interposed the objections that it was incompetent, irrelevant, and immaterial and not within the issues and that no foundation had been laid therefor. The objections were overruled and each witness testified, in substance, that the class had been warned against running a piece of wood less than twelve inches in length through the jointer, but if it were necessary to do so, to always use a "shoe" to hold the material against the blades. On cross-examination only one of the witnesses could recall that plaintiff was present at any of such instructions.

Appellants cite several cases to support their proposition that a notice in respect to the manner of operating and the dangerous quality of the machine must be communicated to the person who is to use the same, and notice to others belonging to the same group as the injured employee is not admissible without first showing that the injured person was present and the instructions or notice were communicated to him. In support thereof counsel cites several cases, among them being Gila Valley, etc., Railway Co. v. Hall, 13 Ariz. 270, 112 P. 845, 846; Grant v. Varney, 21 Colo. 329, 40 P. 771, 773; James v. Northern Pacific Railway Co., 46 Minn. 168, 48 N. W. 783; Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 47 P. 364, 778; Fox v. Peninsular, etc., Works, 84 Mich. 676, 48 N. W. 203; Klaffke v. Bettendorf Axle Co., 125 Iowa, 223, 100 N. W. 1116. Appellants also refer us to 16 California Jurisprudence, page 1031, where a number of cases are cited supporting the rule that it is negligence for the master to expose an employee to danger without first giving the servant such full and complete instructions as will enable him to work safely and with proper care, but the rule is there enumerated that whether or not the servant, or in this case the student, had received such warning and instructions is a question of fact for the jury.

In the case of Grant v. Varney, supra, the court said: "The court below struck out certain evidence given by one of the witnesses for the defendants, and refused to admit other evidence offered by the defendants, tending to show that defendants had issued general rules and instructions to its workmen, which provided, in substance, that the workmen who were engaged in running the drift should do timbering whenever they considered it necessary and essential for their safety. Such evidence was, of course, pertinent, and an offer to prove such rules by competent testimony should have been allowed."

In the case of Gila Valley, etc., Railway Co. v. Hall, supra, the rule is laid down that even an individual comment or warning made to a third person could be shown if there was anything to indicate "with any reasonable certainty that he [plaintiff] heard the remark." These cases indicate to us that the rule here applicable is that it is for the jury to determine from all the facts and circumstances whether or not the injured boy was at any time in the class and heard the instructions of the teacher.

[2] We also believe the testimony is admissible as proper rebuttal. A witness called by plaintiffs on their behalf was asked the following question: "Q. Now Mr. Wilson, prior to the injury to Everett Klenzendorf, which he received on May 27, 1931, was any instruction given to the class of which you and Everett were members with reference to the operation of a hand jointer? A. No." Defendants thereupon called the nine witnesses mentioned. Under our impression of the law, we believe both the question in chief and the rebuttal were proper.

The instructor in the course testified positively that upon at least three different occasions he personally instructed plaintiff Everett Klenzendorf as to the precautions to be observed in the use of the jointer, warning him against running short pieces through the machine, two of these occasions being only a few days prior to the accident.

That plaintiff Everett Klenzendorf also had knowledge and had been notified of the dangerous character of the machine is evidenced by the fact that on the walls of the manual training shop near the machine in question, at a height approximately level with the eyes, and at a place passed by all of the stu-

dents daily, in plain sight, and not far from the locker of plaintiff Everett Klenzendorf, appeared the following sign posted upon the wall:

"The Dangerous Jointer.

"How long is the block you want to joint? Don't put it on the jointer if it is less than 12 inches. If you do, you are in danger of cutting off the tips of your fingers. Be careful of your fingers—you have but one set, and can't afford to lose any." (On this sign to attract attention, appears a picture of a boy standing at a jointer, running a short piece of wood through the machine.)

A second point relied upon by appellants for reversal is the refusal of the court to instruct the jury upon the doctrine of res ipsa loquitur. Appellants cite the case of Damgaard v. Oakland High School District, 212 Cal. 316, 298 P. 983, a case involving an explosion during the performance of a dangerous experiment in the chemical laboratory of the school. There the pleader did not attempt to set forth the items of defendant's omissions or to what causes the explosion was due. As to the particular omissions, the pleader apparently knew nothing and alleged nothing. Under such circumstances, the plaintiff had a right to rely upon the doctrine of res ipsa loquitur, but such doctrine is not applicable to the instant case. In the complaint are pleaded specific acts of negligence on the part of defendants, and specific defects in the jointer are alleged as well as the lack of certain safety devices thereon, and the inadequacy thereof; also that the evidence introduced at the trial tended to establish specific negligence and were facts well within the knowledge of plaintiff Everett Klenzendorf.

In the case of Johnson v. Ostrom, 128 Cal. App. 38, 16 P.(2d) 794, 795, the court, in discussing the doctrine of res ipsa loquitur, said: "The application of the doctrine of res ipsa loquitur depends upon the particular circumstances of each case. It is predicated on the theory that the complainant has no knowledge of the direct cause of the accident, and that the operator of the instrumentality by means of which the injuries are inflicted, possesses superior knowledge or opportunity to ascertain the cause of the accident. Under such circumstances, the one having charge and control of the machine must assume the burden of explaining the cause of accident, or upon failure to do so, a prima facie showing of negligence will be inferred. 45 C. J. 1205, § 773; 15-16 Huddy's Ency. of Automobile Law, p. 280, § 157. The converse of this rule is likewise true. If the evidence affirmatively shows the operator or manager of the instrumentality by means of which the injuries are inflicted has no superior knowledge or by the exercise of reasonable care is unable to secure information regarding the cause of the accident, or the evidence establishes the fact that the complainant possesses all the knowledge or information thereof which is reasonably accessible to the operator of the machine, then the doctrine of res ipsa loquitur has no application."

[3, 4] As is pointed out to the same effect in Jianou v. Pickwick Stages System, 111 Cal. App. 754, 296 P. 108, 109: "It is the established rule that one who relies upon the doctrine of res ipsa loquitur to establish a cause based upon negligence must allege merely general acts of negligence. Upon the contrary, when one alleges specific acts of negligence upon which he relies, the pleading refutes the theory of res ipsa loquitur. The very hypothesis of the doctrine is that the plaintiff has no knowledge of just what caused the accident, and that, since the instrumentality by means of which the accident occurred is solely within the control of the defendant, negligence will be inferred upon proof of a prima facie case, in the absence of an adequate explanation on the part of the defendant exempting him from liability. Connor v. Atchison, T. & S. F. R. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; Ingledue v. Davidson, 102 Cal. App. 697, 283 P. 837; 19 Cal. Jur. 713, § 127."

[5] The complaint here alleges that while plaintiff Everett Klenzendorf was engaged in operating the jointer, the article with which he was working "was jerked from his hand by said 'hand jointer', and plaintiff's right hand was thrown into the blades of said 'hand jointer', there being no proper blade guard covering said blades * * *," and further alleges that defendants carelessly and negligently failed to provide said jointer with proper and safe blade guards, etc., which failed to spring back into place, leaving the blades exposed. One has to but read the record also to learn that the accident was fully explained in the evidence offered by appellants.

[6] As a further reason for upholding the court for refusing to instruct upon the doctrine of res ipsa loquitur, it is well established that the instrumentality shall be under the exclusive control of the defendants in order that the doctrine of res ipsa loquitur may be invoked.

[7] We do not believe a school district can be said to have exclusive control of an instrumentality which is part of the equipment in a shop course to be used and is actually used by members of the class. Hilson v. Pacific G. & E. Co., 131 Cal. App. 427, 21 P. (2d) 663; Hill v. Pacific G. & E. Co., 22 Cal. App. 788, 136 P. 492; Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 519, 58 A. L. R. 129. As was said in the latter case involving an injury to a customer who was passing through a revolving door to the entrance of defendant's store: "The operation of such doors is not within the exclusive control of the owner of the building or proprietor of the store. Customers and patrons take a very distinct part in their operation and are chargeable with the exercise of ordinary care in their use. Injury may occur in their operation from a lack of such care on the part of the persons who use them, and for whose negligence the owner or proprietor would be in no wise responsible."

[8] Appellants also complain that the court refused to give an instruction proposed by them covering the question of the negligence of the officers and employees of a school district as covered in section 2.801 of the School Code. We believe the matter was sufficiently covered in the instructions given. The court gave the following instructions, submitted by plaintiffs:

"You are instructed that if you find from the evidence that the plaintiff, Everett Klenzendorf, was a regularly enrolled pupil in the Shasta Union High School and that while he was attending a class in shop study at the established period therefor, he engaged in the operation of a hand jointer, maintained by and under the management of the defendants, with the consent and permission of the defendants, and that while so operating said hand jointer he was injured as the proximate result of the negligence and carelessness of the defendants, and that said plaintiff was not negligent or careless in the operation of said hand jointer, you are to find for the plaintiff."

"You are instructed that if you find from the evidence that the plaintiff, Everett Klenzendorf, was injured while operating a hand jointer with the consent and authority of the defendants, and which was maintained and managed by the defendants, and that the defendants negligently failed to instruct said plaintiff in the operation of said hand jointer, and that such negligent failure was the direct and proximate cause of the injury sustained by him, you are to find for said plaintiff, if you find that the said plaintiff did not contribute to said injury by negligence on his part."

Appellants also contend that instructions given upon the question of contributory negligence are erroneous in that they fail to state that the contributory negligence of plaintiff, if any, must have contributed proximately to the injury sustained.

Among the instructions given we find the following: "* * * Even if you should find that the defendants * * * were negligent, yet if you also find that the plaintiff was likewise negligent, and that the negligence, if any, of both plaintiff and defendant directly or proximately contributed to the happening of the accident, then in such event your verdict must be in favor of defendant."

[9, 10] Appellants also criticize two so-called formula instructions, one because it failed to state that lack of care on the part of plaintiff must be found to have proximately or directly contributed to the injury in order to bar his recovery, and the other in that it purported to inform the jury that if certain facts are found by them, they must find for the defendants, taking from the jury the right to determine whether or not the hypothetical facts recited constituted negligence. We have read and compared the numerous instructions given and believe as a whole the jury were fully and fairly instructed. As Mr. Chief Justice Waste said in Douglas v. Southern Pacific Company, 203 Cal. 390, 264 P. 237, 239: "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understood it. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism." And in Reuter v. Hill, 136 Cal. App. 67, 28 P.(2d) 390, 394: "There is a disposition to relax the rigid application of the rule regarding formula instructions which is announced in Beyerle v. Clift, 59 Cal. App. 7, 209 P. 1015, and other similar cases since the adoption of article 6, § 4½, of the Constitution, when the record fails to show a miscarriage of justice."

We see no miscarriage of justice in the instant case, and, for the reasons given, judgment must therefore be affirmed, and it is so ordered.

We concur: THOMPSON, J.; PLUMMER, J.



4 Cal.App.2d 178

CALLEGARI v. MAURER.

Civ. 5113.

District Court of Appeal, Third District, California.

Jan. 26, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. **Continuance** ⇐7

Application for continuance is addressed to trial court's sound discretion.

2. **Appeal and error** ⇐966(1)

Trial court's ruling on application for continuance will not be disturbed unless abuse of discretion clearly appears.

3. **Continuance** ⇐12

Refusal of continuance sought on ground of telephone message and telegrams from defendant's indemnity company notifying defendant's attorney of defendant's illness and inability to make trip to place of trial *held* not abuse of discretion, where attorney received no direct communication from defendant or defendant's physician concerning illness.

4. **Continuance** ⇐47

Affidavits of attending physicians submitted on motion for new trial, certifying illness of defendant at time of trial, could not supplement or rectify insufficient showing made on morning of trial, so as to put trial court in error in having denied continuance.

5. **New trial** ⇐140(3)

Affidavit that juror fell asleep during trial *held* insufficient to warrant granting new trial where affidavit did not show that juror failed to hear material testimony and record showed that questions and answers were repeated.

6. **New trial** ⇐36

Examination of defendant's physician by plaintiff's counsel as to whether physician did not testify for defendant in all personal injury actions against him *held* not such misconduct as justified new trial.

7. **Trial** ⇐228(3)

Instruction using words "responsible for an injury occasioned by another" instead of stating "proximately caused by another" *held* not misleading in action for injuries.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by G. Callegari against Armand Maurer. Judgment for plaintiff, and defendant appeals.

Affirmed.

Neumiller & Ditz and Robert L. Beardslee, all of Stockton, for appellant.

Gumpert & Mazzera, of Stockton, for respondent.

Mr. Presiding Justice PULLEN, delivered the opinion of the court.

This is an appeal from a judgment upon a verdict by a jury for personal injuries sustained by plaintiff.

Defendant by mistake had left the public highway and turned into a private driveway. In his efforts to turn around, his heavy car became imbedded in the mud. Several men nearby came to his assistance. Among these men was plaintiff, who took a position at the side of the car and applied his strength toward pushing the car forward. Defendant was in the driver's seat, and as he applied the power, the car shot forward so suddenly that plaintiff slipped and was thrown to the ground and the rear wheel passed over his feet, causing the injury here complained of.

Inasmuch as the principal ground urged for reversal is the refusal of the trial court to grant a continuance, we will recite in some detail the steps preceding the motion.

An amended complaint was filed and served November 10, 1932, and an amended answer interposed November 26, 1932. The cause was set for trial for December 28, 1932, but because the court was then otherwise engaged, this action was, by the order of the presiding judge, reset for January 17, 1933.

We may assume defendant was not present on the day set for trial, for on the following day, December 29th, his counsel wrote to him in Los Angeles, and sent a copy thereof to his Stockton office informing him that the case had been continued to January 17th, and stated it was imperative that he see them as soon as possible in order that they might discuss the facts of the accident and prepare his defense.

Apparently no response was made to this request, and on January 14th, his counsel telegraphed him in San Diego as to the date of trial, and again stated it was absolutely imperative that he be present and testify. In order that his attorneys might be sure that this message was received by appellant, they requested advice from the telegraph company and received a message from the manager of the Western Union Telegraph Company in San Diego that the message was personally delivered to appellant on the day sent, i. e., January 14th.

On the same day appellant's attorneys again wrote him at San Diego, transmitting the same by registered mail, wherein he was again notified of the date of trial, reciting the various communications previously sent him, and again informed him that his presence was absolutely necessary at the trial. This registered letter was received January 15th and signed for by an agent of the addressee in San Diego.

On Saturday, January 14th, appellant called Mr. Neumiller, one of his attorneys, on the long-distance telephone from San Diego and had some conversation with him. Just what was said we do not know except appellant stated he had some business to transact in San Diego and it would be inconvenient to return to Stockton for the trial and asked Mr. Neumiller to obtain a continuance if possible, upon the ground that he had some unfinished business to attend to, but also stated that if a continuance was refused, he would leave San Diego and arrive in Stockton the morning of the trial. Counsel for plaintiff refused to consent to a continuance and appellant was so notified by telegraph on Sunday, January 15th. The next word Mr. Neumiller received was a telephone message received about 5:30 p. m. Monday afternoon, the day before the trial, from the office of the Columbia Casualty Company in San Francisco, stating that office had received a wire from their San Diego representative that appellant was confined to his bed with influenza and that Dr. Russell, a physician in San Diego, would not permit him to make the trip. On the morning of the trial, counsel received the following telegram from the Columbia Casualty Company in San Francisco: "Received wire San Diego representative late Monday reading as follows: A. F. Maurer just advised he is confined to bed with influenza. Dr. Russell will not permit trip. Too late for affidavit. Columbia Casualty Co."

Upon the calling of the cause for trial, Mr. Neumiller requested a continuance, and, in support thereof, submitted an affidavit by himself embodying the foregoing information, and also argued the matter ably and at considerable length. The motion was refused, however, and a jury impaneled and the cause tried. Witnesses were called upon behalf of plaintiff and one witness testified upon behalf of appellant, Dr. Sanderson, a specialist in orthopedics.

[1, 2] It is, of course, elementary that an application for a continuance is addressed to the sound discretion of the trial court, and action thereon will not be disturbed unless an abuse of such discretion clearly appears. In this case, we cannot find such an abuse of discretion.

[3] Strictly speaking, there was nothing before the court upon which it could act. It had before it a series of letters and telegrams from the attorneys of appellant addressed to appellant, urging upon him in most forceful language the necessity of his presence at and before the trial. The court also had before it the fact appellant was not present upon the day previously set for trial, and also the telephonic request from appellant to his attorney stating he was otherwise engaged in San Diego, and requesting a continuance if possible. This was the only indication counsel had received from appellant that he had received or intended to comply with their requests that he return to Stockton. They had received no reply to any of their communications addressed to appellant from December 29th to January 14th. Then after receiving all of these letters and telegrams from his attorneys, appellant failed to communicate with them as to the fact of his illness, and apparently notified some representative of an indemnity company in San Diego, who notified his company in San Francisco, who in turn notified Mr. Neumiller in Stockton. It was upon that information that appellant asked the court to grant a continuance. Not even the name of an individual was affixed to the telegram from the indemnity company, but merely "Columbia Casualty Co."

It is to be recalled, too, that appellant was not a man unacquainted with the methods of quick communication. He was the representative of a large celery company, engaged in the production and marketing of celery, and was then in San Diego to purchase celery to cover their commitments, and we may well assume he was familiar with and frequently used telegrams for communication in his business affairs. If the court had had before it telegrams directly from appellant or from his physician stating the fact of illness, a different situation would be here presented.

The orderly and prompt dispatch of the large volume of litigation that now concerns the courts requires that cases must be disposed of upon the days set aside for them, unless for good cause shown. Here there was nothing before the court upon which it could act.

Appellant was able, physically, to communicate with a representative of an indemnity company in San Diego some time Monday afternoon, informing the representative he was confined to his bed. It is obvious that if appellant had been as concerned in assisting the court and informing his attorneys as he was in protecting himself with his insurance carrier, he could then have wired the necessary information to the court or counsel. Even a telegraphic report by the attending physician on Monday at 10:30, when he first visited his patient and advised him he would not be able to make the trip, would have put this matter in a different light. In other words, the trial court had no information except a telegram from an impersonal corporation, "Columbia Casualty Co.," not apparently sanctioned by any individual of authority, and an affidavit of Mr. Neumiller based upon hearsay statements as to the reason of appellant's failure to appear. We must remember that the good faith of Mr. Neumiller is not on trial, for he apparently did everything that could be done for his client, but rather the evasive and dilatory tactics of appellant.

Many authorities are cited by counsel to the effect that a litigant is entitled to be present at his trial if possible, but each case is governed by its particular set of facts. Appellant relies strongly upon the cases of Betts Spring Co. v. Jardine Machinery Co., 23 Cal. App. 705, 139 P. 657; Pacific Gas & Electric Co. v. Taylor, 52 Cal. App. 307, 198 P. 651, 652; Carl v. Thomas, 116 Cal. App. 294, 2 P. (2d) 872.

In the case of Betts Spring Co. v. Jardine Machinery Co., supra, it appeared by affidavit of the attorney that his client had been seriously ill, and three months prior to the setting of the case for trial had gone to Scotland and would return in two months, and that he was the only witness to prove matters and things in his own defense. The court also there remarked there was no intimation of bad faith.

In the case of Pacific Gas & Electric Co. v. Taylor, supra, defendant was not present at the trial. It appeared by affidavit of his attorney, however, that defendant was seriously ill in Boston, where he had gone prior to the setting of the cause for trial, that defendant alone knew the whereabouts of the witnesses, and it was absolutely necessary for appellant to accompany witnesses who were to apprise the property, it being an action in condemnation. The illness of appellant was not questioned. The court there said: "Moreover, the rule is that, where such showing is made without any objection to the form in which it appears, it should be considered as though it were competent; and legitimate probative force should be accorded to it. In this connection we must remember that there was no controversy in the court below as to Taylor's illness, nor was any objection made to the form of the affidavit or to the failure to produce a physician's certificate."

In the case at bar, not only was objection made as to the character of the evidence, and the good faith of appellant, but also as to the lack of a certificate by a physician.

In the case of Carl v. Thomas, supra, the affidavits showed that through the failure of the mail service, appellant had received no notice of date of trial, and was then at sea, he being a member of the United States Coast Guard.

We believe sufficient has been said to justify the ruling of the trial court and deem it unnecessary to further discuss this point.

[4] Appellant next urges the court erred in refusing to grant a new trial on various grounds, among others being abuse of discretion and errors in law occurring at the trial.

In the affidavits submitted on the question of illness on the motion for new trial, is one by Dr. Russell and one by Dr. Cooper, both of whom attended him and certified he was suffering from influenza. Such showing could not supplement or rectify the insufficient showing made on the morning of the trial, so as to make the court's denial of the original motion for a continuance erroneous. No showing is made by appellant that he was unable to communicate with counsel, nor as to any facts to which he would testify, or even that he was a necessary witness or would testify if the case had been continued or a new trial granted, nor any necessity for his attendance. Ross v. Thirlwall, 101 Cal. App. 411, 281 P. 714.

[5] Appellant also claims the court erred in refusing to grant a new trial on the ground that a juror had been guilty of misconduct. It was claimed that a juror fell asleep during the course of the trial. First, the affidavit of the juror denies he fell asleep, although he admits closing his eyes while listening to the testimony. People v. Ung Sing, 171 Cal. 83, 151 P. 1145. However, the affida-

vit is insufficient, as it does not show that any material testimony was not heard by the juror; in fact, the record shows that the questions and answers were repeated after the court spoke to the juror.

"The fact that a juror falls asleep during the trial is not ground for disturbing the verdict if it does not appear that his sleep was for such a length of time or at such a stage of the trial as to affect his ability fairly to consider the case." Am. & Eng. Ency. of Law (2d Ed.) vol. 17, p. 1247.

[6] As to the alleged misconduct of counsel for plaintiff in asking a medical witness if he did not testify for Mr. Neumiller on behalf of the defense in all his personal injury actions, while not to be commended, is not such misconduct as to justify a new trial. Likewise certain errors pointed out in an instruction given at the request of plaintiff seem to be removed when the instruction is considered as a whole, but even if, as counsel so earnestly contend, it may be construed as an instruction upon a question of fact, nevertheless its giving could not justify a reversal of the judgment.

[7] The second instruction is criticized for using the words "responsible for an injury occasioned by another" instead of stating "proximately caused by another." We do not believe the jury was misled thereby.

For the reasons stated, the judgment is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



Ex parte MARQUEZ. *

Cr. 2658.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1935.

Rehearing Denied Feb. 9, 1935.

Hearing Granted by Supreme Court Feb. 21, 1935.

Habeas corpus ⇐113(3)

Appeal *held* not to lie from order in habeas corpus proceeding granting petitioner's discharge from custody after having served one year in county road camp pursuant to order of probation in rape prosecution, since probation is not a "judgment and sentence" within statute permitting appeal (Pen. Code, § 1506; § 19a, as added by St. 1933, p. 2217).

[Ed. Note.—For other definitions of "Judgment" and "Sentence," see Words & Phrases.]

In the matter of the application of Frank Marquez for a writ of habeas corpus. From an order of the superior court granting petitioner's discharge from custody, the People appeal.

Appeal dismissed.

U. S. Webb, Atty. Gen., Paul D. McCormick, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

Gladys Towles Root, of Los Angeles, for respondent.

CRAIL, Justice.

The people of the state of California appeal from an order of the superior court granting petitioner's (respondent's) discharge from custody in a habeas corpus proceeding. The appeal is under section 1506, Penal Code. Frank Marquez was charged with rape in an information containing four counts. He entered a plea of guilty to count 1 and applied for probation. Thereupon the following order was entered: "It is ordered that proceedings as to Count 1 of the information be suspended and defendant granted probation for a period of twenty years under the following conditions: the first four years of said probationary period defendant shall serve at the county road camp," etc. After serving one year in the county road camp, he sued out a writ of habeas corpus upon the ground "that any period in excess of one year in the county jail is in excess of the period of confinement in the county jail permitted by section 19a of the Penal Code [as added by St. 1933, p. 2217]."

It is the contention of the petitioner that section 1506 of the Penal Code does not give the people the right of appeal, for the reason that there is no existing judgment against the defendant. Said section was added to the Code by the Legislature of 1927 (St. 1927, p. 1061), and prior thereto there existed no right of appeal under the circumstances of this case. In the case of In re Alpine, 203 Cal. 731, 265 P. 947, 953, 58 A.L.R. 1500, the Supreme Court, in passing upon an appeal taken under this section, said: "It is clear from the language

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 45 P.2d 342.

of said section that an appeal is only allowable after conviction and in those cases where there is an existing judgment against the defendant. In all other cases the law remains unchanged." Reaffirmed in Re Page, 214 Cal. 350, 5 P.(2d) 605. The respondent herein having been placed on probation in the first instance, there was no judgment standing against him. Probation is not a judgment and sentence. People v. De Voe, 123 Cal. App. 233, 11 P.(2d) 26; People v. Patello, 125 Cal. App. 480, 13 P.(2d) 1068; People v. Marconi, 118 Cal. App. 683, 5 P.(2d) 974; People v. Noone, 132 Cal. App. 89, 22 P.(2d) 284. It follows therefore that the people have no right of appeal in this case.

The appeal is dismissed.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

On Rehearing.

PER CURIAM.

Before this court's decision was rendered and the opinion released, we considered the matters presented in the appellant's petition for a rehearing and entertained doubts in relation thereto. However, since the Supreme Court has spoken as clearly as it did in Re Alpine, 203 Cal. 731, 265 P. 947, 58 A. L. R. 1500, we thought we were in duty bound to follow it, and we still think so.

Petition for rehearing denied.



4 Cal.App.2d 5

ASSOCIATED OIL CO. v. ORANGE COUNTY.

Civ. 1540.

District Court of Appeal, Fourth District, California.

Jan. 19, 1935.

1. Taxation ⇐478

Taxpayer seeking relief from overvaluation of his property must make timely objection before board of supervisors sitting as board of equalization.

2. Taxation ⇐535

Under statute providing for refund of tax erroneously or illegally collected, taxpayer *held* entitled to excess tax paid under assessment of lessee's interest in oil and gas lease based on lessee's statement of oil production which by mistake set forth more oil than was actually produced, since erroneous assessment was result of erroneous statement of amount of property owned and not result of overvaluation of property owned (Pol. Code, § 3804).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by the Associated Oil Company against Orange County. From a judgment for the defendant, the plaintiff appeals.

Reversed.

Robert M. Searls, of San Francisco, and Harrison Guio and Paul O. Broxon, both of Los Angeles (Humphrey Searls, Doyle & MacMillan, of San Francisco, of counsel), for appellant.

S. B. Kaufman, Dist. Atty., and W. F. Menton, Asst. Dist. Atty., both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The plaintiff, as the owner of an oil and gas leasehold interest in certain real property in the county of Orange, brought this action to recover an overpayment of taxes for the fiscal year 1928–29, on its mineral rights under the lease. In April, 1928, the plaintiff furnished to the county assessor, at his request, a sworn statement of its real and personal property, including a statement of its production of oil from the real property covered by this lease for the preceding year. This statement of production was to be used by the assessor for the purpose of determining the assessed value of the mining or mineral rights owned by the plaintiff. By mistake, the statement so furnished set forth that 486,096 barrels of oil had been produced on the property during the preceding year, whereas, in fact, only 126,132 barrels of oil had been produced thereon during that period. In fixing the assessment on the plaintiff's interest in this property, the assessor employed the method used by him in assessing the mining or mineral rights in all oil-producing properties in said county. He took the number of barrels of oil produced during the twelve months prior to March, 1928, multiplied this number by 60 cents per barrel, subtracted the proportion representing the landowner's interest, took the balance as the value of the lessee's interest, and applied the tax rate to that value, thus determining the amount of the assessment against the lessee's interest.

While the method employed in assessing the plaintiff's interest in this property was exactly like that employed in assessing all similar interests in the county, by reason of the error with respect to the amount of oil which had actually been produced during the preceding year, the amount of the tax assessed against the plaintiff and paid by it was $7,923.57 more than it should have been. The mistake was not discovered until May, 1929, and seasonably thereafter the plaintiff filed with the board of supervisors its verified claim under section 3804 of the Political Code for a refund in the amount of the excess paid, which claim was approved by the assessor. The board of supervisors rejected the claim, and this action was brought within the time required by the statute referred to. The court found in accordance with the facts above set forth, and also found "that said amount of 486,096 barrels of oil was, through inadvertence, error and clerical mistake of an employee of plaintiff when preparing the said statement and without any intent to mislead, deceive or defraud defendant, inserted by plaintiff in said statement of production," and "that the assessed value placed on said mining or mineral rights by said assessor as aforesaid was by reason of said error and mistake excessive and unjust to plaintiff." And as a conclusion of law the court found that "the tax paid pursuant to the said unjust and excessive assessment levied by the assessor of the county of Orange, as aforesaid, was not a tax 'erroneously or illegally collected' within the meaning of section 3804 of the Political Code, and the court is without power to remedy or change said assessment or to order refund of any taxes levied and/or paid thereon." Judgment was entered for the defendant, and the plaintiff has appealed.

[1] The facts are undisputed, and the question presented is entirely one of law. It is well settled that the only relief open to a taxpayer in case of an overvaluation of his property is to be obtained by making timely objection before the board of supervisors sitting as a board of equalization. On the other hand, section 3804 of the Political Code provides another method of relief where taxes have been erroneously or illegally collected. While the statute referred to uses the word "may" in connection with the refund of any amount erroneously or illegally collected as taxes, it has been held that this word is to be construed as "shall." Hayes v. County of Los Angeles, 99 Cal. 74, 33 P. 766. The essential question here is whether, under these facts, the excess amount paid is to be considered as taxes erroneously collected, within the meaning of the Code section referred to, or whether there appears merely a case of overvaluation of the appellant's property.

The respondent, contending that a mere overvaluation appears, relies upon the case of S. Cal. H., etc., Co. v. Los Angeles County, 49 Cal. App. 712, 194 P. 62. In support of the other contention, the appellant mainly relies on the case of Pacific Coast Co. v. Wells, 134 Cal. 471, 66 P. 657, 658. In the first of these cases a statement was furnished to the assessor by the taxpayer showing credits and solvent debts owed to it by others in a certain amount and unsecured debts owed by it in an equal amount. Immediately, and with the knowledge of the taxpayer, the assessor altered each of these figures in such a way as to show a balance of assessable property in a certain amount. The original statement furnished by the taxpayer was intended to be tentative, and the assessable value then fixed by the assessor was also understood to be subject to change in the event the assessor should later determine that a certain debt owed by the taxpayer was properly deductible from the net amount of its taxable assets. The figure then fixed by the assessor was not changed, however, and the question presented was whether the assessor's mistaken belief that the indebtedness last referred to was not deductible, with a consequent excessive assessment, entitled the taxpayer to recover the excess tax paid under the provisions of section 3804 of the Political Code. In effect, it was held that the taxes in question were neither erroneously nor illegally collected, that the erroneous undervaluation of the deductible debts amounted merely to an overvaluation of the assessable property, and that the taxpayer, not having applied to the board of equalization for a revaluation of his property, was without remedy.

While some of the language there used seems to support the contention of the respondent here, that language should be considered in connection with the facts there involved. In that case, in so far as the excess tax was concerned, all of the facts were placed before the assessor. He was informed as to what assets the taxpayer had and of the amount of the debt which it was claimed should be deducted. Whether or not he made a mistake in applying the law, the assessor was engaged in valuing certain assets which were correctly reported to him. With the knowledge of the taxpayer, he fixed a certain valuation on the property. There was a dif-

ference of opinion at the time between the taxpayer and the assessor as to whether or not this valuation was correct, and the taxpayer failed to ask for a revaluation at the hands of the board of equalization. In all of these respects a materially different case is presented by the record now before us.

While in one sense it is true that almost any mistake which results in an excessive assessment amounts to an overvaluation of the property of a taxpayer, we think there is a real and distinct difference between those cases in which it may properly be said that the error is one of overvaluation and those cases in which the overvaluation is a mere incidental result of an erroneous assessment of property which should not have been assessed. This distinction was recognized in Brenner v. Los Angeles, 160 Cal. 72, 116 P. 397, 399, in which case the court said: "But we are of the opinion that, in so far as Henne v. County of Los Angeles [129 Cal. 297, 61 P. 1081] places in the same category the mere overvaluation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all, that case should be overruled."

In Pacific Coast Co. v. Wells, supra, relied upon by the appellant, certain property which was not taxable at all was included in the assessment, through a mistake of the taxpayer's bookkeeper in furnishing a statement of property to the assessor. By reason of this mistake, the taxpayer's solvent credits were reported in a sum which was $100,000 more than the correct amount. While the assessor thought he saw an error in subtraction in the statement and attempted to correct it, in effect he perpetuated the mistake and adopted as correct the erroneous figure as to the amount of solvent credits owned. The mistake was not discovered until it was too late to seek a revaluation before the board of equalization, and, after paying the excessive tax, a refund was sought from the board of supervisors. While a refund was ordered by them, the auditor refused to issue a warrant, and the action followed. In that case the court said:

"We think the facts stated entitled the petitioner to the writ, and that the court erred in sustaining the demurrer. The money so paid to the county as taxes was not due from petitioner. It was the amount of taxes upon an assessment of $100,000 on property that had no existence. It was an assessment made by the assessor in changing the footings of petitioner's assessment. It was paid without consideration, and the city and county have no right to it. Petitioner has paid all its just taxes, and this sum in addition. No doubt, if the assessor had called the attention of petitioner to the statement it had given in, the footings would never have been changed. It was a clerical error that could easily have been explained. When the attention of the assessor was called to it, he recommended that the mistake be corrected. The board of supervisors, representing the county, after investigation made an order to correct it. Shall the city and county keep the $1,625 regardless of all this? It surely would be in violation of honesty and fair dealing for them to do so. Is it in violation of law for them to refund it? We think not. The board were authorized to order the money refunded under section 3804, Pol. Code, which provides: 'Any taxes, penalties and costs, paid more than once, or erroneously or illegally collected, may, by the order of the board of supervisors be refunded by the county treasurer.' This being a remedial statute, it should be liberally construed so as to carry out its intent and object."

And further: "It is said by respondent that it would be a dangerous and pernicious doctrine 'to hold that a taxpayer may, whenever he considers that he has made a mistake in his statement, after making a voluntary payment of the amount claimed, apply to the board of supervisors for a return of the amount which he deems he has overpaid.' The doctrine has never been laid down in so broad terms as the imaginary case stated. Undoubtedly, the rule would not apply to correct an assessment where the taxpayer has merely changed his opinion as to the value of his property. But in a case like this, where it is patent that a mistake was made, and that $100,000 was added by the assessor to the total assessment as stated by the taxpayer, it is not a dangerous doctrine to give back to the taxpayer that to which the county has no right."

[2] In the case just referred to, the actual facts were not before the assessor when the assessment was fixed, due primarily to an error made by the taxpayer's bookkeeper, and as a result property to the amount of $100,000 which was not owned by the taxpayer was included in the assessment. In principle, a similar situation appears in the case at bar. Because of the method employed in assessing this class of property in accordance with the actual production for the preceding year, the error in reporting such production at a figure much too high amounts to the same thing, in so far as the excess is concerned, as reporting

property which the appellant did not possess. As a practical matter and in effect, in so far as fixing this assessment is concerned, the appellant reported more property than it had. The erroneous assessment which followed resulted for that reason, and because the correct facts were not before the assessor, and not because of any overvaluation of what the appellant actually had. While the assessor intended to and did apply the same measure of value which was applied in all like cases, the same was applied, because of the error, to an incorrect statement of what had been produced and to what amounts to an erroneous statement of what was owned by the appellant.

We think this is a case of erroneous assessment coming within the provisions of section 3804 of the Political Code and not one of mere overvaluation of property, and that the appellant is entitled, legally as well as morally, to a return of the excess amount paid.

The judgment appealed from is reversed.

We concur: MARKS, J.; JENNINGS, J.



4 Cal.App.2d 351

Ex parte WILLIAMS.

Cr. 1418.

District Court of Appeal, Third District, California.

Feb. 1, 1935.

Criminal law ⇐991(2)

Judgment, which sentenced petitioner to twenty years' imprisonment and ordered that petitioner be delivered to warden of prison to be dealt with as required by law, *held* not void on ground that court by statute had no power to fix the term of imprisonment, since that part of judgment fixing the term being void was surplusage and did not affect remainder of judgment (Pen. Code, § 1168; St. 1931, p. 1061).

Application of Wilbur Williams for a writ of habeas corpus.

Writ denied.

Wilbur Williams in pro. per.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for respondent.

PER CURIAM.

In 1929 the petitioner was convicted of the crime of murder in the second degree in the superior court of Riverside county. Following his conviction, the court pronounced judgment, and, in so doing, used the following language: "Therefore, it will be the judgment and order of the court that you be punished by twenty years' imprisonment in the States Prison, and that you be delivered by the Sheriff of Riverside County to the custody of the Warden of the States Prison at Folsom, there to be dealt with as required by law."

The petitioner was received at Folsom on the 11th day of July, 1929. On December 27, 1933, the petitioner was brought before the board of prison terms and paroles, and thereupon said board, by order duly made and entered, fixed the term for which the petitioner should be confined in the state's prison at Folsom, at thirty years.

The petitioner contends that the judgment of the superior court of the county of Riverside is void, and that he is entitled to a writ of habeas corpus.

The first paragraph of section 1168 of the Penal Code reads: "Every person convicted of a public offense, for which imprisonment in any reformatory or state prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a state prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." The section then provides for the manner in which sentence shall be imposed, act of 1931, Statutes 1931, p. 1061, now empowering the board of prison terms and paroles to fix the term for which any prisoner sentenced to a state's prison shall be confined. The trial court was without jurisdiction to fix the term. It had jurisdiction, however, to sentence the petitioner to the state's prison at Folsom, there to be dealt with as required by law.

Having no power to fix the term of confinement, that portion of the judgment and sentence we think should be considered as mere surplusage, and full effect and force given to that portion of the sentence within the jurisdiction of the superior court to pronounce, to wit, to order "that you be delivered by the Sheriff of Riverside County to the custody of the Warden of the States Prison at

Folsom, there to be dealt with as required by law." The law specifies, as we have said, what proceedings shall thereafter be taken, and the body authorized to fix the term of imprisonment.

In the case of Ex parte Germino, 38 Cal. App. 497, 176 P. 701, 702, this court used language which, though perhaps not necessary to the decision therein rendered, expresses what we hold to be the law applicable to this case. The court there said: "Indeed, that part of the judgment fixing a specific term of years of imprisonment in such a case is surplusage, and, in our opinion, ought to be disregarded as of no consequence in its effect upon the judgment."

A somewhat similar question as the one presented here was before the Supreme Court of Michigan, in the case of Ex parte Duff, 141 Mich. 623, 105 N. W. 138, where the court said: "The fixing of a maximum term of imprisonment was unauthorized and void. It was mere surplusage as much so as though the sentence had provided what clothes the convict should wear, what food he should eat, or when he should be paroled. Rejecting the unauthorized and illegal surplusage, all of the elements of a strictly legal sentence remain."

The petitioner was legally sentenced to the state's prison at Folsom. The records show that the term of his imprisonment has been fixed by the duly authorized board of prison terms and paroles.

The writ is denied.



4 Cal.App.2d 75

PEOPLE v. BRUNEMAN.

Cr. 2571.

District Court of Appeal, Second District, Division 1, California.

Jan. 24, 1935.

Rehearing Denied Jan. 30, 1935.

1. Criminal law ⇐857(1)

Amended Penal Code section providing that alternate jurors be kept in confinement with other jurors during trial, and that they be kept in sheriff's custody on final submission of case to jury, but not permitting alternate juror to take his place in jury box until after discharge of disqualified regular juror, did not authorize court to admit alternate jurors into jury room during deliberations of jury (Pen. Code, § 1089, as amended by St. 1933, p. 1342; Const. art. 1, § 7).

2. Jury ⇐32(1)

Constitutional right of trial by jury is right as it existed at common law, which required that jury be composed of 12 persons and any act of Legislature attempting to abridge such right is void (Const. art. 1, § 7).

3. Criminal law ⇐857(1)

Presence in jury room during deliberations of jury in criminal case of alternate jurors to whom case had not been submitted for decision *held* reversible error as invasion of right of jury trial, notwithstanding consent of defendant's attorney (Pen. Code, § 1089, as amended by St. 1933, p. 1342; Const. art. 1, § 7).

YORK, J., dissenting.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Les Bruneman was convicted of kidnapping for purposes of extortion and robbery, and he appeals.

Reversed.

Jerry Giesler, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

Judgment was pronounced against the defendant pursuant to the verdict of a jury which found him guilty of kidnapping for purposes of extortion and robbery, in violation of section 209 of the Penal Code of California, as charged in the indictment. Defendant appeals from the judgment and from an order denying his motion for a new trial.

Appellant contends that for many stated reasons the verdict is contrary to the law and contrary to the evidence. He also contends that the court erred in its failure to grant his motion to strike out certain portions of the evidence. For reasons which will hereinafter appear, it has become unnecessary for this court to discuss or decide upon the propositions above stated.

Appellant further contends that the court erred to his prejudice in permitting the two alternate jurors to accompany the jury of twelve members upon their retirement to deliberate, and in permitting said alternate jurors to remain with said jury during their

deliberations, and that this procedure upon the part of the trial court was in violation of section 7 of article 1 of the Constitution of the state of California. We are of the opinion that this assignment of error must be sustained.

At the opening of the trial, twelve jurors were sworn to try the cause; and, it appearing to the court that this would probably be a protracted trial, two other persons were sworn as alternate jurors. It was further ordered that the jury, including the alternate jurors, remain in the custody of the sheriff during the trial. At the close of the trial, after the conclusion of arguments of counsel to the jury, and after the instructions had been read by the court to the jury, the following proceedings occurred with relation to the alternate jurors.

"The Court: Gentlemen, do you wish to stipulate, in order to determine the meaning of the 1933 amendment to the code regarding the custody of alternate jurors, that the two alternate jurors here shall accompany the 12 regulars to the jury room; that the Court shall advise them that they shall listen to the discussion of the other jurors, but that it shall definitely instruct them that they are not to address any other member or members of the jury upon any subject of the case, or connected therewith?

"Mr. Giesler: Yes, your Honor.

"The Court: It is stated by the law that the alternates shall be kept in the custody of the sheriff.

"Mr. Giesler: I haven't read that law since it was adopted, but I don't remember whether it says the alternate jurors shall accompany them to the jury room.

"The Court: It does not say.

"Mr. Giesler: However, with your Honor's admonition, I have no objection.

"The Court: It says they shall be kept in the custody of the Sheriff. It doesn't say whether they shall go to the jury room, or not; yet if one or more of them should have to act, it probably would be desirable that they hear the discussions of the other jurors up to that point.

"Mr. Giesler: I have no objection to that.

"Mr. Veitch: We adopt the stipulation.

"The Court: Then the two alternates will accompany the 12 regular jurors, and will remain with them at all times, but, Mrs. Farr and Mr. White, you must understand, that so far as talking is concerned, you are to remain under the same admonition that you have heretofore been under throughout the trial of the case. You must not address any regular juror on any subject of or connected with the case, or concerning any matter, person, or issue, involved in it. It will be your duty to remain with them and listen to their discussion, but in this instance you have ears and no talk. Now, Mrs. Farr, do you understand that you are not to address any member of the regular jury on any subject connected with this case?

"Juror Farr: I do.

"The Court: How about you, Mr. White; do you understand that?

"Juror White: I do."

Section 1089 of the Penal Code, which provides for alternate jurors in criminal cases, was added to that Code in the year 1895 (St. 1895, p. 279). It was first amended in the year 1927 (St. 1927, p. 1063, § 2). In the original section, and also in the section as amended in 1927, the last two paragraphs of the section read as follows: "They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors; and except, as hereinafter provided, shall be discharged upon the final submission of the case to the jury.

"If, *before the final submission* of the case, a juror die, or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, *who shall then take his place in the jury box*, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

Said section 1089 of the Penal Code was again amended in the year 1933 (St. 1933, p. 1342). By that amendment those last two paragraphs were changed so that they read as follows:

"They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury such alternate jurors shall be kept in the custody of the sheriff and shall not be discharged until the original jurors are discharged, except as hereinafter provided.

"If at any time, whether before *or after* the final submission of the case to the jury, a juror die or become ill, so as to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, *who shall then take his place in the jury box*, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

[1] Giving attention now to the 1933 amendment, we observe, first, that by the amendment the provision for keeping an alternate juror "in confinement with the other jurors" during the trial was supplemented by a further provision that upon final submission of the case to the jury such alternate jurors must "be kept in the custody of the sheriff." This additional requirement became necessary, because, by amendment of the last paragraph of the section, the provision for discharge of a disqualified regular juror and the substitution of an alternate juror was extended so as to cover contingencies which might arise after final submission of the case to the regular jury and before the return of any verdict. But, under the 1933 amendment, the same as before, it was not until after the discharge of the disqualified regular juror and the drawing of the name of the alternate that the alternate juror was to "take his place in the jury box." We are satisfied that in enacting section 1089 of the Penal Code, even as amended in the year 1933, the Legislature did not intend to, and in fact did not, authorize the court to admit into the jury room "alternate jurors," under the circumstances shown by the record in this case. In the case at bar, it appears that the verdict was returned by the original regular jury. Neither one of the alternate jurors was ever authorized in any way to share in the return of the verdict. Nevertheless they were in the jury room at all times during the deliberations of the jury and until the time of return of the verdict.

[2] "The right of trial by jury shall be secured to all, and remain inviolate. * * *" Constitution of California, art. 1, § 7. "It is well settled that the right of a trial by jury, guaranteed by the state Constitution (article 1, § 7), is the right as it existed at common law, and any act of the Legislature attempting to abridge that right is void." People v. Kelly, 203 Cal. 128, 133, 263 P. 226, 228, citing People v. Powell, 87 Cal. 348, 355, 25 P. 481, 11 L. R. A. 75. "Without doubt, one of the essentials of a jury at common law is that it be composed of 12 persons, and that 12 persons, not more nor fewer, shall pass upon and determine the issues of fact. Jennings v. State, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862, and note; 16 R. C. L., p. 221; L. R. A. 1917A, p. 91 et seq., note to Minneapolis, etc., Co. v. Bombolis. Where the procedure provided by section 1089 is followed, the jury before whom the case is actually tried does not at any time consist of more or fewer than 12 persons. Prior to the substitution of the 'alternate juror,' the case is being tried before the original 12 jurors." People v. Peete, 54 Cal. App. 333, 364, 202 P. 51, 65 (year 1921). In the Peete Case, the verdict was returned by a jury in which one of the jurors was an "alternate juror" who had been selected and sworn as provided by section 1089 of the Penal Code, and who during the trial took the place of a regular juror who had become incapacitated by reason of illness. On appeal, it was held that this procedure did not impair any essential incident of the common-law right of trial by jury, but, on the contrary, that the statute, said section 1089 as then in force, made only a reasonable regulation or condition respecting the enjoyment of that right.

[3] Now we come to these questions: "Was the presence in the jury room, of the 'alternate jurors,' to whom the case had not been submitted for decision, an invasion of the right of trial by jury; and was it an invasion of that right in such a vital way that the error could not be cured by consent of the defendant's attorney?"

The courts have held, many times, that the presence of an outsider in the jury room is a sufficient ground for an order setting aside the verdict. In Goby v. Wetherill, 2 King's Bench Div. 674, it was said: "The principle is that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the court, or not, is present for a substantial time during their deliberations, then the verdict is vitiated." In People v. Knapp, 42 Mich. 267, 3 N. W. 927, 929, 36 Am. Rep. 438 (opinion by Mr. Justice Cooley), the court said: "It is not claimed that the officer can with propriety be allowed to be within hearing when the jury are deliberating. Whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression. When the jury retire from the presence of the court, it is in order that they may have opportunity for private and confidential discussion, and the necessity for this is assumed in every case, and

the jury sent out as of course where they do not notify the court that it is not needful. The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out." Other cases, to like effect, are Rickard v. State, 74 Ind. 275; State v. Wroth, 15 Wash. 621, 47 P. 106, 107; Gibbons v. Van Alstyne, 56 Hun, 639, 9 N. Y. S. 157. In State v. Wroth, supra, where it appeared that the judge went to the jury room in response to a request from the jury, and received from them some communication, the Supreme Court held that this was error. Here it was said: "In the discharge of his official duty, the place for the judge is on the bench. As to him, the law has closed the portals of the jury room, and he may not enter." And in response to the suggestion that the judge said nothing to the jury, and hence that his conduct could not have been prejudicial to the defendant, the Supreme Court held that a defendant is not required to depend upon the memory or sense of fairness of the judge as to what occurs between the judge and jury at any time or place when he has no lawful right to be present. "His right in this respect goes to the very substance of trial by jury." We think that these observations apply in their full force to the presence in the jury room of an "alternate juror" at a time when the case has not been submitted for *his* verdict.

We conclude, therefore, that the presence in the jury room of the "alternate jurors," to whom the case had not been submitted for decision, was an invasion of the defendant's right of trial by jury. And from the same premises we further conclude that this was an error so far destructive to the invaded right that the error could not by mere consent be rendered harmless. In People v. O'Neil, 48 Cal. 257, the defendant consented to a trial by a jury of eleven men. In deciding the appeal, the Supreme Court said: "The Attorney-General confesses the error; and it may be added that the authorities cited by the defendant establish the proposition that a jury in a criminal action must, within the meaning of the Constitution, consist of twelve men."

If in the case at bar it be suggested that there were only twelve jurors who returned a verdict, it must be answered that, to an extent which cannot be seen or measured, the process of agreement upon such verdict may have been, and probably was, influenced by the presence of fourteen persons—the twelve jurors plus the two outsiders.

For the foregoing reasons, the judgment of conviction is reversed, and the order denying defendant's motion for a new trial is reversed.

I concur: HOUSER, J.

I dissent: YORK, J.

PEOPLE v. TAYLOR.*

Cr. 2601.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1935.

Hearing Granted by Supreme Court Feb. 25, 1935.

1. Burglary ⇐41(1)

Visible evidence of breaking and entry, forcing of safe, and disarray and loss of property in place of business sufficiently established crime of burglary without direct proof of lack of proprietor's consent to entry and removal of property.

2. Burglary ⇐41(1)

Evidence *held* sufficient to support conviction of burglary.

Appeal from Superior Court, Los Angeles County; William S. Baird and Thomas P. White, Judges.

Wayne Taylor was convicted of burglary, and he appeals.

Affirmed.

Wayne Taylor, in pro. per.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

Appellant was convicted of the crime of burglary, and appeals from the judgment. He assigns insufficiency of the evidence to establish the corpus delicti or to support the verdict of guilty as grounds for reversal.

[1] During the time between closing on March 1, 1934, and opening on the following morning, the place of business of Barnett-Wilcox, Incorporated, automobile dealer, in

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 50 P.2d 796.

Compton, was forcibly entered and articles therein stolen. The visible evidence of breaking and entry and forcing of a safe, and the disarray and loss of property in the place, clearly established the crime of burglary. It required no direct proof of the lack of the proprietor's consent to enter and take property from the premises to complete the proof that some person or persons had entered therein and removed property without the proprietor's or owner's permission.

[2] On the floor near the safe was found an invoice, previously deposited in the safe, on which appeared the imprint of the heel of a shoe. From the contents of the safe there was missing a so-called "pink slip" issued to one C. A. Padgett as evidence of title to an automobile, and which had been delivered by him to the proprietor as security for an obligation and by the latter placed in the safe. This pink slip was found on March 15, 1934, in a box in an apartment at 1140 North Gower street, Los Angeles, occupied by La Verne and Aubrey Taylor, brothers of defendant, and by one Jack Poe. At that time defendant and one M. D. Knott occupied an apartment at 1525 North Van Ness avenue, in Los Angeles. Officers testified that this pink slip was exhibited to defendant and his brothers and others in the county jail on April 5, 1934, and that in defendant's presence La Verne Taylor stated that he had bought the automobile described in the slip from Padgett and had resold it. Defendant at the time said nothing. A sharp conflict was created as to this episode by testimony of La Verne and Aubrey Taylor, both of whom denied that such statement was made and denied any knowledge of the pink slip in question.

Officers testified that in defendant's apartment they found a pair of black shoes, which, on being exhibited to defendant, were admitted by him to be his, and that no one else had worn them. An expert, whose qualifications were admitted, gave testimony as to comparison made by him of the heel and heel print of one of these shoes with the imprint of a heel found on the invoice at the scene of the burglary. He gave it as his opinion that the imprint on the invoice was made by the heel of the shoe which officers testified the defendant had admitted was his. The originals and photographs were also submitted to the jury for its inspection. Defendant at the trial denied that the shoes in question were his. In this he was supported by the testimony of his brother Aubrey; and a demonstration of whether the shoes in question would fit defendant's feet was had in court in view of the jury. Both defendant and La Verne Taylor admitted on the witness stand previous convictions of felony.

On this evidence the jury found appellant guilty, and he contends it is insufficient to support the verdict. While it is true that possession of the pink slip stolen at the time of the burglary is not traced to appellant, it was found in the apartment of his two brothers. This is but a circumstance, and of itself is totally insufficient to warrant a finding that defendant took the pink slip from the burglarized premises. However, there was evidence which, if believed—as the verdict clearly indicates it was—was sufficient to sustain a finding that appellant made the imprint on the invoice at the scene of the burglary with the heel of his shoe, afterwards found in his apartment. This evidence in connection with all the testimony is sufficient to support the verdict.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 220

PEOPLE v. TAYLOR.

Cr. 2602.

District Court of Appeal, Second District, Division 2, California.

Jan. 28, 1935.

1. Weapons ⇐17(2)

To establish crime of possessing cartridge containing and capable of emitting tear gas, state must prove by competent evidence defendant's knowledge that cartridges in his possession contained and were capable of emitting such gas; such knowledge not being presumed from contents of cartridges (Gen. Laws 1931, Act 2955).

2. Criminal law ⇐419, 420(1)

Hearsay evidence is not generally competent to establish specific fact susceptible of proof by witnesses speaking from their own knowledge.

3. Criminal law ⇐419, 420(1)

Police officers' testimony in trial for possessing tear gas cartridge that witness, tes-

tifying when called in rebuttal by district attorney that he never saw defendant in possession of tear gas fountain pen and did not tell officers that defendant had such pen, told them in defendant's absence that defendant had had such a pen, *held* inadmissible (Gen. Laws 1931, Act 2955).

4. Weapons ⇐17(4)

Evidence *held* insufficient to sustain conviction of knowingly possessing cartridge containing and capable of emitting tear gas, in absence of competent proof of defendant's possession of instrument capable of discharging cartridges in his possession (Gen. Laws 1931, Act 2955).

Appeal from Superior Court, Los Angeles County; William S. Baird and Thomas P. White, Judges.

Wayne Taylor was convicted of knowingly and feloniously possessing a cartridge containing and capable of emitting tear gas, and he appeals.

Reversed.

Wayne Taylor, in pro. per.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

WILLIS, Justice pro tem.

Appellant was found guilty by the court below, sitting without a jury, of the crime of knowingly and feloniously having in his possession a certain cartridge containing and capable of emitting tear gar, contrary to the provisions of Act 2955, Deering's General Laws (vol. 1, p. 1423). From the judgment entered this appeal is taken, appellant relying upon two contentions: (1) Insufficiency of evidence to establish the fact that he knew the cartridges in his possession contained and were capable of emitting the substance known as tear gas; and (2) error in admission of evidence over his objection.

On March 13, 1934, appellant was taken into custody by officers, who searched his person, and in an outside coat pocket found three loaded and unexploded cartridges containing the substance known as tear gas and capable of emitting such substance by a firing of the cartridge from a .38 caliber special revolver, a billy club, or a fountain pen gun. Being asked if he knew what the cartridges contained, he stated that he was not sure—that he had not used them yet. The officers searched his person and clothing, his automobile, and his apartment, and found no revolver, no billy club, or fountain pen gun, nor any instrument by which such cartridges could be readily exploded or fired.

On behalf of defendant a witness, M. D. Knott, who resided with defendant, testified that on March 11, 1934, he saw the latter at his automobile with the seat upside down, and that defendant showed him these cartridges and said, "Do you know anything about them?" and "What are they?" that the witness replied, "They look like blank cartridges." Defendant testified that on March 11, 1934, he found these three cartridges lying in a crack back of the seat of his automobile; that he showed them to Knott, and asked him if he knew what they were or who left them there; that he had loaned the auto the night before to his brother Aubrey; and that he asked his brother if he had left them there or knew anything about them and that he said he did not. He testified that he thought they were blank cartridges, and that he had never had a fountain pen gun that would discharge such cartridges. Aubrey Taylor testified that defendant showed him the cartridges on March 11th, and asked him if he had left them in the auto.

In rebuttal, the district attorney called as a witness one Jack Poe, and asked him if he had ever seen defendant in possession of a fountain pen that would shoot tear gas shells, to which the witness answered, "Not that I know of." He testified he might have seen him with a fountain pen. He was then asked if he did not make a statement to an officer to the effect that defendant did have a fountain pen that would shoot these tear gas shells, to which he answered, "No." Over defendant's objection, the court then permitted the district attorney to ask the witness if he had not told certain officers that defendant had a pen that would discharge tear gas shells, and the court also denied a motion to strike such testimony, based on the ground that it was an attempt by the prosecuting attorney to impeach his own witness. The district attorney did not claim surprise in respect to the witness' first answers, but the court overruled the objections and denied the motion on the assumption that the prosecutor was taken by surprise or he would not be asking the question. Thereupon the district attorney called three officers in succession, who were permitted to testify over defendant's objection that on March 13, 1934, they were present at a conversation with the witness Jack Poe, defendant not being present, in which Poe stated that defendant had had a fountain pen which would shoot tear gas shells.

[1] In establishing the crime charged herein by proofs, it was essential to prove that the defendant knew that the cartridges in his possession contained and were capable of emitting the substance known as tear gas. Knowledge thereof constitutes part of the corpus delicti. Such knowledge cannot be presumed; it must be established as a fact by competent evidence. The knowledge made a part of this offense by statute is not analogous to the intent which constitutes an essential in certain crimes and as to which the rule that one intends the natural and obvious consequences of his acts applies. In this case a special intent was required to make out the offense, amounting to knowledge of the character and contents of the proscribed cartridges. People v. Brown, 74 Cal. 306, 16 P. 1. That it was true that the cartridges contained tear gas does not alone support an inference that the possessor thereof had knowledge of that fact. People v. Peloian, 95 Cal. App. 96, 272 P. 304.

[2-4] It is clear from a reading of the transcript herein that the sole proof on the part of the prosecution which tended to establish the crime charged was the fact of possession by defendant of the proscribed cartridges. There was no proof that he had knowledge of their character as tear gas shells, nor was there any evidence from which such knowledge could be inferred. It thus becomes plain what the effect of the testimony of the officers given in rebuttal would be. By the use of hearsay evidence, the district attorney sought to prove that defendant had had in his possession a tear gas fountain pen gun. This, if true, would establish a basis for an inference of knowledge on the part of defendant of the contents and use of the cartridges found in his possession. Hearsay evidence is not as a rule competent to establish any specific fact which in its nature is susceptible of being proven by witnesses who can speak from their own knowledge. 1 Greenleaf, Ev. § 99; People v. Nagy, 199 Cal. 235, 248 P. 906. Certainly it cannot be contended herein that the district attorney could rightfully be permitted to prove by the officers in the first instance that a third party had told them that defendant had had a tear gas fountain pen gun in his possession. It follows that what might not be done directly cannot be done by indirection—by the expedient of placing the third party on the witness stand, eliciting a denial of knowledge of the fact desired to be proved, and then by process of impeachment attempting to prove by the third party's declarations that defendant had been in possession of the tear gas fountain pen gun. The error in admitting such proof is patent, and its prejudicial nature and effect is manifest. Without proof of the fact of possession by defendant of an instrumentality capable of discharging these cartridges found in his pocket, there was no sufficient evidence in this case to sustain a conviction.

For the error in admitting such evidence, and because of insufficiency of evidence to sustain the finding of guilt, the judgment must be reversed, and it is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 309

KILLOUGH v. LEE et al.

Civ. 9219.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1935.

Hearing Denied by Supreme Court April 1, 1935.

1. Automobiles ⇐245(55)

In action for death of deceased who was struck by truck which collided with automobile near deceased who was standing near edge of highway, negligence of motorist proximately resulting in death of deceased *held* for jury.

2. Trial ⇐191(1)

Instruction *held* not erroneous as invading province of jury by assumption of a fact where alleged assumption of fact was prefaced with words "if you further find."

3. Trial ⇐260(1)

Refusal of instruction *held* not error where same point was covered by other instructions which were given.

4. Automobiles ⇐246(60)

Instructions which embodied presumption that deceased, who occupied position of safety near edge of highway before truck passed and from which position he was not seen to move, and who was fatally injured after truck passed him, took ordinary care for his own safety *held* proper (Code Civ. Proc. § 1963, subd. 4).

5. Automobiles ⇐246(60)

Instruction that presumption that deceased, who was struck by truck which collided with automobile near deceased who was

standing near edge of highway, took ordinary care for his own safety was evidence and must prevail and control deliberations of jury until overcome by other evidence correctly stated law, and did not place on defendant motorist burden of overcoming presumption by preponderance of evidence (Code Civ. Proc. § 1963, subd. 4).

6. Automobiles ⇐244(54)

In action against motorist for death of deceased who was struck by truck which collided with automobile near deceased who was standing near edge of highway, defendant motorist had burden of proving deceased was contributorily negligent by preponderance of evidence.

7. Automobiles ⇐226(2)

In action against motorist for death of deceased who was struck by truck which collided with automobile near deceased who was standing near edge of highway, deceased's negligence in prior collision would not bar recovery for injuries received as result of second collision.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Suit by Myrtle Killough against Lewis E. Lee and Mrs. Lewis E. Lee and others. From a judgment for the plaintiff, the named defendants appeal.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Gibson, Dunn & Crutcher and Philip C. Sterry, all of Los Angeles, for appellants.

Russell H. Pray, of Long Beach, for respondent.

WILLIS, Justice pro tem.

Respondent, as widow, brought suit for damages for the death of her husband which she alleged resulted from injuries inflicted by a passing automobile truck and trailer owned by Miller & Phillips Trucking Company and operated at the time of injury by Thomas S. Phillips, a defendant herein, which truck at about the same time had run into the rear of an automobile belonging to appellant Mrs. Lewis E. Lee and being at the time operated by her husband, appellant Lewis E. Lee. All four of the above-named parties were joined as defendants, all and each being charged with negligence in general terms. Separate answers of the two groups of defendants contained denials of negligence and a plea of contributory negligence. After trial before a jury, a verdict was rendered against all four parties, and, from the judgment entered thereon, Lewis E. Lee and Mrs. Lewis E. Lee have appealed. The record consists of a transcript containing the judgment roll and a bill of exceptions.

The questions raised and presented by appellants comprise two general propositions: (1) Sufficiency of the evidence to sustain the verdict against these appellants, and (2) errors in giving and refusing certain instructions.

[1] The accident from which this case arose was unusual, and it appearing that the parties in their briefs cannot agree with each other's statement of facts, we have carefully read and studied the bill of exceptions to the end that we might secure a clear understanding of the facts as set forth therein. We are of the opinion, and so hold, that the evidence adduced by plaintiff was such that different inferences might be drawn therefrom, one of which would establish a case of negligence on the part of these appellants proximately resulting in the injury and death of deceased. Under this state of the proofs it was incumbent on the trial court to deny the motion of appellants for nonsuit. Upon conclusion of the evidence there was much conflict appearing therein, and the opportunity for drawing different inferences therefrom was equal to the several situations in which the conflicting evidence possibly placed the parties. This second state of the evidence, therefore, required the trial court to deny the motion of appellants for a directed verdict. It appears from the record that the jury determined that the deceased, who was without fault, while standing near the edge of the paved portion of the highway, was struck by one of the colliding vehicles as a direct result of such collision, and that such collision was the result of the concurrent negligence of the drivers of both vehicles in operating their respective machines. We find ample support in the evidence to sustain the verdict rendered against appellants.

[2] Appellants complain of instruction No. XII, given at plaintiff's request, on the ground that the language thereof constituted an invasion of the province of the jury by assumption of a fact. Fairly interpreted, this instruction is not open to the objection specified. It prefaces the statement claimed to be a statement of fact with the words "If you further find," which clearly leaves the jury free to exercise its prerogative of decision of the facts referred to. Baillargeon v. Myers, 180 Cal. 504, 510, 182 P. 37; Freeman v. Adams, 63 Cal. App. 225, 218 P. 600.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[3] Appellants' requested instruction No. I was refused. While this instruction is not subject to any objection as to its form or contents and might well have been given, yet we cannot say that its refusal by the court caused any prejudice to appellants. In several other instructions given the same point is covered, and the jury clearly instructed therein that if the negligence of defendant Phillips in the operation of his truck was the sole cause of the collision between the truck and the Cadillac, then appellants were entitled to a verdict in their favor.

[4-6] Instructions numbered VII and VIII, given at plaintiff's request, are complained of. They contain a statement of the presumption that deceased at the time of injury took ordinary care of his own concerns. Under the facts of this case these were proper instructions. No one saw deceased move from the position of safety which he occupied near the rear of his car, yet he was found fatally injured at about the same spot immediately after the truck and trailer had passed and left him exposed to the view of others. In the absence of evidence showing what he did, if anything, he was presumed to have taken ordinary care for his own safety (section 1963, subd. 4, Code Civ. Proc.), and instructions embodying such presumption were proper to give. This presumption is evidence, and may in certain cases outweigh positive evidence adduced against it. Fortier v. Hogan, 115 Cal. App. 50, 1 P.(2d) 23. Nor is there any merit in the contention that the language therein, "This presumption is in itself a species of evidence and it shall prevail and control your deliberations until and unless it is overcome by other evidence," had the effect of instructing the jury that the burden was cast upon defendants to overcome the presumption of due care by a preponderance of the evidence. The burden of establishing contributory negligence of deceased was cast upon appellants, and these instructions were given in connection with that subject. Contributory negligence must be established by a preponderance of the evidence. It is recognized law that the presumption in question is evidence, subject to being controverted; and until controverted it is evidence in accordance with which the jury is bound to decide [Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 97, 239 P. 709, 41 A. L. R. 1027], and unless overcome and dispelled by other proofs the presumption that deceased exercised due care for his safety is an established fact [Smellie v. Southern Pacific Co., 212 Cal. 540, 549, 299 P. 529; Barrett v. Harman, 115 Cal. App. 283, 286, 1 P.(2d) 458].

[7] Appellant's requested instruction No. II was properly refused. If the instruction was intended to convey the idea that appellants would not be liable for injuries received in the first accident to deceased, it entirely failed in that respect. The literal effect of the language used is that any negligence of deceased in connection with the first collision with Craig's Hudson which caused or contributed to his injuries in the slightest degree would bar recovery for injuries received in the second accident which is the subject of this action. Manifestly, any negligence of deceased in his collision with Craig would be wholly irrelevant in a controversy over a subsequent accident involving deceased and other parties.

We have carefully examined the record of the colloquy between the court and jurors and the instructions given on the occasion of the jury's return to court for instruction, and fail to find anything therein which could in anywise prejudice appellants.

The judgment is affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 1

JACOBS v. NORWICH UNION FIRE INS. SOC., Limited.

Civ. 4967.

District Court of Appeal, Third District, California.

Jan. 19, 1935.

Rehearing Denied Feb. 18, 1935.
Hearing Denied by Supreme Court March 18, 1935.

1. Judgment ⇐313

Judgment finally adjudicating parties' rights was conclusive as to relief granted and denied or withheld, and entry thereof exhausted court's jurisdiction over subject-matter and parties, unless preserved in mode authorized by statute (Code Civ. Proc. §§ 473, 663a, 1008).

2. Insurance ⇐670

Jury's affirmative answer to court's query in form of instruction to state whether verdict for defendant in action on fire insurance policy was based solely on ground that appraisement of loss was not had for reason attributable to plaintiff or his appraiser *held* special verdict controlling general verdict for defendant (Code Civ. Proc. § 625).

3. Judgment ⇐564(1)

Judgment, ordering that defendant in action on fire insurance policy recover costs after setting forth general verdict for defendant and special verdict that jury found for defendant solely on ground that appraisement of loss was not had for reason attributable to plaintiff or his appraiser, *held* judgment in abatement, not in bar.

4. Judgment ⇐525

No recital in judgment, containing general verdict for defendant as well as special verdict stating ground of jury's finding, was required to give life or vitality to latter verdict; legal effect of judgment being determined by substance thereof, not recital therein.

5. Appeal and error ⇐1073(9)
Judgment ⇐303

Trial court's order, amending judgment for defendant in action on fire insurance policy by striking out words, "solely upon the ground that an appraisement of the loss was not had prior to the commencement of the above entitled action," *held* improper, but not prejudicial to either party.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Jonathan Jacobs against the Norwich Union Fire Insurance Society, Limited, a corporation. Judgment for defendant, and from an order amending the judgment, plaintiff appeals.

Affirmed.

Albert Picard, of San Francisco (Francis McCarty, of San Francisco, of counsel), for appellant.

Percy V. Long and Bert W. Levit, both of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff sued defendant on a policy of insurance to recover for losses occasioned by the destruction by fire of personal property belonging to him.

The cause was tried before a jury, and, at the request of plaintiff, the court submitted to the jury the following query:

"I instruct you that if the jury finds a verdict for the defendant you must state whether this verdict is based solely upon the ground that an appraisement of the loss was not had prior to the commencement of this action for a reason attributable to the plaintiff and/or the appraiser appointed by the plaintiff. Answer yes or no."

The jury returned a general verdict in favor of defendant, and, in addition, answered the foregoing query in the affirmative. On the day the verdict was returned, a judgment was filed, recorded, and docketed in the usual form. This judgment, after reciting the title of the court and cause, set forth in full the verdict and the special verdict, concluding with this paragraph:

"Whereof by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said defendant Norwich Union Fire Insurance Society Limited, a corporation, have and recover from said plaintiff Jonathan Jacobs, costs and disbursements incurred in this action, amounting to the sum of $———." A receipt of a copy of the notice of entry thereof was received and acknowledged by plaintiff October 3, 1932.

Upon the entry of this judgment, plaintiff gave notice of intention to move for a new trial, but thereafter and prior to the day set for the argument thereon, withdrew this motion for a new trial and offered to stipulate that the judgment entered might be considered a final judgment and the action abated upon the ground that an appraisement of the loss was not had prior to the commencement of the action. This proposal defendant refused to accept, whereupon on October 17th plaintiff filed a waiver of his right to move for a new trial and stipulated that the judgment be considered a final judgment.

Upon the same day that plaintiff filed this waiver, said judgment was upon ex parte request of plaintiff amended by interlineation, by the addition of the following words, immediately following the judgment as originally entered: "Solely upon the ground that an appraisement of the loss was not had prior to the commencement of the above entitled action."

Thereafter a copy of the judgment, as amended, was mailed by the county clerk to defendant. Upon receipt of the judgment as amended, defendant on October 31, 1932, moved to amend the judgment by striking therefrom the portion added thereto by the ex parte order, which motion to strike was granted on November 14, 1932, and it is from this order amending the judgment that plaintiff now appeals, claiming generally that the court was without authority to make the amendment.

[1] It is probably true, as urged by respondent, that the court should not have

amended the original judgment after entry upon the ex parte application of appellant. As was said in the case of White v. White, 130 Cal. 597, 62 P. 1062, 1063, 80 Am. St. Rep. 150: "The judgment rendered was a final adjudication of the rights of the parties, and was conclusive, not only as to the relief granted, but as to the relief denied or withheld. Code Civ. Proc. § 1908. Upon its entry the jurisdiction of the court over the subject-matter of the suit and the parties was exhausted, unless preserved in the mode authorized by statute."

The method prescribed is clearly set forth in section 663a of the Code of Civil Procedure, or in a proper case relief may be had by proceeding under section 473 of the Code of Civil Procedure, but we do not believe the proposed amendment either in or out of the judgment affected the substantial rights of the parties nor that the judgment was essentially different in either case.

[2] At the request of plaintiff, a query was put to the jury. It is true the form was not all that might be desired. Respondent insists that by the question the jury were not directed to find upon a particular question of fact as required by section 625 of the Code of Civil Procedure, but merely called for a statement from the jury of their reason for, or the basis of, their general verdict. We believe respondent is construing the query too literally. Undoubtedly, the jury felt they were answering an interrogatory as to whether or not an appraisement of loss had been made prior to the commencement of the action. We believe the reply to the interrogatory may be fairly construed as a special verdict and, as such, was controlling over the general verdict. Section 625, Code Civ. Proc.

[3, 4] If the jury by their special verdict found, as we believe they did, that no appraisement had been made prior to the commencement of the action, then the judgment is one in abatement and not in bar. Offutt v. National Fire Insurance Co. (Mo. App.) 273 S. W. 161; National Fire Insurance Co. v. Lam, 34 Ga. App. 246, 129 S. E. 116; William Cameron & Co. v. Bassel (Tex. Civ. App.) 252 S. W. 1081. Also, the use of the word "solely" in the special verdict disposes of the claim of the insurance company that in certain of its separate defenses it set up actions in bar which it claims were found in its favor by the general verdict.

The judgment as originally entered contained the general verdict as well as the special verdict and it required no recital in the judgment to give life or vitality to the special verdict. The judgment speaks the language of the verdicts. One looks not to a recital in the judgment to determine its legal effect, but to the substance of the judgment itself, and a study of the general verdict and the special verdict fully informs the parties of the findings of the jury and from which the law draws its conclusions. The jury having declared by their special verdict that they found in favor of defendant solely upon the ground that an appraisement of the loss was not had prior to the commencement of the action for a reason attributable to plaintiff and/or to the appraiser appointed by plaintiff, of itself determines the judgment to be one in abatement and not in bar.

[5] We therefore hold that the judgment as rendered by the jury was a judgment in abatement; furthermore, that the order of the trial court amending the judgment, by striking therefrom the words "solely upon the ground that an appraisement of the loss was not had prior to the commencement of the above entitled action," was improper in the premises, but did not prejudice the rights of either party to the action.

The order is affirmed.

We concur: THOMPSON, J.; PLUMMER, J.



3 Cal.App.2d 492

COPE v. STECKEL et al.

Civ. 9032.

District Court of Appeal, Second District, Division 2, California.

Jan. 25, 1935.

Appeal from Superior Court, Los Angeles County; Caryl Sheldon, Judge.

On rehearing.

Prior opinion, 39 P.(2d) 482.

Paul Taylor, of Los Angeles, for petitioner.

Ray L. Chesebro, F. Von Schrader, and Arthur Loveland, all of Los Angeles, for respondents.

PER CURIAM.

Appellant petitions for a rehearing setting forth that a brief on behalf of respondents was filed by permission after the case was

submitted and presenting argument and authorities which he contends should be considered as affecting our determination of this appeal. We have considered the points urged and cases cited, and are of the opinion that they do not support any view other than that already expressed, and that our decision on rehearing would be that already expressed.

The petition for rehearing is therefore denied.



4 Cal.App.2d 172

COCHENS v. PRUDENTIAL INS. CO. OF AMERICA.

Civ. 1546.

District Court of Appeal, Fourth District, California.

Jan. 25, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. Appeal and error ⇐1071(1)

In beneficiary's action on life policy, erroneous finding that insured had not been permanently disabled, within clause providing for waiver of payment of premiums in event of permanent disability, *held* harmless where under admitted facts beneficiary was not entitled to recover.

2. Insurance ⇐362

Where life policy waived payment of premiums upon proof of insured's permanent disability, such proof was a condition precedent to release from obligation to pay premiums and notice of insured's permanent disability after lapse of policy and insured's death furnished no basis of recovery on policy by beneficiary.

3. Insurance ⇐362

That life insurer's soliciting agent or other employees knew that insured had been injured and was in hospital did not constitute proof of permanent disability, within provision waiving further payment of premiums upon proof of insured's permanent disability.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Lillie Cochens against the Prudential Insurance Company of America. From a judgment for defendant, plaintiff appeals.

Affirmed.

Harry C. Westover, of Santa Ana, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondent.

MARKS, Justice.

On August 25, 1922, defendant issued to Wilfrid L. Eggleton a policy of insurance for $2,000 on his life, and on December 21, 1926, plaintiff was made the beneficiary. Premiums of $15.12 were made payable quarterly. The policy contained the following provision: "If the Insured, after the first premium on this Policy has been paid, shall furnish due proof to the Company, while this Policy is in full force and effect and while there is no default in the payment of premium, that he at any time after payment of such first premium, from any cause whatsoever shall become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, the Company upon receipt of such proof will waive the payment of each premium that may become payable thereafter under this Policy during such disability."

On October 23, 1932, the insured was injured in an automobile accident. He was in and out of hospitals until August 16, 1933, when he died from gangrene in one of his legs which had been broken in the accident and which had not healed.

After the accident the first premium on the insurance policy fell due on November 25, 1932. Mr. Eggleton was then confined to his bed in a hospital and applied to defendant for a policy loan which was made and the premium paid. The premium falling due on February 25, 1933, was not paid, but the policy was continued in force until June 25, 1933, as a nonparticipating term policy under its nonforfeiture provisions. The policy by its terms lapsed on July 25, 1933, unless the fact of the injury continued it in force under the clause we have quoted.

The application for the loan was taken by a soliciting agent of defendant who saw Mr. Eggleton in bed in a hospital. Plaintiff testified that she told a girl in an insurance office in the city of Long Beach that Mr. Eggleton had been injured and also that another employee of the defendant saw him in bed shortly after the accident. No proof that he had been injured was ever given the defendant prior to Mr. Eggleton's death.

[1] The trial judge found that the insured had not been permanently disabled. Plain-

tiff urges that this finding is not supported by the evidence and is contrary to it. The evidence shows that Mr. Eggleton's leg was broken; that it was in a plaster cast until his death; that he never progressed in his recovery further than being able to sit in a chair. In some of the cases hereafter cited similar facts have been held to constitute total and permanent disability. From the view we take of the case this erroneous finding cannot affect the results reached.

Plaintiff relies upon two cases to support her theory that the total and permanent disability of Mr. Eggleton fixed the liability of defendant and suspended premium payments by the insured regardless of when the proof of this disability was made. Minnesota Mutual Life Ins. Co. v. Marshall (C. C. A.) 29 F.(2d) 977; Hablutzel v. Home Life Ins. Co. of New York (Mo. App.) 52 S.W.(2d) 480.

In both of these cases the terms of the insurance policies differed materially from those of the policy in question here, which are in legal effect practically identical with the policy forming the basis of the action in Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, 52 S. Ct. 230, 231, 76 L. Ed. 416. In that case the policy contained the following provision: "Upon receipt by the Company of satisfactory proof that the Insured is totally and permanently disabled as hereinafter defined the Company will pay for the Insured all premiums becoming due hereon after the receipt of such proof." In discussing the case the Supreme Court of the United States said:

"The insured died on April 18, 1929. Judgment was sought for disability benefits from December 1, 1927, to April 1, 1929, at the rate of $50 per month, with interest. The last premium paid was due on May 27, 1927. The next, allowing a month's period of grace, should have been paid not later than September 27, 1927. Neither that nor any subsequent premium was ever paid. Long prior to the death of the insured, the policy therefore had lapsed, unless saved by the terms of the disability clause above quoted. There is evidence in the record from which it reasonably may be found that the insured was totally and permanently disabled from a time before the premiums first became in arrears, and that this condition continued until his death; but no proof thereof was furnished to the company.

"The petitioners, nevertheless, contend that this is enough to bring into effect the promise of the company to pay the premiums which became due after the disability began. In support of this contention, Minnesota Mut. Life Ins. Co. v. Marshall, supra, is cited. The pertinent provisions of the policy there, however, differ from those found in the policy here under consideration. There the policy provided that if the insured, while the policy is in force and before default in payment of premiums, 'shall become totally and permanently disabled * * * and shall furnish satisfactory proof thereof, the Company will waive the payment of premiums thereafter becoming due,' and that 'upon the receipt of due proof of total and permanent disabilities * * * the Company will waive the payment of all premiums thereafter becoming due.' The court held that the waiver took effect at the time of the disability, and did not depend upon the time when proof thereof was furnished.

"We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof*. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy. Compare Brams v. New York Life Ins. Co., 299 Pa. 11, 14, 148 A. 855. It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. Mutual Ins. Co. v. Hurni Co., 263 U. S. 167, 174, 44 S. Ct. 90, 68 L. Ed. 235, 31 A. L. R. 102; Stipcich v. Insurance Co., 277 U. S. 311, 322, 48 S. Ct. 512, 72 L. Ed. 895. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings."

The provision in the insurance policy involved in the case of Hablutzel v. Home Life Ins. Co., supra, closely resembles those in the case of Minnesota Mut. Life Ins. Co. v. Marshall, supra, and materially differ from the one in Bergholm v. Peoria Life Ins. Co., supra, and those in the instant case. The Mi-

souri Court of Appeals recognized the distinction made by the United States Supreme Court in the effect of the terms of the policies.

Numerous cases have construed insurance policies having provisions similar in effect to those in the Bergholm and the instant cases and follow the same rule as the one followed by the Supreme Court of the United States. See New England Mutual Life Ins. Co. v. Reynolds, 217 Ala. 307, 116 So. 151, 59 A. L. R. 1075; Parker v. Jefferson Standard Life Ins. Co., 158 S. C. 394, 155 S. E. 617; Goldman v. New York Life Ins. Co., 115 N. J. Eq. 535, 171 A. 541; Berry v. Lamar Life Ins. Co., 165 Miss. 405, 142 So. 445, 145 So. 887; Brams v. New York Life Ins. Co., 299 Pa. 11, 148 A. 855; New York Life Ins. Co. v. Alexander, 122 Miss. 813, 85 So. 93, 15 A. L. R. 314; Kasarsky v. New York Life Ins. Co., 145 Misc. 732, 260 N. Y. S. 769; Yohalem v. Columbian Nat. Life Ins. Co., 136 Misc. 748, 240 N. Y. S. 666; Mutual Life Ins. Co. v. Hebron, 166 Miss. 145, 146 So. 445; Black v. Jefferson Standard Life Ins. Co., 171 S. C. 123, 171 S. E. 617; New York Life Ins. Co. v. Farrell, 187 Ark. 984, 63 S.W.(2d) 520; Franklin Life Ins. Co. v. Fisher, 164 Okl. 193, 23 P.(2d) 151; Jones v. New York Life Ins. Co., 158 Wash. 12, 290 P. 333; Kearns v. Penn. Mut. Life Ins. Co. (Wash.) 34 P.(2d) 888.

[2] We have been cited to no cases upholding the position of plaintiff where the policy of insurance contained provisions similar to those in the instant case. We therefore conclude that the correct rule governing us here is that announced in the Bergholm Case by the Supreme Court of the United States as follows: "It is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums." In the absence of such proof having been made the plaintiff cannot prevail.

[3] No serious claim can be made that defendant had any notice, prior to his death, that Mr. Eggleton had been totally or permanently disabled. Mere information that he had been injured, or merely seeing him in bed in a hospital, would not constitute the furnishing of proof of total and permanent disability of the insured. There is no evidence showing that any of the persons receiving this knowledge possessed any sufficient authority from defendant so that notice to them would constitute notice to the company. Knowledge of a soliciting agent will not bind his principal. Valentine v. Head Camp, P. J., W. O. W., 180 Cal. 192, 180 P. 2, 3 A. L. R. 380; Elliott v. Frankfort, etc., Ins. Co., 172 Cal. 261, 156 P. 481, L. R. A. 1916F, 1026; Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185, 11 P.(2d) 94.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.



4 Cal.App.2d 322

CHAUVIN v. KRUPIN et al.

Civ. 8809.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1935.

1. Master and servant ⇐66

Complaint alleging employment of beauty shop operators, their undertaking work of curling plaintiff's hair, and negligent adjustment and operation of curling devices, resulting in burning plaintiff's head, *held* sufficient to authorize recovery under doctrine of res ipsa loquitur, where plaintiff did not attribute injury to any specific act of either operator nor did she undertake to explain how injury occurred.

2. Master and servant ⇐66

Where specific acts of negligence are alleged, plaintiff is entitled to benefit of res ipsa loquitur doctrine, if acts proved are such as to raise presumption of negligence.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by Margaretta Chauvin against Nathan Krupin and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Raphael Dechter, of Los Angeles, for appellants.

A. H. Mauer, of Los Angeles, for respondent.

SHINN, Justice pro tem.

Plaintiff recovered judgment against defendants Krupin, proprietors of a beauty parlor, on account of a burn inflicted upon her scalp while she was receiving a so-called beauty treatment known as a permanent

wave. Defendants appeal, and urge as the sole ground for reversal of the judgment that the specific allegations of negligence charged in the complaint were not proved, and that plaintiff was erroneously allowed to recover under the doctrine of res ipsa loquitur, after an amendment of the complaint made at the time of a motion for nonsuit. In discussing this point, it will be necessary to make reference to the process used by defendants in placing waves in plaintiff's hair.

The curling of the hair was accomplished by means of electrically heated curlers attached to locks of hair, and separated from the scalp by protecting devices which are supposed to keep a space of one and one-quarter inches between the heater and the scalp. During the process plaintiff experienced a burning sensation at a particular point upon her head. She complained to defendant Nathan Krupin, and he put some cotton at the place indicated. It developed later that plaintiff had received a severe burn during the operation.

The original complaint alleged the employment of defendants, their undertaking the work of curling plaintiff's hair, and that the defendants negligently failed to fix or adjust the curling devices so as to protect plaintiff's head, but fixed, adjusted, and attached the same so as to permit and cause the same to burn the plaintiff; that they negligently performed their services in the manner of their use of the devices employed, and negligently used and manipulated the same and the heating elements thereof, and failed to protect plaintiff's head from the heating devices, so that the same were caused to and did burn plaintiff's hair and head. At the close of plaintiff's case, a motion for nonsuit was made, upon the ground that the complaint alleged specific acts of negligence which had not been proved, and that plaintiff was not entitled to rely upon the doctrine of res ipsa loquitur. The court allowed an amendment of the complaint, which was made by striking out certain of the particular allegations of the complaint and stating the negligence in more general terms than the original complaint had done.

Appellants rely upon the rule that, where specific acts of negligence are alleged and there is no charge of negligence in general terms, plaintiff can recover only upon proof of the specific acts charged and not under the doctrine of res ipsa loquitur, citing Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462; Marovich v. Central California T. Co., 191 Cal. 295, 216 P. 595; and Jianou v. Pickwick Stages System, 111 Cal. App. p. 756, 296 P. 108. The rule cannot properly be applied to the facts of this case.

[1, 2] The original complaint charged negligence in general terms. Plaintiff alleged generally the acts performed by defendants in the course of their work; namely, the adjustment of the heater to the head, the use and manipulation of the heater, and the failure to protect plaintiff sufficiently against contact therewith. These acts constituted the entire operation undertaken by defendants in which plaintiff might have received her injuries, and they were all charged to have been done in a negligent manner. Under the original complaint, plaintiff was entitled to describe, as she did in her testimony, the acts of the defendants in the course of their work. She was not required under these allegations, nor did she undertake, to attribute the injury to any specific act of either defendant; nor did she attempt to explain how it occurred. Both the complaint and the testimony of plaintiff clearly show that she did not know, or claim to know, the particulars in which defendants acted negligently, whether in the placing of the heater upon her head, its use or manipulation, or the inadequate protection provided against injury from burns.

Where specific acts of negligence are alleged, plaintiff is entitled to the benefit of the res ipsa loquitur doctrine if the acts proved are such as to raise a presumption of negligence. Lippert v. Pacific Sugar Corp., 33 Cal. App. 198, 164 P. 810; Atkinson v. United Railroads of San Francisco, 71 Cal. App. 82, 234 P. 863.

Plaintiff was allowed to amend her complaint by alleging negligence in somewhat more general language. The original complaint undoubtedly was sufficient, without amendment, to allow the introduction of plaintiff's evidence from which a presumption of negligence necessarily arose. Had this not been the case, the amendment of the complaint was properly allowed and would have answered the objections made to the sufficiency of the evidence received under the original complaint. No prejudice to the defendants is claimed by reason of the allowance of the amendment. They went to trial fully advised of the charge that each and all of their several acts were negligently done and had ample opportunity to prove the contrary.

It is a case in which the application of the res ipsa loquitur doctrine is eminently just

and proper. The devices used in the process were under the exclusive control of the defendants. The injury was one which in the natural course of things would not have occurred had defendants used due care, and plaintiff was therefore entitled to recover, unless the defendants offered a satisfactory explanation to overcome the presumptive evidence of their negligence. This they failed to do. Their testimony, in effect, was that their work was done so carefully that it would have been impossible for plaintiff to have sustained the injury claimed. No attempt was made, however, to account for the fact that, when the operation was finished, plaintiff was suffering from a severe burn. The attempted explanations of defendants were not satisfactory to the trial court, and the finding of negligence is amply supported by the evidence.

The pleadings and evidence are sufficient to support the findings and judgment, and it is therefore affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.



4 Cal.App.2d 338

DARK v. PRUDENTIAL INS. CO. OF AMERICA.

Civ. 8726.

District Court of Appeal, Second District, Division 2, California.

Feb. 1, 1935.

1. Insurance ⇐646(8)

Burden of proving that insured's death resulted from accidental means within double indemnity provision of life insurance policy sued on rested on plaintiff.

2. Insurance ⇐515

To recover double indemnity provided for by life insurance policy in event of insured's death from injuries effected solely through accidental means, there must have been element of unexpectedness in act or occurrence which led to death, not merely unexpected or unforeseen death.

3. Insurance ⇐515

Application of term "accidental means" in double indemnity provision of life insurance policy depends on facts of each particular case.

[Ed. Note.—For other definitions of "Accidental Means," see Words & Phrases.]

4. Insurance ⇐669(12)

Instructions, in action for double indemnity provided for by life insurance policy in case of insured's death from injuries effected through accidental means, *held* erroneous as telling jury that plaintiff should recover if insured's death resulted from accident or accidental injury.

The instructions defined both "accident" and "accidental means" as a casualty, something out of the usual course of events and happening suddenly and unexpectedly, without design of person injured or killed, and charged the jury that it was unnecessary for plaintiff to produce direct testimony of eyewitnesses to make out case, though burden was on her to show that wound which caused insured's death was inflicted accidentally, but that plaintiff made out prima facie case and was entitled to verdict, if circumstances in evidence and inferences therefrom pointed clearly to accidental injury.

[Ed. Note.—For other definitions of "Accident; Accidental," see Words & Phrases.]

5. Trial ⇐296(2)

Error in instructions failing to distinguish between terms "accidental death" and "death by accidental means," in action on life insurance policy for double indemnity provided for death by such means, *held* not cured by instruction correctly defining "accidental means."

6. Appeal and error ⇐1170(9)

Instructions, telling jury in effect that plaintiff should recover double indemnity, provided for by life insurance policy in event of insured's death from injuries effected through accidental means, if his death resulted from accident or accidental injury, *held* prejudicial error, requiring reversal of judgment for plaintiff (Const. art. 6, § 4½).

7. Insurance ⇐669(12)

Instruction warranting finding by jury, in action to recover double indemnity under life insurance policy for insured's death from accidental injuries, that insured was killed by unknown assailant, if inferable from evidence, as basis of verdict for plaintiff, regardless of whether killing was provoked by insured or resulted from some act on his part, *held* erroneous.

8. Insurance ⇐668(13)

Whether insured committed suicide, so as to bar recovery of double indemnity un-

der life insurance policy for his death from accidental injuries, is exclusively for jury to determine under proper instructions.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Clara E. Dark against the Prudential Insurance Company of America. Judgment for plaintiff, and defendant appeals.

Reversed.

Loeb, Walker & Loeb, of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for appellant.

Carson B. Hubbard, of West Los Angeles, and E. B. Drake, of Los Angeles, for respondent.

PACHT, Justice.

Defendant appeals from a judgment in an action to recover on a life insurance policy issued on the life of plaintiff's deceased husband. Recovery was sought and had for the face amount of the policy, $5,000, together with double indemnity therein provided in the event of death of insured "as a result directly and independently of all other causes of bodily injuries, effected solely through external, violent and accidental means." The complaint alleged that the insured lost his life by being shot in the head by a person or persons unknown to plaintiff. Defendant denied such cause of death and pleaded affirmatively that death resulted from suicide and that recovery was barred of any amount except premiums theretofore paid by insured.

The policy in question was dated November 14, 1930. Insured was found dead from a gunshot wound, death having occurred December 30, 1930. The policy provided for payment of $5,000 upon due proof of death, and an additional death benefit of $5,000 in the event of death by "accidental means," as quoted above. It is further provided that in the event of suicide, whether insured was sane or insane, no accidental death benefit should be payable, and if the same occurred within two years from the date of the policy, the liability of the company should not exceed the amount of premiums paid on the policy.

Appellant urges, as grounds for reversal: (1) That the jury was misinstructed in several particulars; (2) that there was no evidence that the insured died as a result of injuries effected through accidental means; (3) that the evidence is insufficient to support any reasonable conclusion other than that the insured committed suicide and that the verdict, therefore, is without support in the evidence. In considering the several points urged, it will be necessary to survey briefly the evidence upon the trial.

The insured, William R. Dark, was found dead at about 5:30 a. m., December 30, 1930. His body lay on the ground on the right-hand side of his Model T Ford automobile, which was parked heading south on Drury lane, a short unpaved street in Los Angeles county, which runs into Century boulevard. Death had resulted from a gunshot wound, a .22-caliber bullet having entered his head at a point about one inch above the upper border of the left ear. His hair was not singed and there were no powder marks. Deceased's head lay about two feet from the back wheel with his feet extended towards the south. Near his left foot was a sawed-off barrel of .22-caliber rifle with an exploded shell in the firing chamber. The stock and trigger guard had been removed. There was a rag over the aperture at the muzzle and one was wrapped around the trigger and breach. A coat with the sleeves turned inside out was found on the ground near where the body lay. Witnesses testified that this coat had never belonged to insured. Neither did he smoke Old Gold cigarettes, a package of which was found in the pocket of the coat. There were no signs or marks of any struggle engaged in by deceased. Evidence of various circumstances was offered by appellant, apparently in an effort to prove death by suicide. Rebuttal testimony going to the same point, and also circumstantial in character, was offered by plaintiff. No useful purpose could be served in detailing the whole of such testimony. Suffice it to say that both parties contend that it is sufficient to support their respective theories of the case.

[1-5] Appellant complains that the instructions given to the jury at the request of plaintiff failed to properly note the distinction between the term "accidental death" and "death by accidental means," as used and understood in insurance policies. As recovery was allowed by the verdict for the gross amount payable under the policy, the jury must have found that death resulted from "accidental means." Defendant requested, and there was given, an instruction correctly defining such term. But, appellant contends, certain instructions, given at the request of respondent, negatived such correct instruction as to the law, and constituted prejudicial error. This contention must be upheld.

The instructions complained of in this regard follow:

"You are instructed that the word 'accident', as used in these instructions and as used in the contract or policy of insurance involved herein, is thus defined:

"'An accident is defined to be a casualty, something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured or killed.'" (Plaintiff's No. 2.)

"You are instructed that while the burden is upon the plaintiff, by the terms of the contract or policy of insurance, to show that the wound which caused the death of William R. Dark was inflicted accidentally, as defined to you herein, yet I charge you it is not necessary, for her to make out her case, that she should produce the direct testimony of eyewitnesses. If the circumstances placed in evidence, and the inferences to be drawn therefrom, point clearly to an accidental injury, the plaintiff has made out a prima facie case and is entitled to a verdict in her favor and against the defendant." (Plaintiff's No. 6.)

"You are instructed that the words 'accidental means', as used in the insurance policy herein sued on, is defined to be a casualty—something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person killed." (Plaintiff's No. 10.)

It must be remembered that the burden of proof to establish that the death of insured resulted from "accidental means" rested on respondent. Postler v. Travelers' Ins. Co. (1916) 173 Cal. 1, 3, 158 P. 1022; Price v. Occidental Life Ins. Co. (1915) 169 Cal. 800, 802, 147 P. 1175. Respondent concedes this, and admits the further proposition "that there is a distinction in law between 'accidental death' and 'death by accidental means.'" When it comes to defining and applying the meaning of the term "accidental means" as used in policies of insurance, some difficulty is met. The varying language used by courts and text-writers in expressing their conception of the meaning of the term indicates the problem presented. Mr. Justice Sloss reviewed the leading authorities and stated a rule adopted by the Supreme Court, which must govern here. In the case of Rock v. Travelers' Insurance Co. (1916) 172 Cal. 462, 156 P. 1029, L. R. A. 1916E, 1196, judgment for plaintiff on verdict was reversed on the grounds of the insufficiency of evidence. The opinion reads (with our emphasis) relative to the governing principle involved (page 465 of 172 Cal., 156 P. 1029, 1030): "The policy, it will be observed, does not insure against accidental death or injuries, but against injuries effected by accidental means. *A differentiation is made, therefore, between the result to the insured and the means which is the operative cause in producing this result.* It is not enough that death or injury should be unexpected or unforeseen, but *there must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death.*" This rule has been consistently followed and applied in this state. Ogilvie v. Aetna Life Ins. Co. (1922) 189 Cal. 406, 209 P. 26, 26 A. L. R. 116; Moore v. Fidelity & Casualty Co. (1928) 203 Cal. 465, 265 P. 207, 56 A. L. R. 860; Harloe v. California State Life Ins. Co. (1928) 206 Cal. 141, 273 P. 560; Losleben v. California State Life Ins. Co. (1933) 133 Cal. App. 550, 24 P.(2d) 825. As has been stated, the term "accidental means" depends for its application upon the facts of each particular case. Moore v. Fidelity & Casualty Co., supra; Davilla v. Liberty Life Ins. Co. (1931) 114 Cal. App. 308, 315, 299 P. 831. The different facts and circumstances presented have resulted in the varying language used in application, but the rule or principle involved has been essentially the same. The instructions complained of here cannot be said to have properly given the law to the jury. As in the Ogilvie Case, supra, which was reversed because of error in charging the jury, the plain effect of such instructions was to tell the jury that plaintiff should recover if death resulted from accident or accidental injury. To paraphrase the language of the Ogilvie Case: "The instructions fail to give effect to the plain language of the policy in that they do not distinguish between the result to the insured and the means by which that result was brought about. And it is not enough to say that a single instruction given at the request of the appellant correctly states the law and so negatives the error mentioned." As stated in Pierce v. United Gas & Electric Co. (1911) 161 Cal. 176, 185, 118 P. 700, 704: "It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff." See, also, Douglas v. Southern Pacific Co. (1928) 203 Cal. 390, 393, 264 P. 237, and Abelseth v. City and County of San Francisco (1933) 129 Cal. App. 552, 555, 19 P.(2d) 53.

[6] Respondent cites the cases of Magby v. New York Life Ins. Co. (1934) 136 Cal. App. 772, 29 P.(2d) 791, and Byers v. Pac. Mutual Life Ins. Co. (1933) 133 Cal. App. 632, 24 P. (2d) 829. The facts distinguish these cases. In the former, the policy was different; the risk insured against being death as a result of "accidental cause." Neither the instructions nor the evidence are set forth in the opinion, the reviewing court saying that the evidence would have supported a verdict finding either suicide or natural death, and that the jury could not have been confused by the instructions. In the Byers Case the facts aided by the admissions of defendant company are so different as to warrant a clear distinction. Also, no question of the instructions was raised. The case of Losleben v. California State L. Ins. Co. (1933) 133 Cal. App. 550, 24 P.(2d) 825, should also be noted. But there again the facts and instructions under review were so different from those in the instant case that it cannot aid respondent. Respondent invokes article 6, § 4½ of the Constitution; but a careful examination of the entire cause, including the evidence, leads only to the conclusion that the erroneous instructions resulted in a miscarriage of justice. Under the facts in evidence, the jury might well have found under a proper charge, that respondent had not proved death within the terms of the contract. Appellant was thus denied a substantial right by the error of the trial court.

[7] Objection is also made to respondent's requested instruction Nos. 3 and 17, given by the trial judge. Both of them leave out of consideration the only theory upon which recovery could have been sustained, viz., death resulting from "accidental means." The former is also bad in that under it the jury would have been warranted in finding death at the hands of an unknown assailant, if such could be inferred from the evidence, as the basis of a verdict for plaintiff, and regardless of whether or not insured had provoked the killing or that such had resulted from some act on his part. Postler v. Travelers' Ins. Co., supra.

Appellant complains of certain other instructions, but in view of our conclusion that the judgment must be reversed for the reasons already indicated, it becomes unnecessary to discuss these or any other claimed errors.

[8] Finally, this court is asked by appellant, in effect, to find and hold as a matter of law that the insured took his own life, and that respondent is therefore barred from recovery. In such a case as this, however, considering the presumptions allowed, such a finding lies only within the province of the jury, under proper instructions from the court. Wilkinson v. Standard Accident Ins. Co. (1919) 180 Cal. 252, 180 P. 607; Jenkin v. Pacific Mutual Life Ins. Co. (1900) 131 Cal. 121, 63 P. 180; Beers v. Cal. State Life Ins. Co. (1928) 87 Cal. App. 456, 262 P. 380.

Judgment reversed.

STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 468

PIERRE v. GREAT ATLANTIC & PACIFIC TEA CO. OF NEVADA et al.

Civ. 9077.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1935.

Hearing Denied by Supreme Court April 8, 1935.

Malicious prosecution ⇐71(1)

In action against chain grocery store corporation for malicious prosecution, whether store manager had acted for corporation in attempting to collect from plaintiff money to reimburse corporation for bad check cashed during course of business, and whether manager had used criminal process to accomplish result, *held* for jury.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Naomi Pierre against the Great Atlantic & Pacific Tea Company of Nevada, sued herein as the Great Atlantic & Pacific Tea Company, and the Great Atlantic & Pacific Tea Company of America, sued herein as the Great Atlantic & Pacific Tea Corporation, and others. From a judgment for the defendants after order granting motion for nonsuit, the plaintiff appeals.

Judgment and order of nonsuit reversed.

A. Brigham Rose, of Los Angeles, for appellant.

Joseph Scott, of Los Angeles (Theodore C. Heyl and Cuthbert J. Scott, both of Los Angeles, of counsel), for respondents.

SCOTT, Justice pro tem.

Plaintiff appeals from judgment for defendants after order granting motion for nonsuit.

The complaint was entitled "complaint for damages—false arrest," and contained three counts variously stating the incident upon which the action was predicated. It was in fact an action for malicious prosecution. See 12 Cal. Jur. 429. Service of summons and complaint was made on corporate defendants and they appeared and answered. The record indicates no service on nor appearance for any individual defendants.

Defendant corporations operate a chain of grocery stores, each managed by a representative in charge. Plaintiff entered store 18 in Monrovia, accompanied by her seven year old child, on February 5, 1931. She had traded there over a dozen times previously and was acquainted with one Seaman (named as defendant herein but not appearing), who wore a smock and a badge or button which said "Manager and Cashier" and who would check her groceries at the counter where the cash register was located and accept the money therefor. On the day in question she entered, and while making a purchase the following conversation and events transpired between Seaman and plaintiff, according to the latter's testimony: "He asked me if my name wasn't Anna Fields. I said, 'No, it isn't.' I said, 'My name is Naomi Pierre.' He said, 'Oh, I know who you are, because I have been looking for you lots of times.' I said, 'Looking for me for what?' He said, 'Because you owe us $16.50.' I said, 'What do I owe you $16.50 for?' He said, 'For a bum check you passed on us.' I said, 'Why, I didn't pass any checks here at all.' So we argued for about five or ten minutes, and I kept telling him I didn't pass any check there, but he insisted that I did, and I paid him for the coffee when he gave it to me, and started out of the store. He says, 'Wait a minute. Where are you going?' And I said, 'I am going down to Slick Brothers Grocery Store.' * * * So he says for me to wait a minute. I said, 'Why should I have to wait?' He said, 'Because you have got to pay that $16.50. If you don't pay it we have got a way of making you pay.' I said, 'What do you mean, you have got a way of making me pay?' I said, 'I don't owe it and I am not going to pay it.' He said, 'You are going to pay it or we will send you to jail.' I said, 'Go on, then.' He said, 'Don't you leave here. You stay here and wait a minute.' I said, 'Why should I stay here and wait?' I said, 'Who are you to tell me what to do and what not to do?' He said, 'I am going to call a policeman.' I said, 'I am going on down to the grocery store, to Slick's Grocery Store, and you can go ahead and call the policeman. You know where I am if you want me.' * * * When I left the store, I guess it was about 10 or 15 minutes from the time I left there that Mr. Seaman and a police officer walked up. Mr. Seaman said to the police officer, 'There is the girl that gave me that bum check, passed a bum check at the store.' And the police officer asked me what was my name. I said, 'Naomi Pierre.' He said, 'No, that is not her name; I know her.' * * * Mr. Seaman said to the police officer that 'her name is not Naomi Pierre; her name is Anna Fields.' The police officer asked me what street I lived on. I told him 619 Maple avenue. He said, 'How long have you lived there?' I said, 'Since November.' And he spoke to Mr. Seaman and asked him what he intended to do about it. He said I said my name was Naomi Pierre, and Mr. Seaman said my name was Anna Fields. Then Mr. Seaman told the police officer, 'You take her over. She can't fool me. I know who she is.' He said, 'I gave her a chance to pay that $16.50 check and she wouldn't do it. You take her in charge and I will sign the complaint.'"

Plaintiff was arrested upon Seaman's complaint and was kept in jail 43 days, and upon trial in superior court she was found not guilty. She testified that she was never known as "Anna Fields" and had never cashed a check in defendants' store. She also described the detriment caused by the arrest and imprisonment. At the conclusion of plaintiff's case, motion for nonsuit was granted "upon the ground the evidence is insufficient to show a liability on the part of the defendants"; it being urged by defendants' counsel that the "said acts and conduct of said Seaman were beyond the line and scope of his authority—nor has he [plaintiff] shown a ratification of the acts of the defendant Seaman."

It is not questioned that the evidence should be construed in the light most favorable to plaintiff, nor does it seem to have been contended that Seaman was not actually manager of defendants' store, or that the events testified to by plaintiff did not transpire. Respondents cited Mackie v. Ambassador H. & I. Corporation, 123 Cal. App. 215, 11 P.(2d) 3, as supporting the court's ruling. The distinction is there made that where an employee acts "for the purpose of protecting the property [of the employer] by preventing a felony or of recovering it back," the employer is liable for such acts of the employee under the doctrine of respondeat superior; whereas if it is "an act done for the purpose of punish-

ing the offender for that which has already been done," it is outside the scope of his employment and the employer is not liable.

In the instant case it was a question of fact to be submitted to the jury as to whether Seaman was acting for his employer in attempting to collect for the latter money to reimburse it for a check which had been cashed during the course of its business, and was using criminal process to accomplish this result. The evidence presented by plaintiff, which must be construed in the light most favorable to her case in considering the court's ruling, is such that we cannot say as a matter of law that Seaman was acting outside the course and scope of his employment. That being the ground on which the motion for nonsuit was granted, and there appearing to be no other ground which, although not stated, would support such a motion, we conclude that the trial court erred in its ruling and that appellant is entitled to a new trial.

Judgment and order of nonsuit reversed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 252

KOEBERLE v. HOTCHKISS et al.

Civ. 8936.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1935.

Hearing Denied by Supreme Court March 29, 1935.

1. Evidence ⇐397(1), 432

Want or failure of consideration may be proved, but, in absence of fraud or mistake, parol evidence cannot be permitted to vary terms of a written contract.

2. Evidence ⇐419(1)

Parol evidence is admissible to contradict or show that true consideration is different from that expressed in written instrument, as an exception to rule that legal effect of written instrument cannot be varied by parol evidence.

3. Evidence ⇐419(1)

Statement in written instrument as to the consideration which is more than a mere statement of facts or acknowledgment of payment of a money consideration, and is of a contractual nature, cannot be modified by parol or extrinsic evidence.

4. Evidence ⇐419(9)

Where contract described consideration for assignment to plaintiff of percentage of oil bonuses and royalties to be services rendered in connection with leasing of land, parol evidence *held* inadmissible to prove additional provision obligating plaintiff to keep in touch with and to keep defendants informed as to operations on land (Code Civ. Proc. §§ 1856, 1962, subd. 2).

5. Brokers ⇐42

Action on contract assigning to plaintiff percentage of oil royalties for services rendered defendants in connection with leasing of oil land *held* maintainable, although plaintiff was not licensed real estate broker during 1928 when royalties sued on were paid, where plaintiff was licensed in 1921 when agreement and lease were executed (St. 1919, p. 1252, as amended).

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by J. E. Koeberle against Minna K. Hotchkiss and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for appellants.

Stewart, Shaw & Murphey, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff sued to recover for services rendered to defendants in connection with certain oil-bearing property owned by them and leased to a corporation to enable the latter to produce therefrom oil and gas. From judgment for plaintiff, this appeal is taken by defendants.

It is first contended that "the trial court committed prejudicial error in refusing to permit defendants to show the true consideration for plaintiff's agreement" under the terms of which the latter recovered. The agreement between the parties, dated October 3, 1921, recited substantially that, in consideration of $10 and for valuable services rendered by J. E. Koeberle in connection with the leasing of the land in question, by defendants to said corporation, defendants "agree and shall pay to J. E. Koeberle, his heirs, executor, administrator and assigns ten per cent of the full amount of cash and oil bonuses when and as received by us or either of us account of said lease and ten per cent of any and all royalties" so received. The lease was executed next day by defendants and said cor-

poration, the latter entered into possession of the property, drilled wells, and produced and saved oil and gas, and said corporation and its assignee paid royalties when due, up to August 20, 1928. Notice of cancellation of the lease had been served on the corporation August 17, 1928. Royalties were paid by the corporation to defendants on the 20th day of May, June, July, and August, respectively, in 1928, being in such sums that 10 per cent. thereof would equal the amounts to which the court found plaintiff was entitled under his contract and for which he recovered judgment. Defendants resisted payment of these amounts and claim that the contract between them and plaintiff was not correct in referring to the latter's services as having been rendered in the past, that the true consideration for the agreement was intended to be continuing services rendered by plaintiff during the life of the lease, and that, since he had not been rendering such services during the time these last four installments of royalty were being earned and paid, he was not entitled to his 10 per cent. of them.

Plaintiff testified that he had kept in touch with the field during the entire time. Objection was sustained to a question addressed to him by defense counsel as to whether "at the time of entering into this agreement" he had promised defendants he would keep in touch with operations on the field and keep them informed and advised as to lessee's acts. It is not clear from the record, and counsel did not state, what answer defendants expected to elicit from plaintiff. When one of the defendants was called in her own behalf, she was asked: "How long did you live in Mexico prior to 1921?" Objection was interposed, and some colloquy between court and counsel ensued, followed by defense counsel's declaration, "I will not press it, your honor." These two questions are the essential basis for defendants' contention. We have considered them in the light of the other testimony to which our attention has been called and which we have gleaned from the transcript, and have weighed the argument and discussion to discover the view of the parties concerning the law. The record does not disclose that plaintiff did not in fact keep defendants informed as to the progress of work and conduct of lessee on the premises, nor have we any intimation as to the detriment, if any, suffered by defendants by reason of any willful or inadvertent failure of plaintiff to promptly convey complete information concerning these matters to defendants. We have nevertheless considered the legal propositions advanced by appellants to discover whether the trial court should have permitted the questions to be answered.

The answer did not specifically set up the defense that the true consideration was other than that contained in the agreement, but we have assumed that the pleadings sufficiently tendered the issue by the denials they contained. Under section 1962, subd. 2, Code of Civil Procedure, the recital as to the consideration for a written instrument is not deemed conclusive and may be assailed. It is apparent that what defendants herein were seeking was to vary the terms of the written agreement by parol evidence, contrary to section 1856 of the Code of Civil Procedure. The written contract described the consideration as services rendered, not to be rendered in the future, and it is not disputed that plaintiff had done all the acts and performed all the services that the parties understood he had done and performed up to the time when the contract was made. That both parties knew and understood that the consideration was for past services is clearly confirmed by the term of the agreement which provided for such payments of the percentage of the royalty to be made to plaintiff's "heirs, executor, administrator and assigns." It would be unreasonable to say that such payments therein provided should be made contingent upon performance of services, when it is shown that they were to continue after the death of the party who is obligated to perform. The written contract is not declared to be uncertain nor ambiguous, nor is it attacked upon the ground of fraud, mistake, or accident. It appeared to the trial court that what defendants were seeking to do was to prove an additional clause in the contract obligating plaintiff to keep in touch with the operations on defendants' land and to keep them informed concerning the acts of the corporation lessee and making the payment of the percentage of royalty which was unconditionally promised in the contract contingent upon these future services to which no reference was made in the written agreement.

[1-4] "Want of consideration or failure of consideration may be proved in a proper case, but, in the absence of fraud or mistake, parol evidence cannot be permitted to vary the terms of a written contract." Lompoc Valley Bank v. Stephenson, 156 Cal. 350, 104 P. 449. As the court said in Hendrick v. Crowley, 31 Cal. 471, at page 477: "There is no doubt but that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the written instrument. But

this is not a rule but an exception to the rule that the legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence. The exception can never be allowed to override the rule, for that would be to dispense with the rule entirely and preserve only the exception." The proposal of appellants herein, construing the record in the light most favorable to the view they now advance, would inject a new, different and contingent obligation into the contract, and would impeach or destroy the instrument. No authority cited would support such a course. As said in Harding v. Robinson, 175 Cal. 534, page 542, 166 P. 808, 811: "The well-recognized limitation upon the right of a party to vary by parol evidence the terms of a contract and prove the true consideration is well declared as follows: 'Where the statement in a written instrument as to the consideration is more than a mere statement of fact or acknowledgment of payment of a money consideration, and is of a contractual nature, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part, for the party has the right to make the consideration of his agreement of the essence of the contract, and when this is done the provision as to the consideration for the contract must stand upon the same plane as the other provisions of the contract with reference to conclusiveness and immunity from attack by parol or extrinsic evidence.'" See 10 R. C. L. p. 1044, §§ 238, 239. "While the recitals of consideration in written instruments are not conclusive as to the amount, or character, or payment of the consideration, when these latter matters are the subject of litigation, evidence of want of consideration, or of a different consideration, is not admissible for the purpose of varying, contradicting, and defeating covenants by which rights are expressly vested." Arnold v. Arnold, 137 Cal. 291, 70 P. 23, 24; Leonard v. Miner, 120 Cal. 403, 52 P. 655. Where such an alleged parol agreement changes the terms of a written contract and reduces it from an absolute to a conditional or contingent obligation, "it makes for the parties another and different agreement" (First National Bank v. Fickert, 51 Cal. App. 99, 196 P. 112, 114), and it is not admissible for that purpose.

[5] Defendants further suggest that plaintiff was not entitled to maintain the action for the reason that he was not a licensed real estate broker during 1928, when the royalties here sued on were paid. It is not questioned that he was so licensed in 1921, when the agreement and lease were executed. We find nothing in this point which merits discussion, since the maturing of defendants' obligation to plaintiff as the installments were paid in by the lessee required no act on the part of plaintiff which would come within the purview of the Real Estate Brokers Act (Deering's Gen. Laws, 1923, p. 25, Stats. 1919, p. 1252, as amended).

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.



4 Cal.App.2d 319

LANTERMAN v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA.

Civ. 8166.

District Court of Appeal, Second District, Division 1, California.

Feb. 1, 1935.

1. Evidence ⇐314(2)

In proceeding to revoke physician's license for performing an abortion, testimony of woman, that before alleged abortion another physician had advised her that she was pregnant, *held* inadmissible as hearsay, and board of medical examiners was unauthorized to base any conclusion thereon.

2. Physicians and surgeons ⇐11(3)

Evidence *held* insufficient to sustain finding by board of medical examiners, which revoked physician's license to practice medicine, that physician had performed an illegal operation upon a pregnant woman by which an abortion was produced.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

The Board of Medical Examiners of the State of California revoked petitioner's license to practice medicine, and, from a judgment of the superior court discharging writ of certiorari issued to review such action, Roy S. Lanterman appeals.

Reversed and remanded.

Oliver O. Clark, of Los Angeles, and Ray L. Morrow, of Glendale, for appellant.

Otto J. Emme and Bayard R. Rountree, both of Los Angeles, for respondent.

PER CURIAM.

From the record herein it appears that, following and in pursuance of a hearing had before the board of medical examiners of the state of California, an order was made by which the license theretofore issued to Dr. Roy S. Lanterman to practice medicine in this state was revoked. In due course, on the application of said Lanterman, a writ of certiorari was issued out of the superior court by which the jurisdiction of said board to make its said order in the premises was proposed to be tested. Following a return to the writ and a hearing had thereon in said court, in effect it was adjudged that the writ be, and it was, discharged. It is from such judgment that the instant appeal is taken.

The only question that is presented to this court relates to whether, on the hearing before the respondent board of the charges that were preferred against Dr. Lanterman, the evidence adduced was sufficient to support an implied finding that he had performed an illegal operation on the person of a young woman by which an abortion was produced. In that regard, it appears that the only evidence that was introduced with reference to the charge consisted in the testimony that was given by the young woman. In substance, the material part of her testimony was that "prior to the early part of December" she had had sexual intercourse with a male human being; that she could not remember the date, or even the month, in which such intercourse had occurred; that she menstruated in the month of October, but not in the month of November; that "she wasn't feeling so well," and that she had consulted a woman physician who had advised her that she was pregnant; that she "didn't have much energy," but that she experienced none other of the "symptoms" which ordinarily attend the condition of pregnancy; that "in the early part of December" she visited the office of Dr. Lanterman and told him she was pregnant; that he made no physical examination of her, but after agreeing with him upon his fee of $75, he told her to return on a later date to have "an operation and treatment * * * for pregnancy"; that nothing was said about an operation to produce an abortion, but that "that was understood"; that a few days afterward, in the forenoon of a certain day, she returned to a room in Dr. Lanterman's office, and after removing her outer clothing, and while she was then clad in a "slip-on" only she donned a kimono and went into another room, where she was seated on a table; that Dr. Lanterman and his nurse were then and there present; that no physical examination was made of her, but that after she lay down she was given an anæsthetic; that thereafter she knew nothing more until early in the afternoon of that day, when she recovered consciousness and went to her home; that thereafter she did not suffer anything more than slight pain throughout her abdomen, although she "flowed a little" for about three days; and that within a week after her second visit to the office of Dr. Lanterman, she visited the office of another physician.

It is apparent that if the evidence failed to establish either the fact that at the time when the "treatment" occurred the young woman was pregnant, or that an operation was performed by Dr. Lanterman, or attempted to be performed by him, for the purpose of producing an illegal and criminal abortion upon the person of the young woman, the order made by the respondent board by which the license of Dr. Lanterman to practice medicine in this state was revoked, was rendered in excess of the jurisdiction of said board, and consequently was void.

[1] The effect of the evidence adduced at the hearing before said board is determinative of the question herein presented. It is obvious that the testimony given by the young woman, that "prior to the early part of December" she had had sexual intercourse, etc., is extremely indefinite and uncertain; that is to say, it cannot be either accurately or at all determined therefrom whether such intercourse occurred within a week, a month, a year, or at any other specified time "prior to the early part of December." It is manifest that if such intercourse occurred ten months or more prior to such time, it would be more than improbable that because of the alleged intercourse regarding which she testified any pregnancy could result. The fact that the young woman had menstruated in the month of October, but not in the month of November, would not be conclusive as to the fact of pregnancy. The testimony of the young woman (given over the objection of Dr. Lanterman) that some physician had advised her that she was pregnant was hearsay, both as to the fact that the person who gave the advice was a physician, and more particularly regarding the alleged pregnant condition. Being thus inadmissible, the respondent board had no right to receive such facts in evidence, nor to base its conclusion in any part thereon. What the young woman told Dr. Lanterman, or what he assumed regarding her condition, could add nothing to the actual fact. Nor could the

amount of the "fee" that was paid to Dr. Lanterman for a "treatment" tend to establish the condition of pregnancy. The statement by the young woman that the operation "was understood" was but a conclusion on her part that was entirely negatived by her accompanying statement that "nothing was said about an operation." On the other hand, the testimony, in substance, that, although she was given an anæsthetic, her underclothing was not removed; that she suffered very little pain; that after the "treatment" she flowed very little and for only "about three days," would tend to indicate that no abortion had occurred. It is significant that at no time was the nurse in Dr. Lanterman's office, nor the woman physician who purportedly had advised the young woman with respect to her examination, called as a witness; nor did the physician whom the young woman consulted after her visit to Dr. Lanterman's office give any testimony.

[2] It is apparent that the prerequisite condition of pregnancy in the young woman was not established by the evidence; nor was the fact established as to whether any abortion was performed, or attempted to be performed, by Dr. Lanterman; or whether (in the language of the "complaint") he aided or abetted in any abortion upon the person of the young woman; or whether he ever agreed or offered to procure any such abortion. In that regard, the most that appears is that the young woman was given an anæsthetic, and that thereafter for "about three days" she suffered some slight pain and flowed "a little."

The judgment is reversed, and the cause remanded, with the direction that a judgment be entered annulling the said order.



4 Cal.App.2d 345

PEOPLE v. TERMAN.

Cr. 1398.

District Court of Appeal, Third District, California.

Feb. 1, 1935.

1. Criminal law ⇐59(5)

To authorize conviction as aider and abettor of crime, proof is necessary, not only that accused assisted in commission of crime, but that he criminally or with guilty knowledge and intent aided actual perpetrator in commission of criminal act (Pen. Code, §§ 31, 971).

Legal definition of "aid" is not different from its meaning in common parlance, that is, to assist, to supplement the efforts of another. "Abet" is a French word combined of two words "a" and "beter"—to bait or excite an animal. The word "aid" does not imply guilty knowledge or felonious intent, whereas the word "abet" includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime.

[Ed. Note.—For other definitions of "Abet" and "Aid," see Words & Phrases.]

2. Homicide ⇐254

Evidence that accused knew that codefendant intended to kill accused's husband and arranged to be away and to have dog away on night husband was killed sustained conviction of murder of second degree on theory that accused aided and abetted murder (Pen. Code, §§ 31, 971).

3. Criminal law ⇐706

In prosecution for murder of accused's husband, district attorney's questions with reference to accused's statements as to husband's insurance *held* not prejudicial misconduct.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Hazel Terman was convicted of murder of the second degree, and she appeals.

Affirmed.

Melvin Belli, of San Francisco, and Donald Smith, of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and Ralph H. Cowing, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Appellant herein, together with Edwin Williams and another, were by an indictment charged with the murder of David Terman, the husband of appellant, on the 11th day of April, 1934, and in a second count the defendants were charged with the crime of conspiracy to murder, and thereafter, in pursuance of said conspiracy, did murder David Terman.

At the first trial Williams was found guilty of murder, but as to the guilt or innocence of the others the jury could not agree. Upon the present trial appellant was found guilty

of murder of the second degree and her co-defendant was acquitted.

The evidence disclosed that Williams shot Terman, and appellant was charged on the theory that she aided and abetted him in the commission of the crime.

[1] Appellant, appealing, contends the evidence is insufficient to support the verdict, and that the district attorney was guilty of prejudicial misconduct. Section 31 of the Penal Code provides that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed."

Section 971 of the Penal Code provides: "* * * All persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals."

In 7 California Jurisprudence 888, it is said: "* * * The legal definition of 'aid' is not different from its meaning in common parlance. It means to assist, to supplement the efforts of another. 'Abet' is a French word combined of two words 'a' and 'beter',—to bait or excite an animal. The word 'aid' does not imply guilty knowledge or felonious intent, whereas the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime."

To authorize the conviction of one as an aider and abettor of a crime, it must be shown not only that he aided and assisted therein, but also that he abetted the act, that is to say that he criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act.

[2] The record unfolds a sordid story of the family life of appellant, her deceased husband, and their three daughters, who range from eleven to sixteen years of age. It reveals a dissolute idle husband, a wife forced into acts of prostitution in the house, and the three daughters seeing and understanding the entire evil surroundings.

Williams, the actual killer, seems to have been unsound mentally, for although found by the jury to have caused the death of Terman, was later held to have been not guilty by reason of insanity. He was a neighbor of the Termans, and earlier in their history had been a frequent visitor at their home and was apparently sympathetic towards Mrs. Terman and the daughters. He frequently supplied them with groceries and vegetables and also gave Mrs. Terman considerable sums of money at different times. Unfriendly relations arose between Terman and Williams and each threatened to kill the other. Williams was forbidden to visit the Terman household, but did so clandestinely and continued to supply Mrs. Terman and her daughters with food and occasionally with money. He often came to the house of the Termans late at night and stealthily looked through the windows to see how the family were getting along. Apparently the things he saw were not to his liking and he told Mrs. Terman, whom he met for a few minutes every Saturday night, outdoors and under cover of darkness, that he was going to kill Terman. The sixteen year old daughter testified her mother told her at different times that Williams was threatening to kill her father and not to be surprised if she came home some time and found him dead, and on the day before the actual killing appellant told her Williams was going to do away with the old man and that it might be Wednesday.

Upon Wednesday, April 11th, appellant, her three daughters, with two men, one a young man who was apparently a friend of the oldest daughter, and the other man who was jointly charged with appellant of the murder, but acquitted thereof, all went to Healdsburg —the two younger daughters to a picture show, the other four to an amusement park or dance pavilion. They invited Terman to accompany them but he refused. When they returned home, they discovered Terman had been shot and dragged into the orchard, where they found his dead body.

After the arrest of Mrs. Terman, she made a statement to the district attorney in which she narrated in considerable detail all that preceded the shooting, much of which was also corroborated by witnesses during the trial. She told of the clandestine meetings between Williams and herself, and contributions made by him to the family. About three or four weeks before the death of Terman, Mrs. Terman told Williams that her husband wanted her to return to her former life of prostitution to support the family. This seemed to greatly disturb Williams and from then on he began to talk of killing Terman. On the Saturday immediately prior to the killing, Williams asked Mrs. Terman if Terman had succeeded in his plans of compelling her

by acts of prostitution to add to the family finances, and she told him no, but she did not know how much longer she could hold out, as Terman was threatening to bring some one to the house by the end of the week. Williams then said, "I am going to kill him. The first night I come down and the dog is not home, and he is there, I will kill him,—I will come down and get him, and if the dog stands in my way, I'll kill him too." On Monday evening Williams again met Mrs. Terman out in the orchard and again told her he was going to kill Terman, and said, "I have definitely made up my mind to do the act this week," to which Mrs. Terman replied, "We will be gone Saturday night, and maybe one night between that," and Williams said also, "If I should come down with the intention to do that deed and you are not home and the dog is in the yard, I shall kill him." The dog in question was a young police dog about four months old, belonging to the girls, and, as the mother said, "The children thought more of the dog than they did of him" (Terman).

A trip to Healdsburg had been arranged for Wednesday evening. On that afternoon the dog was given into the custody of a man named Pike, who had agreed to keep the dog for the evening. The mother and daughters left the house, leaving Terman there, and did not return until about 11:30 o'clock, when they found Terman dead, as related above.

From these facts, can it be said appellant aided and abetted in the murder of Terman? That appellant had knowledge of the criminal intent of Williams, is clearly shown from the evidence. In fact, as we understand the argument of counsel, they conclude the prior knowledge on the part of appellant, but claim she did nothing to aid, encourage, or abet Williams in the killing. We gather from the evidence appellant was not adverse to the loss of her husband. She had in fact promised a man named Pike that if she could get a divorce from Terman she would marry him. Her home surroundings were not congenial and she had wanted for some time to return to her former home in Idaho.

It is quite obvious that appellant meant to encourage Williams in his plans when he said he would kill Terman some night, by her telling him they would not be home with the deceased on Saturday night and maybe one night before that. With that in mind, and knowing that Williams did not want the dog there and would kill the dog if it were there, they all left the house and arranged to have the dog away, and remained away until a late hour. While at the dance hall that evening, appellant talked with her companion about the contemplated killing and remarked that if Williams had carried out his threat it was probably all over by that time.

From a study of the entire record, we must agree with the prosecution that appellant, by her words and acts, aided and abetted and encouraged Williams to murder her husband, having full knowledge of his criminal purpose and desiring to see him accomplish his object.

The evidence is sufficient to sustain the verdict of murder in the second degree on the theory that appellant aided and abetted in the commission of the crime.

[3] It is the contention of appellant also that the district attorney was guilty of prejudicial misconduct, but we find nothing in the citation thereof to justify that charge.

During the redirect examination of one of the Terman girls, the district attorney asked her if her mother had not told her that she would collect some insurance money after the death of Terman, and take the witness, together with her sisters, back to Idaho, to which the witness answered in the negative. No objection was made to the question, but a motion to strike on the ground it was not proper redirect examination was denied. The asking of the question was also cited as prejudicial misconduct, and the district attorney stated he would introduce further evidence upon that subject. Later he asked another daughter as to a conversation she had with the matron at the detention home, and the witness said she told the matron her mother told her they were going to Idaho with money they were going to get from the government. She did not remember, however, whether or not she heard her mother say anything about insurance money. Appellant herself said she referred to money which might be received from the soldier's bonus, to which appellant was entitled.

We see no indication of bad faith on the part of the district attorney, nor does it appear that any prejudicial error was committed.

A careful reading of the entire record does not disclose reversible error in the record or insufficiency of the evidence to justify the finding of the jury, and the judgment and order appealed from therefore should be affirmed, and it is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

4 Cal.App.2d 271

ABDALLAH v. JACOB et al.

Civ. 5238.

District Court of Appeal, Third District, California.
Jan. 30, 1935.

Fraudulent conveyances ⇐141

Where there was no transfer of possession of automobile from original purchaser to registered owner nor from registered owner to lender advancing balance of purchase price, and court found that transfers were made with intent to defraud creditors, and that no mortgage was executed or recorded in compliance with statute, and that conditional sales contract executed between registered owner and lender was a chattel mortgage not executed as provided by statute, transaction *held* invalid as against execution creditor of original owner levying upon automobile (Civ. Code, §§ 2957, 3440).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Catherine Abdallah against M. J. Jacob, wherein Paul Jacobs filed a claim. From a judgment denying the claim claimant appeals.

Affirmed.

Gumpert & Mazzera and C. H. Hogan, all of Stockton, for appellant.

W. R. Jacobs, of Stockton, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This appeal is presented upon a bill of exceptions setting forth only the findings, conclusions of law, and judgment of the trial court. The names of the defendants are variously spelled "Jacob" and "Jacobs."

The court found that on or about the 16th day of June, 1921, the plaintiff recovered judgment against M. J. Jacob for the sum of $1,158.27. Thereafter, and following proceedings instituted therefor, on or about the 7th day of November, 1933, the trial court entered an order that execution be issued for the enforcement of the judgment referred to, and on the 10th day of November, 1933, execution was issued. On the 29th day of January, 1934, the sheriff of the county of San Joaquin levied said execution upon the property of M. J. Jacob, and particularly upon a certain "Terraplane Eight" sedan automobile, motor number 19064, as the property of the defendant M. J. Jacob, by taking said automobile into his possession under said writ of execution. At the time of the levy of the execution the automobile referred to was in the possession of the defendant M. J. Jacob. Following the levy of the execution, the appellant herein filed a third party claim which was duly heard and passed upon by the trial court, and on February 23, 1934, judgment was entered to the effect that said appellant had no right or title to the automobile as a third party claimant against the right of the plaintiff, under and in pursuance of the execution heretofore referred to. The appeal is from this judgment and the order of the trial court refusing to vacate and set aside said judgment and enter judgment in favor of the third party claimant.

The findings show that on the 19th day of May, 1933, the defendant M. J. Jacob bought the automobile in question from the Superior Auto Company as the seller thereof, for the sum of $996.80, being given a trade-in credit in the sum of $500 for an old automobile, leaving a deferred balance of $496.80, payable in installments of $41.40 each. The automobile was bought under a conditional sales contract. Following the execution of the conditional sales contract the same was assigned to the Industrial Finance Company of Lodi. Application was thereupon made to the division of the registration department of motor vehicles of the state of California, and registration was had designating the Industrial Finance Company of Lodi as the legal owner, and M. J. Jacob, the defendant, as the purchaser thereof. Subsequently, payments were made according to the terms of the contract, until the amount due on the automobile was reduced to the sum of $331.20.

On the 3d day of October, 1933, there was presented to and filed with the division of registration department of motor vehicles of the state of California a joint indorsement of transfer, with application for reregistration of said automobile, which was signed by M. J. Jacob as registered owner and the Industrial Finance Company of Lodi as legal owner, and Hazel Jacob, a daughter of the defendant M. J. Jacob, as first buyer thereof, and certificates of registration and ownership in usual form were issued, and record thereof filed in said office on the 3d day of October, 1933, showing the name Hazel Jacob as registered owner with the Industrial Finance Company of Lodi as the legal owner.

On the 8th day of December, 1933, the third party claimant, Paul Jacobs, borrowed $350 from a bank in Stockton, obtaining a cashier's check therefor, which check he delivered to

the Superior Auto Company of Stockton, to be used in payment of the balance due upon the said automobile, receiving in return a check for the sum of $63.70. This check was indorsed by the Superior Auto Company of Stockton and delivered to the Industrial Finance Company of Lodi in full payment of the balance due upon the conditional sales contract hereinbefore referred to. The Industrial Finance Company of Lodi, upon receipt of the check, issued to the Superior Auto Company of Stockton a receipt in the following form: "Lodi, California, December 12, 1933. Received from Superior Auto Company, credit of Hazel Jacob, payment in full, $289.80, contract No. 5631, less refund, $6.00, $283.80. Industrial Finance Company, Per W. M. Babcock, Jr., Manager."

The court found that thereupon the conditional contract of sale was fully paid and discharged, and that no assignments of any rights under the contract were made by the Industrial Finance Company of Lodi to any one.

Thereafter, a conditional contract of sale was entered into between Hazel Jacob and the appellant Paul Jacobs, using the same form of contract that had been executed between the Superior Auto Company and M. J. Jacob, in which it appeared that Hazel Jacob was the purchaser for the sum of $673.42, and Paul Jacobs was the seller; place of payment, indicated in the contract, at the office of the appellant in this action.

The court found that during all the times mentioned herein the possession of said automobile was had by the defendant M. J. Jacob; that there was no transfer of possession from M. J. Jacob to Hazel Jacob, nor was there any transfer of the possession of the automobile from Hazel Jacob, the daughter of the defendant M. J. Jacob, to the appellant Paul Jacobs; that at the time of the levy of the execution referred to herein the automobile was in the possession, use, and enjoyment of the defendant M. J. Jacob, and that such had been the case from the date of the original purchase thereof.

The court found that the apparent transfer of the automobile from M. J. Jacob to Hazel Jacob was made with the intent and purpose of the said parties to hinder, delay, and defraud the creditors of the defendant M. J. Jacob. The court further found that the apparent transfer of title from Hazel Jacob to Paul Jacobs, the appellant herein, was made for the purpose of hindering, delaying, and defrauding the creditors of the defendant M. J. Jacob, who at all times was the owner of said automobile.

The record also shows that there was no mortgage executed or recorded in conformity with the provisions of section 2957 of the Civil Code, and that the conditional sales contract executed between Hazel Jacob and Paul Jacobs was in effect nothing more than a chattel mortgage, not executed as provided by the Code, and possession, as we have said, never delivered to the said Paul Jacobs, and under the provisions of section 3440 of the Civil Code the transactions referred to herein were void as against creditors of M. J. Jacob.

No testimony being presented in the bill of exceptions, the holding of this court must be that the findings of the trial court as to the fraudulent nature of the transactions referred to hereinbefore found by the court were sufficiently supported. Under such circumstances it seems unnecessary to extend the length of this opinion. However, we will refer to three cases.

The appellant relies upon the case of Cosby v. Cline, 186 Cal. 698, 200 P. 801, to support his contention that change of possession as required by section 3440 of the Civil Code is not necessary if registration is had with the division of registration of the motor vehicle department of the state of California, as prescribed by section 45 of the California Vehicle Act (St. 1923, p. 524, as amended by St. 1929, p. 514). The case referred to, however, shows that the automobile in question was in possession of the sheriff, and transfer of possession was impossible.

In Washington Lumber, etc., Co. v. McGuire, 213 Cal. 13, 1 P.(2d) 437, in an opinion citing a number of cases, the Supreme Court hold that, notwithstanding the provisions of section 45 of the California Vehicle Act, section 3440 of the Civil Code covers every transfer of personal property, with certain enumerated exceptions, of which the transfer of an automobile is not one, and that in order to be effective as against creditors there must be a change of possession as required by section 3440 of the Civil Code.

In the case of Wehrle v. Marks, 134 Cal. App. 141, 25 P.(2d) 51 (quoting from the syllabus), the court held: "Where, to secure payment of a loan, the borrower transfers title to an automobile to the lender, who executes a conditional sales contract, but such contract is not acknowledged or recorded and there is no affidavit of good faith, or change of possession, the instrument is a conditional sales contract in form only and in legal effect constitutes nothing but a mortgage as between the lender and borrower; and where such instrument does not conform to the

statute regarding chattel mortgages and there is no change of possession, the transfer to the lender is void as against an execution creditor."

The court also found that Paul Jacobs was a mere volunteer, and therefore was not entitled to be subrogated to any rights held by the Industrial Finance Company of Lodi prior to the discharge and extinguishment of the conditional contract of sale held by it.

Finding no merit in the appeal, the order and judgment are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.



4 Cal.App.2d 373

STUMPF et al. v. LAWRENCE et al.

Civ. 5266.

District Court of Appeal, Third District, California.

Feb. 4, 1935.

Hearing Denied by Supreme Court April 4, 1935.

1. Fraud ⇐11(2), 55

Statement of owner of property with respect to its value is usually considered expression of mere opinion which may not become basis of suit for damages for fraud; but, where owner makes positive statement of value coupled with other asserted facts like a false representation of past income therefrom, it may constitute competent evidence in proof of alleged fraudulent representations upon which judgment for damages may be supported.

2. Fraud ⇐30

Owner of apartment house and her agents were each liable for damages resulting from fraudulent representations which procured exchange of properties, where agents were acting within their actual or apparent authority, and principal accepted and retained benefits accruing from transaction, although principal was innocent of personally participating in fraud.

3. Fraud ⇐43

In considering sufficiency of complaint to state cause of action in fraud alleged to have been exercised in procuring exchange of properties, court disregarded alleged representations as to prospective income of property, since such statements did not furnish basis for damages for fraudulent representations.

4. Fraud ⇐43

Complaint alleging that agents of owner of apartment house had represented to plaintiffs, for purpose of deceiving them, that house was worth $35,000, and had produced income for year of $4,800, whereas house was worth only $15,000, and income had been only $2,750, as agents and owner knew, and that plaintiffs, relying upon truth of representations, had exchanged properties and delivered a note as part payment, *held* sufficient.

5. Fraud ⇐59(2)

Damages sustained by plaintiffs, induced to exchange properties through fraudulent representations as to value of defendants' property, *held* properly computed by estimating difference between actual value of property at time of exchange and value thereof as represented by defendants.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Allen H. Stumpf and another against Richard C. Lawrence, who interposed a cross-complaint, and Harry S. Myles and another. Judgment for plaintiffs, and named defendants appeal.

Affirmed.

Aubrey M. Finley, of Los Angeles, for appellants.

Chester J. Staley and C. C. Caswell, both of Los Angeles, and Smith & Dunn, of Santa Monica, for respondents.

Mr. Justice THOMPSON delivered the opinion of the court.

A joint and several judgment was rendered against the defendants for fraud alleged to have been exercised in procuring the exchange of properties situated in Los Angeles county. The defendants Lawrence and Myles, only, have appealed.

The plaintiffs owned three tracts of land in Santa Monica and Pasadena, of the total value of approximately $33,000, subject to mortgages aggregating the sum of $14,400. The defendant Lillian B. Fergie owned the Melba Apartment House in Santa Monica, together with the furniture and equipment thereof, represented by her agents to be worth $35,000. The Melba Apartment House was also subject to a mortgage of $14,400. The defendants Richard C. Lawrence, who is a real estate broker, and Harry S. Myles, his salesman, were the agents of Mrs. Fergie. An exchange of the Melba Apartment House for the plaintiffs' three pieces of prop-

erties was negotiated July 30, 1930, by the brokers. Incident to this trade of properties, the plaintiffs executed and delivered their promissory note for $1,450 payable to the defendant Lawrence in payment of their agreed proportion of the commissions for the services of the brokers. The exchange of the properties was consummated subject to the several mortgages which then existed against the various properties. The court found that the exchange of properties was procured by means of fraudulent representations on the part of the defendants consisting, among other false statements, of the positive assertion that during the year immediately prior to the time of exchanging properties the apartment house "produced * * * an income from rentals * * * of the aggregate sum of forty-eight hundred dollars ($4800.00) per year with an average of four hundred dollars ($400.00) per month throughout the calendar year," and that the Melba Apartment House and its furnishings were worth $35.000. The court further found that upon the contrary the entire income from the apartment property for the year prior to the time of the exchange of properties did not exceed the amount of $2,700, and that the value of the property was only the sum of $24,000, as the defendants well knew. The court also found that these misrepresentations were made by the defendants to deceive and defraud the plaintiffs who believed them to be true and exchanged their properties in reliance thereon. The record contains ample evidence to support the findings of the court. A judgment for damages resulting from the fraud exercised was rendered against the defendants jointly in the sum of $9,500, less two items of indebtedness due from the plaintiffs incident to the exchange of properties, aggregating the sum of $821.42. The court also decreed that the $1,450 note, which was executed by the plaintiffs and delivered to the defendant Lawrence, was procured by fraud and directed that it be cancelled as void.

The appellants contend that the amended complaint fails to state facts sufficient to constitute a cause of action for the reason that the specific charges of fraud upon which the plaintiffs rely are not adequately alleged; that there is a fatal variance between the allegations of the amended complaint and the findings of the court with respect to the alleged fraudulent representations; and that the court erred in computing the amount of the judgment by following an inapplicable rule for the measure of damages.

We are of the opinion the amended complaint states a good cause of action based on damages sustained as the result of fraudulent representations made by the defendants which induced the plaintiffs to exchange their properties. Among the fraudulent statements which were specifically alleged in the amended complaint were the preceding assertions made by the defendants that the Melba Apartment House was worth $35,000, and that the income therefrom for the year prior to the time of the exchange of properties was $4,800, while the actual value of the property did not exceed the sum of $15,000, and the income derived therefrom during the year preceding the time of the exchange of properties was only the sum of $2,700. It was specifically alleged these false statements were made by the defendants to deceive and defraud the plaintiffs, and that they believed them to be true and were induced thereby to exchange their properties to their detriment in a sum in excess of the amount of the judgment which was rendered.

[1, 2] The statement of the owner of property with respect to its value is usually considered the expression of a mere opinion on his part which may not become the basis of a suit for damages for fraud on that account. But when a positive statement of the value of property is made by the owner, coupled with other asserted facts or circumstances like a false representation of past income therefrom, it may constitute competent evidence in proof of the alleged fraudulent representations upon which a judgment for damages may be supported. 24 R. C. L. p. 343, § 633; 26 C. J. p. 1217, § 110; Cruess v. Fessler, 39 Cal. 336; Conner v. Butler, 113 Cal. App. 502, 511, 298 P. 546. The owner of the Melba Apartment House and her agents were each liable for damages which resulted from the fraudulent representations which procured the exchange of properties in the present case. When agents acting within their actual or apparent authority procure an exchange of properties by means of fraud, the principal is jointly liable with the agents for damages incurred thereby, even though the principal is innocent of personally participating in the fraud, when he accepts and retains the benefits which accrue from the transaction. 2 Pomeroy's Equity Juris. p. 1887, § 909; Lewis v. McClure, 127 Cal. App. 439, 449, 16 P.(2d) 166.

[3] Other allegations of fraud may have been immaterial or defectively alleged. They

were in the nature of statements regarding the prospective future income of the property, such as the extravagant assertion that the Melba Apartment House was a "veritable gold mine." These last-mentioned statements may be disregarded as immaterial. They are usually classified as an owner's exaggerated opinion regarding the value of his property, or his visionary estimation of future income therefrom, neither of which furnishes a basis for damages for fraudulent representations. Disregarding these last-mentioned allegations, however, the amended complaint contains sufficient other specific charges of fraud to constitute a good cause of action on that ground. The defendants failed to demur to the amended complaint.

There is no substantial variance between the findings of the court and the material allegations of fraud above related as they appear in the amended complaint. The court adopted findings regarding the defendants' assertions respecting the value of the Melba Apartment House and the income therefrom in almost the exact language in which those false statements were alleged in the complaint. There is no fatal variance in that regard.

Nor did the court adopt an incorrect measure of damages in estimating the loss sustained by the plaintiffs on account of the fraudulent statements of the defendants with respect to the value and income of their property.

[4] We are of the opinion the amended complaint states a good cause of action based on fraudulent representations. Among other specifications of fraud, the amended complaint does allege in substance that the agents of the defendant Lillian B. Fergie represented to the plaintiffs for the purpose of deceiving and defrauding them that the Melba Apartment House was worth $35,000, and that it produced an income for the year ending June 1, 1930, of $4,800, while upon the contrary the property was not then actually worth more than $15,000 and the income therefrom for the year mentioned was only the sum of $2,750, as the defendants well knew, and that the plaintiffs, relying upon those and other alleged fraudulent statements of the defendants as true, exchanged their three parcels of land for the Melba Apartment House property and executed and delivered to the defendant Lawrence their promissory note for the sum of $1,450, and that they were thereby damaged in the sum of $23,050. The defendants failed to demur to the amended complaint. While the pleading contains recitations of many unnecessary details and circumstances, together with other untrue representations which amount only to the owner's opinion as to the possible future income of the property, the preceding specific statements with respect to the value and the past income of the property constitute sufficient charges of fraud upon which a suit for damages may be properly founded.

[5] The court did not err in computing the damages sustained by the plaintiffs in this case as the result of fraudulent representations on the part of the defendants by means of which an exchange of properties was induced, by estimating the difference between the actual value of the defendants' property at the time of the exchange, and the value thereof as it was represented by the defendants. 12 Cal. Jur. p. 843, § 88; Hines v. Brode, 168 Cal. 507, 143 P. 729; Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P. (2d) 643; Holcomb v. Long Beach Inv. Co., 129 Cal. App. 285, 293, 19 P.(2d) 31. That rule with respect to the measure of damages under such circumstances has been so well established by a long line of authorities without variance therefrom, that it is no longer open to controversy.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

4 Cal.App.2d 135

BARRETT v. BOARD OF OSTEOPATHIC EXAMINERS OF CALIFORNIA.

Civ. 8563.

District Court of Appeal, Second District, Division 1, California.

Jan. 25, 1935.

1. **Physicians and surgeons** ⇐11(3)

In reviewing order of Board of Osteopathic Examiners which revoked physician's license on ground one of his employees prescribed and administered treatments in violation of Medical Practice Act, conflicts in testimony between employee and patient as to nature of treatments given will be resolved in favor of testimony of patient who received treatment (Gen. Laws 1931, Act 4807, § 14, subd. 7 (a).

2. **Physicians and surgeons** ⇐11(2)

Under statute defining unprofessional conduct of physician as aiding or abetting any unlicensed person to practice any system or mode of treating the sick, word "aid" imputes no knowledge or notice of the unlawful act or purpose, while the word "abet" presupposes a guilty knowledge on part of accused; hence it must be assumed that Legislature did not intend to make the mere aiding in the act a violation thereof unless such aid be wrongfully and knowingly extended (Gen. Laws 1931, Act 4807, § 14, subd. 7 (a).

[Ed. Note.—For other definitions of "Abet" and "Aid," see Words & Phrases.]

3. **Physicians and surgeons** ⇐11(2)

Right to practice medicine, once granted, becomes property right which cannot be taken away except for reasons which furnish reasonable grounds for believing that licensee is no longer fit to continue in the practice.

4. **Physicians and surgeons** ⇐11(2)

Unauthorized practice of healing by physician's employee, without physician's knowledge or consent and against his express instructions and wishes, does not furnish grounds for revocation of physician's license under statute which defines unprofessional conduct of physician as aiding or abetting any unlicensed person to practice any system or mode of treating the sick or afflicted (Gen. Laws 1931, Act 4807, § 14, subd. 7 (a).

5. **Physicians and surgeons** ⇐11(3)

Evidence *held* insufficient to sustain order of Board of Osteopathic Examiners which revoked physician's license on ground that physician employed an unlicensed practitioner for treatment of sick (Gen. Laws 1931, Act 4807, § 14, subd. 7 (a).

Evidence disclosed that physician employed person to give massages, that employee gave spinal adjustments to physician's patients, prescribed and sold pills to patients, but that physician did not know of the employee's unauthorized acts and had not consented to such practices.

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Wesley M. Barrett against the Board of Osteopathic Examiners of the State of California. From judgment, the Board of Osteopathic Examiners of the State of California appeals.

Affirmed.

Otis D. Babcock, of Sacramento, for appellant.

Harry S. Harper, of Burbank, for respondent.

HOUSER, Justice.

This is an appeal from a judgment rendered by the superior court that ensued from a hearing on a writ of certiorari theretofore issued by said court with reference to certain proceedings had before the appellant board, which proceedings resulted in the making of its order or judgment, by which the license of respondent herein to practice in this state the system of treatment known as osteopathy was revoked.

The only concern of this court in the matter is to determine whether the evidence received by the examining board of appellant was legally sufficient to sustain its order in the premises. The identical question was involved on the hearing of the matter in the lower court; and preceding the rendition of its judgment that court rendered its written opinion therein. In the main, that opinion constitutes a correct and adequate expression of the opinion of this court in the matter of the instant appeal; and, to the extent hereinafter set forth, is hereby adopted by this court as its opinion herein. That part of said opinion is as follows, to wit:

"The acts charged against petitioner as disclosed by the record before the court consist of employing an unlicensed practitioner for treatment of the sick or afflicted and the aiding or abetting of an unlicensed person to treat the sick or afflicted.

"The evidence discloses that petitioner at the time of the alleged offenses was the manager of a corporation running a so-called health center or institution for the treatment of the sick and afflicted, in which capacity it

was his duty to employ and he did employ and discharge physicians and assistants who were paid for their services by the corporation. In the instant case two women were treated by the institution under written contracts entered into with the corporation. Among the employees was an Indian known as Chief Thunder Cloud. The Chief was an entertainer, lecturer, and instructor in Indian dancing and hygiene, and was also after a fashion a masseur, having gained some knowledge of the practice of massage among the members of his tribe. He was employed by the petitioner as an entertainer during a course of lectures which petitioner was giving to the Friday Morning Club of Los Angeles. During this course of lectures Chief Thunder Cloud gave some instruction to his audiences as to the proper manner in which to walk, as well as instruction in Indian dance steps. Following this course of lectures he was retained by the health institute as a masseur. He brought to the institution some herbs prepared in the form of pills. These he turned over to the institute in order that they might be prescribed and sold by the physicians. There is evidence that he himself recommended the use of these pills to patients who testified at the hearing and that he received several dollars therefor. He gave massage to two female patients and some sort of manual treatment which seems to have been designated as 'brain vibrations'. One of these patients testified that the Chief twisted her neck causing the vertebrae to snap, while the other one testified that he pounded her up and down the spine. These treatments, it appears, were given while the patients were seated in chairs. He looked into the eyes of one of the patients who was suffering from eye trouble and, as she testified, informed her that her eyes could be cured. At the same time these treatments were being administered the patients were also receiving treatment from a physician in the organization who gave them spinal adjustments upon an operating table designed for that use.

[1] "It may be noted that the Chief denied having administered any treatment except the simple massage that he had learned among his own people, where it had long been used. This conflict in the testimony must necessarily be resolved in favor of the testimony of the women who received the treatments, and being taken as true for the purposes of this proceeding, the acts testified to will be regarded as a violation of the Medical Practice Act. Careful reading of the testimony fails to disclose any evidence of the following facts: that Chief Thunder Cloud was employed to perform, or was instructed to perform, any acts or to give any treatment other than simple massage of the patients entrusted to him for that purpose; that he was ever instructed to prescribe or deliver or sell any herbs or pills; that petitioner had any knowledge or information to the effect that the Chief had administered any treatment by way of spinal adjustments or otherwise, or that the petitioner had any knowledge or information that the Chief had prescribed, delivered or sold any of his herbs or pills. There is likewise no evidence that he was employed to diagnose the ailments of patients or that petitioner had any knowledge that he would diagnose or had diagnosed any such ailments.

"It appears from the evidence that the Chief gave the petitioner a sample massage treatment before he was allowed to operate upon patients and that it was this treatment that was prescribed for the patients whom he afterwards served. Patients were turned over to him to receive massage, and not with the understanding or instruction that they were to receive spinal adjustments or any other treatment.

[2] "A case is thus presented where one employed by a physician to render services not constituting medical treatment voluntarily and without the knowledge or instruction of his employer goes a step beyond his proper duties and performs acts that are prohibited by the statute regulating the practice of medicine. If, under these circumstances, the license of the employing physician is properly revoked the ruling of the board in revoking Dr. Barrett's license must be sustained. If the contrary is true the order of the board should be annulled. There is no evidence in the record tending to show that the masseur in question was employed to render any treatment for the sick or afflicted. It is not contended that simple massage constitutes such treatment. The statute, Act 4807, Deering's Gen. Laws 1931 (Act 1913 as amended), section 14, subd. 7 (a), defines unprofessional conduct in part as 'aiding or abetting any unlicensed person to practice any system or mode of treating the sick or afflicted'. The use of the words 'aiding' and 'abetting' in the disjunctive, if the statute is to receive literal interpretation, would permit the conviction of a physician who had no knowledge that his employee was doing acts in violation of the law. The word 'aid' imputes no knowledge or notice of the unlawful act or purpose, whereas the word 'abet' presupposes a guilty knowledge upon the part of the one accused. It is clear that the statute should not be given such an interpretation as would admit of

the conviction of one who has no guilty knowledge or wilful intent respecting the commission of the prohibited act. Such construction manifestly would be utterly unreasonable and would render the provision nugatory, as an unwarranted and arbitrary assumption of legislative authority. If such had been the intention of the legislature the word 'abet' would not have been used at all and while it cannot be assumed that the terms were intended to be used in the conjunctive, it must be assumed that it was not the intention of the legislature to make the mere 'aiding' in the act a violation of the law unless such aid be wrongfully and knowingly extended.

[3, 4] "The right to practice medicine, once granted, becomes a property right which cannot be taken away except for reasons which supply at least some reasonable grounds for believing that the one who has been licensed is no longer fit to continue in the practice. The legislature has the unquestioned right to prescribe the grounds upon which a license may be revoked, but that right is not wholly uncontrolled and does not extend so far as to authorize the legislature to prescribe grounds for revocation which are capricious and bear no relation to the matter of qualification of the licensee or to the proper conduct of his professional duties. It is no less the duty of a board, vested with authority to revoke the license of a physician for misconduct, to protect from unwarranted charges those who are not guilty than it is to condemn and punish those who are guilty of misconduct consisting of a violation of their professional duties prescribed by statute. There can be but one reasonable interpretation of the act as applied to the facts before the court, namely, that a violation of the law by an employee without the knowledge or consent and against the express instructions and wishes of the employer, furnishes no ground for the revocation of the latter's license.

[5] "It appeared to the court from a reading of the transcript of testimony that the board overlooked the fact that the employee in question was not hired to perform acts which he was not licensed or qualified to perform, and that they further overlooked the fact that knowledge of these unlawful acts was not brought home to the petitioner in such manner as to impute to him consent to or acquiescence therein. It must be assumed that the board understood the evidence to be sufficient to supply these necessary facts for it is not conceivable that the members of the board believed that they had the right or that it would be proper to make an order adverse to the petitioner in the absence of evidence of guilty knowledge upon his part. Such an adverse ruling, of course, would place in jeopardy the licenses of the most conscientious and ethical members of the profession, since it would declare liability upon their part for the unauthorized, voluntary and furtive acts of their employees."

The judgment from which the instant appeal is taken is affirmed.

We concur: CONREY, P. J.; YORK, J.



4 Cal.App.2d 185

NEWMAN v. STEUERNAGEL et al.

Civ. 1337.

District Court of Appeal, Fourth District, California.

Jan. 26, 1935.

Automobiles ⇐245(26, 62)

Evidence in action for injuries sustained when guest of oil company's foreman moved double-parked automobile to permit another car to leave curb *held* insufficient to make issue for jury whether foreman's negligence in double-parking automobile was proximate cause of accident or whether guest acted as oil company's employee.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by John Elliott Newman against William F. Steuernagel and the Cypress Petroleum Company. Judgment for defendants, and plaintiff appeals.

Affirmed.

Borton & Petrini and Conron & Conron, all of Bakersfield, for appellant.

George W. Nilsson, of Los Angeles, and J. W. Heard, Jr., and T. N. Harvey, both of Bakersfield (Monta W. Shirley, of Los Angeles, and Frederick E. Hoar, of Bakersfield, of counsel), for respondents.

BARNARD, Presiding Justice.

The respondents have moved to dismiss this appeal, or to affirm the judgment, upon the

grounds, among others, that the points here raised, having been decided adversely to appellant on a former appeal, have become the law of the case, and that the questions involved are so unsubstantial as not to need further argument.

This action was brought to recover damages for personal injuries suffered by the appellant when he was struck by an automobile which was being moved by one Andreola, who had been left in the car by Steuernagel when he double-parked the same in order to go into a garage on business. A jury returned a verdict in favor of this appellant, and the judgment was reversed. Newman v. Steuernagel, 132 Cal. App. 417, 22 P.(2d) 780. The facts are rather fully stated in that opinion, and need not be here repeated. Upon a second trial, the motion of these respondents for a nonsuit was granted, and, from the ensuing judgment, this appeal was taken.

In his opening brief the appellant argues that the case should have been submitted to the jury because certain new evidence, taken in the light most favorable to appellant, is sufficient to show that Steuernagel's negligence in parking the automobile was the proximate cause of the accident, and that Andreola, in moving the car, was acting as a servant in carrying out his duty to his master.

Leaving out certain statements not justified by the record, the only new evidence relied upon and called to our attention in the opening brief, which could have any bearing on the case, may be summarized as follows:

Steuernagel testified that during the winter preceding the accident, which occurred on April 14, 1930, he rode in a model A Ford driven by Andreola on four or five occasions; that on one occasion, the time of which is not given, he was talking with Andreola about shifting gears and then told him that the gear shift on the model A Ford was the same as that on the Pontiac; that he did not explain to Andreola about the operation of the starter, ignition, or brakes on his own car, which was a Pontiac; that there were no valuables in his car at the time he double-parked the same and left Andreola in it; and that just before the accident occurred he heard Andreola call to him. In reference to this he testified:

"Q. Mr. Steuernagel, after hearing Mr. Andreola call, 'Bill,' how long was it before you started out? A. Well I couldn't say just how long; it was more than—I should say from one to two minutes.

"Q. You didn't start immediately? A. Well I started out; I was started out, and this man, this clerk was talking to me about this repair, and I kind of looked back, talking to him, and started for the door at the same time.

"Q. So you finished what your conversation was with the clerk before you went out? A. Yes."

Another witness testified that at one time Steuernagel told him that, when he double-parked his car on this occasion, he left the motor running. Steuernagel testified that he turned off the ignition but did not set his emergency brake, and Andreola testified that, when he started the car, he turned on the ignition. Andreola further testified that he had driven a model T Ford for seven years before the time of the accident; that he had driven a gear shift car, "the new car we got"; that he had never driven a gear shift car up to April, 1930; that before the day of the accident he had driven a gear shift car but a few times; and that he had never driven Steuernagel's car.

The appellant argues that it appears from this new evidence that Steuernagel intrusted his vehicle to a driver whom he knew to be incompetent, and that it therefore appears that the negligent parking of the car was the proximate cause of the accident.

On the former appeal this court held in effect that the evidence was not sufficient to sustain the implied finding that Steuernagel intrusted the car to Andreola, that Andreola's act in moving the car was the intervening act of a third person, and that any possible negligence in connection with the parking of the car was not a proximate cause of the injuries to the appellant. The only new fact now appearing, in so far as negligence in parking is concerned, is that Steuernagel once stated to another person that he left his motor running on the occasion in question. If this be assumed to be true, it has no material effect on the main question as to whether any negligence in the matter of parking the car was the proximate cause of the accident.

The other new evidence referred to can have a bearing only upon the question as to whether Steuernagel intrusted the car to Andreola in the sense of investing him with the right or duty to move the same, or whether the relationship between these parties was one of agency or master and servant, express or to be implied. Assuming that it now appears that Andreola was an incompetent driver, there is neither evidence that Steuer-

nagel knew this nor that he intrusted the car to him in so far as moving the same is concerned. Neither can it be inferred from the fact that no valuables were in the car, that Andreola was first left in it and later sent back to it for the purpose of moving the same. The entire evidence merely indicates, as before, that Steuernagel did not want to leave the car unattended, and the same is far from sufficient to show direction or authority to move the car. The evidence to the effect that Steuernagel heard Andreola call to him and that he was a little slow in responding does not show such an emergency as would justify a stranger in assisting an employee within the rule discussed in our former opinion. If anything, this fact bears out what we then said as to Steuernagel's availability for the purpose of moving the car when the occasion arose.

There is no new evidence which could change the result or render inapplicable our holding on the same questions when raised on the previous appeal. For all practical purposes the evidence is substantially the same as that produced on the first trial of the case and reviewed in our former opinion. Giving full consideration to any new testimony which appears, it must still be held that the evidence is not sufficient to justify a verdict against these respondents.

The motion to affirm is granted, and the judgment is affirmed.

We concur: JENNINGS, J.; MARKS, J.

4 Cal.App.2d 12

PATEK v. CALIFORNIA COTTON MILLS.

Civ. 9366.

District Court of Appeal, First District, Division 1, California.

Jan. 21, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Constitutional law ⇐186

Retrospective legislation is not unconstitutional merely on ground that it is retrospective.

2. Constitutional law ⇐42

Corporation, claiming unconstitutionality of statute providing that stockholder paying corporation's debt because of statutory proportionate stockholder's liability shall be subrogated to claim of creditor against corporation, can only protect its own interests (Civ. Code, § 322a, as added by St. 1931, p. 1784).

3. Constitutional law ⇐42

Solvent corporation must be assumed to have property sufficient to pay debts, and therefore cannot urge applicability of rule adopted for protection of creditor that pro tanto subrogation is not permitted, when attacking statute providing stockholder paying corporation's debt shall be subrogated to creditor's claim (Civ. Code, § 322a, as added by St. 1931, p. 1784).

4. Constitutional law ⇐154(2), 278(1) Corporations ⇐217

Statute providing stockholder paying corporation's debt because of statutory proportionate stockholder's liability shall be subrogated to claim of creditor against corporation *held* not unconstitutional as impairing obligation of contract between stockholder and corporation or as taking corporation's property without due process (Civ. Code, § 322a, as added by St. 1931, p. 1784; Const. Cal. art. 1, §§ 13, 16; Const. U. S. Amend. 14, and art. 1, § 10, cl. 1).

5. Corporations ⇐544(2)

Doctrine that assets of corporation constitute trust fund for creditors is not accepted in California.

6. Constitutional law ⇐154(2)

Statute providing that stockholder paying corporation's debt because of statutory proportionate stockholder's liability shall be subrogated to claim of creditor against corporation *held* not unconstitutional as impairing obligation of contract between creditor and corporation or between stockholders inter se (Civ. Code, § 322a, as added by St. 1931, p. 1784; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10, cl. 1).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Frederick Patek against the California Cotton Mills. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Reversed, with directions.

Goldman & Altman, of San Francisco, for appellant.

Philip S. Ehrlich, of San Francisco (Conrad Louis Gardner, of San Francisco, of counsel), for respondent.

McNUTT, Justice pro tem.

The plaintiff, a stockholder who had paid his proportionate share of defendant corporation's debt, brought suit against the corporation under section 322a, Civil Code, to recover the amount thereof. Demurrer to his complaint having been sustained, he stood thereon, and appeals from the consequent judgment.

Article 12, § 3, of the Constitution, and section 322, Civil Code, established stockholders' liability; November 4, 1930, said section 3 was repealed, and at the same time section 1 of article 12 was amended to give the Legislature power to prescribe the rights and liabilities of stockholders; in August, 1931, the Legislature adopted the general corporation law (St. 1931, p. 1762), repealed section 322, Civil Code (St. 1931, p. 444), enacted section 280, Civil Code (St. 1931, p. 1765) to preserve accrued liabilities, and contemporaneously enacted section 322a (St. 1931, p. 1784) which follows: "Any shareholder who because of his proportionate stockholder's liability under statutes heretofore in effect and not in discharge of his obligation to pay the full consideration agreed to be paid for his shares, *has heretofore* made or shall hereafter make any payment in discharge in whole or in part of any debt or liability of the corporation shall be subrogated to the extent of such payment to the claim of the creditor against the corporation." (Italicized as in respondent's brief.)

The paying stockholder is not thereby subrogated to a creditor's right to pursue other stockholders.

The salient facts of the complaint are that between October 22, 1929, and July 16, 1930, and, while defendant corporation was, as at all times, a solvent going business concern, defendant became indebted to a bank for $700,000 borrowed money; that in *October, 1932*, the bank sued appellant (plaintiff below) for his proportionate stockholder's share of defendant (respondent) corporation's debt, recovered judgment *May 20, 1933*, in a sum of approximately $2,500, which the stockholder *paid May 22, 1933*, to said bank; that the whole sum borrowed remains unpaid except what the appellant stockholder paid; that appellant's stock was paid in full; that the payment was made in discharge, in part, of the debt and liability of respondent corporation to the bank, and was made by appellant as a stockholder of respondent; that by virtue of the provisions of section 322a, Civil Code, plaintiff has been subrogated to the claim of the bank against the corporation to the extent of the sum paid by the stockholder; and that there is unpaid from the corporation to appellant the sum so paid.

Under respondent's general demurrer, it is urged that section 322a is unconstitutional as violative of the due process clauses of the Constitutions of the United States and of California, respectively, and of the contract and ex post facto clauses of said Constitutions (Const. Cal. art. 1, §§ 13, 16; Const. U. S. Amend. 14; art. 1, § 10, cl. 1); and further that the section is so indefinite and obscure as to make its meaning incapable of ascertainment; that it does not prescribe any method to carry into effect the right of subrogation; that there can be no partial subrogation to an indivisible claim; and, finally, that the statute relied upon cannot be constitutionally construed to create retrospectively the right of subrogation.

[1] At page 2 of respondent's brief, we find: "The sole issue involved in this appeal is: 'Whether section 322a of the Civil Code, in so far as it purports to be retroactive, is unconstitutional.'"

There is no constitutional inhibition against retrospective legislation merely upon the ground that it is such. 5 Cal. Jur. p. 747. Respondent's criticisms of the statute in a constitutional aspect are: (A) Section 322a impairs the obligation of contracts, respectively, between stockholder and the corporation, (B) between the creditor and the corporation, (C) between the creditor and the stockholder, (D) between the stockholders inter se; that section 322a is a deprivation of property without due process of law in that (a) it deprives the corporation of property, (b) the creditor of the corporation of property, (c) the stockholders of the corporation of property, without due process. It argues further that the right of pro tanto subrogation created by the section is unenforceable and for that reason void. Respondent contends that at common law pro tanto subrogation was not permitted; the cases cited in support thereof hold generally that a surety may not at law or in equity call for an assignment of the claim against his principal unless the entire debt of the corporation has been paid, because pro tanto assignment or subrogation will not be allowed.

[2, 3] The record does not disclose the specific reason for the ruling on demurrer, but it should be observed that no one in whose behalf these constitutional questions are raised is a party, except the corporation, which would not appear to have a right to protect any but its own interests. Hooker v. Burr, 137 Cal. 663, 70 P. 778, 99 Am. St. Rep.

17; Lindsay-Strathmore Irrigation Dist. v. Wutchumna Water Co., 111 Cal. App. 688, 296 P. 933.

Assuming that at common law pro tanto subrogation was not permitted, the Legislature has changed the rule by the adoption of 322a; the cases referred to in support of the rule contended for are those in which it was held that injury might come to the creditor by permitting the surety to exercise such right.

In Columbia Finance & Trust Company v. Kentucky Union R. Co. (C. C. A.) 60 F. 794, 796, it is held that "the payment of the whole debt for which the surety is liable is essential to subrogation. If the surety, upon making a partial payment, became entitled to subrogation pro tanto, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was *insufficient* to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall *proportionately* upon the *creditor* and upon the *surety*. Such a result would be grossly inequitable." (Italics added.)

It is apparent that the rule just stated was adopted for the protection of the creditor. The complaint alleges that the corporation debtor is solvent; hence it must be assumed that it has property sufficient to pay its debts.

The argument that the statute is constitutional prospectively but not retrospectively is not clear; the stockholder pays his proportion of the debt by reason of a pre-existing statutory mandate. By the terms of section 322a, the payment which gives the stockholder the right to reimbursement by subrogation to the creditor's claim against the corporation is a discharge, in whole or in part, of his statutory liability as a stockholder *by reason of statutes heretofore in effect*. That liability must have become fixed before the enactment of 322a and while liability of stockholders existed. The section does not purport to provide for reimbursement of the stockholder for a payment he might make in discharge of a corporate debt by reason of a law which the Legislature might pass because of powers conferred by article 12, § 1, of the Constitution, as amended November 4, 1930. The contractual aspect of relations of stockholder to corporation, to other stockholders, and to creditor crystallized when the corporation incurred the debt, and at a time when no right to reimbursement existed—at least by statute. If permitting the paying stockholder to have reimbursement from the corporation is to violate the obligation of a contract, it would seem that the allowance of reimbursement and not the time that the stockholder made his payment (before or after the enactment of section 322a) should be the factor which violates the obligation of the contract if the operative effect of the section is to violate the contract clauses of either Constitution. If before the passage of section 322a the creditor had had the right to collect its debt from both the corporation debtor and the stockholder rather than from either, it might complain either under the contract or due process clauses of the Constitutions, if the stockholder were given the right to reimbursement. But the creditor has never been entitled to any more than the payment of his claim by the debtor or by the stockholder.

Respondent contends that before the adoption of section 322a a stockholder had no right to reimbursement from the corporation, having paid his share of its debts, as his liability was a primary one and he did not occupy the position of a surety, citing Trindade v. Atwater Canning, etc., Co. (Cal. App.) 128 P. 756; Morrow v. Superior Court, 64 Cal. 383, 386, 1 P. 354; Long Beach Brick Co. v. De Dodson, 104 Cal. App. 99, 285 P. 382; Sacramento Bank v. Pacific Bank, 124 Cal. 147, 56 P. 787, 45 L. R. A. 863, 71 Am. St. Rep. 36; 6 Cal. Jur. pp. 1036, 1037, § 413.

[4] The crux of this case is not, Did the stockholder have a right to reimbursement before the enactment of section 322a? but rather, Is he obligated by contract to pay a corporate debt for its benefit and not to seek reimbursement from the corporation? It does not follow, however, that because his obligation as a stockholder was primary and that he had no right to reimbursement, a statute giving him such right would necessarily violate the obligation of a contract between him and the corporation, the creditor or other stockholders. As the Constitution of California contained no provision which prohibited the Legislature from passing laws for the relief of a stockholder who had paid a part of the corporate debt, the situation is that up to the enactment of section 322a there was merely an absence of the right to such reimbursement. Respondent has not pointed out how the contract between the stockholder and the corporation immunizes the corporation from the assertion of a claim by the stockholder for reimbursement. If a law giving a right of reimbursement is not forbidden by the Constitution, and the contract between the stockholder and the corporation

contains no agreement on his part that he will not ask for reimbursement, or no provisions which estop him to seek it, it cannot be said that, as a part of the obligation of the contract between him and the corporation, there is a duty on the stockholder not to ask for reimbursement. Therefore the enactment of section 322a does not impair the obligation of any contract between the stockholder and the corporation, or take its property without due process of law. By virtue of the statute in question, he asserts a right which he did not theretofore have.

[5, 6] The argument that the section in question impairs the obligation of a contract between the creditor and the corporation seems to be based upon the theory that the assets of the corporation constitute a trust fund for the creditors. This doctrine is not accepted in California. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 238 P. 703; Rhode v. Dock-Hop Co., 184 Cal. 367, 194 P. 11, 12 A. L. R. 437; Fornaseri v. Cosmosart Realty, etc., Corp., 96 Cal. App. 549, 274 P. 597; Delaney Producing & Refining Co. v. Crystal Petroleum Products Corp., 88 Cal. App. 784, 264 P. 521.

In the case of Dominguez Land Corporation v. Daugherty, supra, at page 479 of 196 Cal., 238 P. 703, 707, the court says: "* * * Even those assets to which the so-called trust fund doctrine is applicable are not charged with any enforceable trust or with any equitable lien on behalf of any general creditor of the corporation, if it be a solvent, going concern, and that such creditors have no vested right of any nature whatever in or to the property of such a corporation."

The respondent corporation was at all times a solvent going concern. The stockholder by paying a part of its debt has, in effect, increased its assets to the extent of such payment, and therefore the compulsory reimbursement by the corporation works no injury to the corporation. The cases cited by respondent lay down the rule that a stockholder had no right to subrogation (prior to the enactment of section 322a) because his liability was primary and not secondary, and that one who pays a debt which by law he is independently obligated to pay cannot invoke equitable subrogation. None holds, however, that the absence of the right of subrogation or a denial of the right to be subrogated to the creditor's claim grew out of any contractual agreement between the paying stockholder and either the corporation or the creditor thereof not to seek reimbursement. Though the liability of a stockholder to a creditor is primary and not that of a surety, it does not logically follow that making such liability independent and primary was in exoneration or was exculpatory of the equally primary liability of the corporate debtor. The only effect of such quality of liability, so far as the relation of stockholder and corporation, or stockholder and creditor, is concerned, is that, when either shall have paid the creditor, his claim to that extent is discharged. It is not a necessary legal consequence of such quality of his obligation, that he may not be legally authorized to seek reimbursement from the corporation. The evident object of the constitutional and statutory provisions now repealed was to render more secure the position of a creditor of a corporation, rather than for the relief of the latter entity.

Respondent offers no authority to support the proposition that permissive reimbursement of a stockholder who has paid violates the obligation of contracts of stockholders inter se. It is alleged that the corporation is a solvent going concern, from which fact it must be inferred, so far as concerns stockholders other than the one who has paid, that he, having added to the assets of the corporation by paying his share of the debt, has cast no burden upon them by accomplishing repayment thereof from the corporation. When he is given back that which he himself has added, he has taken from other stockholders nothing which he, by contract, agreed to pay for their benefit and not to seek return of.

Aronson & Co. v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1385, holds that the constitutional and statutory provisions relating to liability of stockholders are terms of the stockholder's subscription agreement as though set forth therein; that, when he accepted his stock he offered to make payment to the extent of his liability to one who gave credit to the corporation during the period of his ownership; that, during such time, the extension by any one of credit to the corporation was an acceptance of the stockholder's offer to pay his liability; and that a completed contract came into being between him and the creditor of the company. While the court defines the liability of the stockholder to be direct and primary and enforceable against him independently of proceedings against the corporation, it nevertheless observes that, though rules relating to the liability of a guarantor are not applicable to stockholder's liability, the latter's obligation is in the nature of a continuing guaranty of payment of corporate debts. This case is no

authority for the proposition that the stockholder has obligated himself by subscribing for stock not to ask reimbursement from the corporation whose debts he has in part paid; or that the stockholder was a guarantor of the liability of his fellow stockholders.

The holding that the complaint states a cause of action as against the corporation cannot do violence to the rights of either creditors of the corporation or of other stockholders.

Respondent invokes the rule of Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866, to support the view that section 322a impairs contract obligations. Section 3 of article 12 of the State Constitution made directors of a corporation jointly and severally liable to creditors and stockholders for money misappropriated by corporate officers during the directors' term of office. A bill was filed alleging misappropriation of moneys of the corporation by its officers; pending appeal to the Supreme Court from the judgment of the superior court on demurrer the above constitutional provision was repealed, and the Supreme Court of this state dismissed the appeal because of abatement of action by repeal. The United States Supreme Court reversed, holding that the director's liability was not purely statutory, but was contractual, and that the repeal could not destroy or impair the previously vested right of the creditors. Section 322a does not take away the creditor's right to sue stockholders or the solvent corporate debtor, or both.

To illustrate by analogy: Every subscriber for stock agreed that the liability imposed by section 3, article 12, of the Constitution, and section 322 of the Civil Code was a term and was of the obligation of his contract with the corporation. If as between him and it those provisions obligated the stockholder to pay the corporation's debts, the corporation had a vested right to have him pay such debts, and the repeal of those provisions violated the obligation of the subscription contract as to all debts incurred by the corporation after the stockholder received his certificate of stock. The repeal had no such effect because the provisions referred to were enacted for the benefit of the creditor and not for the benefit of the corporation. If then it cannot be successfully contended that the corporation had a vested right to have the terms which the law read into the contract remain static, how may it be said that the stockholder contracted not to seek reimbursement from the corporation when as between them the latter had no vested right to make him bear or share its burden? The means for the protection of their rights is available, namely, by intervention or other appropriate procedural method whereby issue could be joined as to the solvency of the corporation.

Respondent quotes 6a California Jurisprudence, 1025, with reference to section 322a, as follows: "This statute is prospective and gives a right which did not exist prior to 1931." If before the enactment of the statute he had no right to sue and by the statute he is given the right, of course the statute is prospective as concerns the right to go forward by suit, but it is not prospective or retrospective accordingly as he has paid after or before the passage of the statute, and in this instance he paid after.

The judgment is reversed, with directions to overrule the demurrer.

We concur: TYLER, P. J.; KNIGHT, J.



4 Cal.App.2d 29

H. S. CROCKER CO., Inc., v. LAKE COUNTY.

Civ. 4937.

District Court of Appeal, Third District, California.

Jan. 21, 1935.

Hearing Denied by Supreme Court March 21, 1935.

1. Counties ⇨152

Claim for furniture for use in courthouse *held* entitled to be allowed in full where claim was legally incurred and at a time when county had ample money to pay it, notwithstanding that funds from which it was payable were practically exhausted when claim was presented for payment, and notwithstanding that claimant had other claims paid from such fund after contract was awarded (Pol. Code, § 3714; Const. art. 11, § 18, amended in 1926).

2. Constitutional law ⇨121(2)

Amendment prohibiting county from incurring liabilities in excess of budget appropriations except upon order of court or for an emergency *held* not to defeat vested right of claimant for balance due under valid contract for furniture furnished for courthouse, since construction of statute to that effect would constitute an impairment of obligation

of contract (Pol. Code, § 3714, subd. 5, as amended; U. S. Const. art. 1, § 10; Const. art. 11, § 18, as amended in 1926).

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by the H. S. Crocker Company, Inc., against Lake County. From an adverse judgment, the plaintiff appeals.

Reversed, with directions.

Jesse H. Steinhart and John J. Goldberg, both of San Francisco, and Herbert V. Keeling, of Lakeport, for appellant.

Burt W. Busch, Dist. Atty., of Lakeport, for respondent.

Mr. Justice THOMPSON, delivered the opinion of the court.

The plaintiff has appealed from a judgment disallowing the bulk of a claim for the balance due upon a valid contract for furniture sold and supplied for use in the courthouse of Lake county. When the contract for the furniture was awarded, there was ample money in the "Capital Outlay Court House Fund" with which to pay the claim, but, before the contract was fully performed, that fund was practically exhausted by the payment of claims which were subsequently incurred. On the assumption that plaintiff's claim was not a liability against the county, except to the extent of the money remaining in that fund, under the provisions of section 3714, subdivision 5, of the Political Code, the claim was disallowed to the extent of $1,849.52. The balance of $7.94, which remained in the fund, was allowed. From that judgment the plaintiff appealed.

This case was tried on a written stipulation of facts concerning which there is no dispute. December 31, 1929, the plaintiff was awarded a contract to supply the county of Lake with furniture for its courthouse for the aggregate sum of $7,429.84. There was then ample money in the "Capital Outlay Court House Fund," from which this charge was to be paid, to meet all obligations which had then been incurred against that fund. The contract was fully performed and the furniture was supplied by the plaintiff, in accordance with the terms thereof. April 19, 1930, plaintiff was paid on that account the sum of $5,572.40. This left a balance of $1,857.46 due to the plaintiff on the contract. June 11, 1930, a claim for the last-mentioned sum was presented to the board of supervisors of Lake county. Subsequent to the awarding of the furniture contract to plaintiff and before its claim for the balance of $1,857.46 had been presented for payment, other obligations were incurred by the county for the payment of which the entire "Capital Outlay Court House Fund" was exhausted, except the sum of $7.94. Plaintiff's claim was not allowed. Suit was commenced against the county to recover a judgment for the amount due on the contract. The court adopted findings in accordance with the facts above related, and thereupon rendered judgment in favor of the plaintiff for the sum of only $7.94. From this judgment the plaintiff has appealed.

It is conceded the obligation for the payment to plaintiff of the original sum of $7,429.84 for courthouse furniture was lawfully incurred by the county of Lake when there were ample funds in the treasury with which to meet the claim, and that the contract did not violate the inhibition of article 11, section 18, of the Constitution of California. The respondent, however, asserts that under the provisions of section 3714, subd. 5, of the Political Code, the plaintiff's claim is not a valid liability against the county except to the extent of the balance which remained in the "Capital Outlay Court House Fund" at the time the plaintiff's claim was presented, notwithstanding the fact that other claims had been incurred and paid from that fund subsequent to the awarding of plaintiff's contract, and that plaintiff is therefore entitled to a judgment for only such sum as actually remained in that fund at the time the claim was presented. It is also contended that, because the plaintiff was paid from that fund ten other claims aggregating the sum of $1,664.22 which were incurred after the awarding of the furniture contract, it may not complain of the lack of money with which to meet its original contract.

[1] The plaintiff's claim in the sum of $1,857.46 was legally incurred and is a valid obligation against the county of Lake, for which sum it is entitled to judgment, notwithstanding the fact that the funds from which it was payable were practically exhausted at the time the claim was presented for payment. Arthur v. City of Petaluma, 175 Cal. 216, 223, 165 P. 698, 699; Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670; Weaver v. City & County of San Francisco, 111 Cal. 319, 43 P. 972; Montague v. English, 119 Cal. 225, 51 P. 327; Briney v. Santa Ana High School District, 131 Cal. App. 357, 21 P.(2d) 610. In the Arthur Case, supra, it is said in that regard: "Having a valid claim, one valid when the indebtedness

was incurred, the subsequent exhaustion of funds from which the same could be paid before the claimant was able to obtain formal allowance and payment, does not make his claim bad, but only affects his remedy to obtain payment, and he is entitled to have his claim established by a judgment for the amount due. * * *

"If at the time the liability to petitioner was incurred such liability was not in excess of the revenue and income for the fiscal year, he was entitled to his judgment, as held in numerous cases to which we have referred, notwithstanding that at the time of presentation of his claim, commencement of action, and judgment the funds for the year had been exhausted, and the interposition of these matters as a defense would have been unavailing."

The plaintiff was entitled to judgment for the unpaid balance of its claim in the sum of $1,857.46, notwithstanding the fact that the corporation had been paid from that fund, after its furniture contract was awarded, other claims aggregating the sum of $1,664.22. The subsequent payment of other claims in no way affects the validity of plaintiff's furniture contract, which obligation was incurred when there was ample money in the fund with which to satisfy the claim. Not even the misappropriation of funds by a board of supervisors will affect the validity of a previous obligation lawfully incurred. The subsequent payment of illegal claims based on obligations incurred in contravention of article 11, § 18, of the Constitution, may not become a defense to a suit to establish a liability for the fulfillment of a previous valid contract. Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698. The exhausting of a fund after a valid obligation has been incurred by the subsequent misappropriation of the money, regardless of the persons to whom it is paid, may not defeat the claimant's right to a judgment based on a previous valid claim, even though the misappropriation may prevent the satisfaction of the judgment.

The respondent concedes that, prior to the amendment of section 3714 of the Political Code in 1927 (St. 1927, p. 721), in accordance with the case of Arthur v. Petaluma, supra, and the other cases heretofore cited, a claimant was absolutely entitled to judgment for the unpaid amount of an obligation which was incurred at a time when there was sufficient money in the particular fund of the fiscal year in which the indebtedness was incurred with which to pay the claim. It is, however, asserted that the amendment of that section of the Code changed the law so as to relieve the debtor of all liability for any claim which is presented for payment after the fund has been exhausted, regardless of whether the claim was originally valid or invalid. Section 3714, subd. 5, as amended, now reads in part: "Expenditures made, liabilities incurred, or warrants issued in excess of any of the budget appropriations * * * shall not be a liability of the county. * * * The county board of supervisors shall approve no claim, and the county auditor shall issue no warrant for any expenditure in excess of said budget appropriations, * * * except upon an order of a court of competent jurisdiction, or for an emergency, as hereinafter provided."

[2] This amendment of the Political Code may not be construed so as to defeat vested rights which have accrued by virtue of obligations incurred by the terms of previous valid contracts. Such a construction of this section of the Code would render the preceding language thereof void under the provisions of article 1, section 10, of the Constitution of the United States, which precludes the impairing of the obligations of a contract by declaring that "no State shall * * * pass any * * * Law impairing the Obligation of Contracts." The language heretofore quoted from section 3714 of the Political Code should be construed to mean that "liabilities incurred * * * in excess of * * * the budget appropriations" are invalid. This is exactly what article 11, § 18, of the Constitution of California, declares by providing that "no county * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year." The statute adds nothing in that regard to that constitutional provision. The statute further provides that expenditures shall not be made and warrants shall not be drawn "in excess of said budget appropriations, * * * except upon an order of a court of competent jurisdiction, or for an emergency." The very exception contemplates that a court may allow expenditures in excess of the budget appropriations under proper circumstances. The exception also authorizes the expenditures of money in excess of the budget appropriation in case of an emergency. Niceley v. County of Madera, 111 Cal. App. 731, 296 P. 306. The Code provision relied upon by the respondent, in so far as it enlarges upon constitutional inhibition above referred to, applies merely to the

payment of money or the drawing of warrants, and not to the validity of claims which were previously legally incurred or to the establishing of legal liability for lawfully incurred obligations by the recovery of a judgment therefor. The language of section 3714 of the Political Code is no defense to a demand for judgment for an indebtedness lawfully incurred. The question as to whether the law furnishes some means of satisfying such a judgment after it has been recovered is not before us in this case. We are not called upon to determine that problem.

We are therefore of the opinion the plaintiff is entitled to judgment in this case for the balance of its valid claim under the contract for supplying the courthouse of Lake county with furniture.

The judgment is reversed, and the trial court is directed to render judgment for the plaintiff in the sum of $1,857.46, together with 7 per cent. interest thereon from June 11, 1930, at which time the claim was presented for payment.

We concur: PULLEN, P. J.; PLUMMER, J.



4 Cal.App.2d 267

Ex parte STEIN.

Cr. 2668.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1935.

Habeas corpus ⊂⇒50

Prisoner confined in city jail for more than one year under separate commitments in three separate cases imposing sentences of 180 days each, which were to run consecutively, *held* not entitled to release before expiration of his term because of Code provision prohibiting commitment in city jail for longer than one year, since such provision does not refer to sentences under different cases (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2).

Application by Lewis R. Stein for a writ of habeas corpus.

Writ discharged, and petitioner remanded.

L. G. Shelton, of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., and Newton J. Kendall and John L. Bland, Deputy City Attys., all of Los Angeles, for respondent Chief of Police of Los Angeles.

CRAIL, Justice.

This is a proceeding under a writ of habeas corpus for the release of the petitioner on the ground that he has been confined in the city jail for more than one year and that his further confinement is illegal under section 19a of the Penal Code, as added by St. 1933, p. 2217, § 2, which provides: "In no case shall any person sentenced to confinement in a county or city jail on conviction of misdemeanor, or as a condition of probation, or for any reason, be committed for a period in excess of one year," etc. The return of the chief of police of the city of Los Angeles states that the petitioner is held in custody under and by virtue of three separate commitments issued out of the municipal court in three separate cases as follows: Case No. 48878, case No. 49799, and case No. 49800—in each of which a sentence of 180 days was imposed, which were to run consecutively, and that the term of imprisonment of the said petitioner has not expired. Section 19a, Penal Code, provides that "in no case" shall a defendant be committed for a period longer than one year. There is nothing in the law which indicates that a defendant shall not be confined for a longer period where there are two cases or more. If the Legislature had intended the law to prohibit confinement for more than one year where there were two or more cases, it would have said so. The instant case was argued orally along with other cases, and the contention was made that the expression of this court in the case of People v. Phair, 137 Cal. App. 612, 31 P.(2d) 421, 423, where the court said, "it was the intention to limit the period of confinement in the county jail to one year in any and all cases where a misdemeanor has been committed," seems to imply that there was no distinction where sentences were made in one case containing two or more counts and sentences in three separate and distinct cases. We do not think so. In the Phair Case, supra, the question which is now before us was not presented and was not discussed, and the language used has no reference to sentences under different cases. There are good reasons for the distinction which the Legislature has made in this regard, one of which is that, where the crimes of which the defendant is convicted are all presented in the same case, the trial judge is

more likely to have a complete view of the situation in imposing sentences and deciding what shall be done, especially where he has a choice of sentencing the defendant either to the penitentiary or to the county jail; whereas, if the crimes come before the court in different cases, the trial judge may not have such a view. Indeed, the cases may come before different judges.

The writ is discharged, and the petitioner is remanded to the chief of police of the city of Los Angeles.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.



4 Cal.App.2d 269

Ex parte BUCHANAN.

Cr. 2670.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1935.

1. Habeas corpus ⇐50

Prisoner confined in county jail under consecutive sentences of one year on each of three counts of information *held* not entitled to release on habeas corpus because of Code provision prohibiting commitment in county jail for more than one year, where prisoner had not been confined for one year when he sued out writ and obtained order for his release (Pen. Code, § 19a, as added by St. 1933, p. 2217, § 2).

2. Prisons ⇐15

Prisoner confined in county jail *held* not entitled to reduction of sentence for good time in absence of showing that he had obtained consent of county board of parole commissioners to reduction (Pen. Code, § 1614a).

Application by George Buchanan for a writ of habeas corpus.

Petitioner remanded to the sheriff.

John F. Groene, of Los Angeles, for petitioner.

Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent Sheriff of Los Angeles County.

CRAIL, Justice.

[1] This is a petition for the release of George Buchanan under a writ of habeas corpus which alleges that he is being illegally confined in the county jail by the sheriff of Los Angeles county upon sentences under three counts of an amended information charging the petitioner with the issuing of checks without sufficient funds. The defendant was sentenced for one year on each count, the sentences to run consecutively, and it is the contention of the petitioner that he is being illegally confined in the county jail because of the provisions of section 19a, Penal Code (as added by St. 1933, p. 2217, § 2). It is clear that under said section the petitioner should not be confined in the county jail under the above circumstances for a period in excess of one year. People v. Phair, 137 Cal. App. 612, 31 P.(2d) 421; In re Fisher (Cal. App.) 36 P.(2d) 841. It is also clear, however, that the defendant had not been confined for the period of one year at the time he sued out his writ herein and obtained an order for his release upon giving bond in the sum of $100. The respondent contends that the petitioner should be held even though his sentences were all rendered in one case. but we have fully covered this contention in Ex parte Stein, 40 P.(2d) 934, the opinion in which was filed on this date.

[2] The petitioner contends that he is entitled to a reduction on the one-year period for good time under section 1614a of the Penal Code, and in this behalf he sets forth a letter purporting to be signed by Deputy Sheriff Peoples, the jailer of the county jail. But nowhere does he show that he has obtained the consent of the county board of parole commissioners for reduction for good time for his term of sentence as required by said section. On the contrary the return of the sheriff sets forth a certificate issued by said board of parole commissioners certifying that no application has been made to it or any such certificate granted.

The petitioner is remanded to the sheriff.

We concur: STEPHENS, P. J.; SCOTT, Justice pro tem.

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4 Cal.App.2d 127

DAILY et al. v. SUPERIOR COURT IN AND FOR MONTEREY COUNTY et al.

Civ. 9699.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1935.

Rehearing Denied Feb. 23, 1935.

Hearing Denied by Supreme Court March 25, 1935.

1. Fraud ⇐17

"Deceit" may be negative as well as affirmative, and consist in suppression of that which it is one's duty to declare as well as in declaration of that which is false.

[Ed. Note.—For other definitions of "Deceit," see Words & Phrases.]

2. Fraud ⇐23

Where relation of trust and confidence exists, it is duty of one in whom confidence is reposed to disclose fully all material facts within his knowledge respecting transaction in question, and any concealment of such facts is "fraud."

[Ed. Note.—For other definitions of "Fraud," see Words & Phrases.]

3. Attorney and client ⇐14

Attorneys are court officers, whose obligation to aid court in avoiding error and determining cause in accordance with justice and established rules of practice is as imperative as their duty to protect and defend their clients' interests.

4. Contempt ⇐7

Rules concerning concealment of material facts, known to party bound to disclose them, have special application in contempt proceedings.

5. Contempt ⇐10

Attorneys of record for defendant in case wherein plaintiff recovered judgment, on which execution was issued, were bound to disclose to acting judge on presentation of their ex parte motion for delivery to defendant of all excess proceeds of execution sale under judgment against same defendant in another case that plaintiff in latter case was claiming fund and had moved for delivery thereof to such plaintiff, and were guilty of contempt in failing to do so, though one of them did not appear as attorney for defendant in latter action.

6. Contempt ⇐54(4)

Affidavit and order, in proceeding against attorneys for defendant in two actions by different parties for contempt in failing to inform acting judge on presentation of their ex parte motion for delivery to defendant of excess proceeds of execution sale under judgment for one plaintiff, that other plaintiff had moved for delivery thereof to it, *held* not insufficient as not alleging intent.

7. Contempt ⇐67

Extent of appellate court's power in proceeding for writ of review to annul order in contempt proceeding is to inquire whether there was any evidence sustaining trial court's jurisdiction.

8. Contempt ⇐67

Weight of conflicting evidence in contempt proceeding was for trial court and not for Court of Appeals in proceeding to review trial court's order.

9. Contempt ⇐2

Absence of wrongful intent *held* not sufficient defense, under facts found by trial court, in proceeding against attorneys for contempt in failing to inform acting judge on their ex parte motion for delivery of excess proceeds of execution sale under judgment against their client to latter, that plaintiff in another suit against client had moved for delivery thereof to such plaintiff.

Application by Roy Daily and others for a writ of review to annul an order of the Superior Court of the State of California in and for the County of Monterey, and H. G. Jorgensen, Judge thereof, in a contempt proceeding against petitioners.

Order affirmed.

Theodore M. Monell and Roy Daily, in propria persona, both of San Francisco, for petitioners.

John Thompson, of Monterey, and Walter Slack, of San Francisco, for respondents.

STURTEVANT, Justice.

This is an application for a writ of review brought for the purpose of having annulled an order in a contempt proceeding. The alleged contempt occurred in the immediate presence of the trial court while calling the calendar. Judge Jorgensen, the trial judge, being absent on his vacation, Judge Atteridge of Santa Cruz county was presiding. At the time of the alleged contempt no action was taken. After Judge Jorgensen returned from his vacation John M. Thompson, Esq., the attorney for one of the aggrieved parties, presented to the respondent court his affidavit setting forth the facts and applied for a citation. The citation was issued and served. Later each of the petitioners appeared and

filed verified answers. A hearing was had, on issue joined, and thereafter an extended order was prepared and signed. Among other things that order contains the following:

"Findings of Fact

"The court finds that the statements, allegations and averments contained in the affidavit of John Thompson above referred to are true, except that the court finds that Roy Daily did not appear as an attorney for Bayside Fish Flour Co. in the Irwin suit hereinafter referred to.

"That at all of the times herein mentioned said John Thompson was and now is the attorney for Del Mar Canning Corporation, a corporation, plaintiff in the above entitled action; that in the above entitled action a judgment was rendered in favor of the plaintiff and against the defendant on the 10th day of December, 1962, for a sum of money in excess of $5,000.00; that on the 9th day of April, 1964, there was filed in the above entitled court an action entitled O. W. Irwin, plaintiff v. Bayside Fish Flour Co., a corporation, defendant; that in the action of Irwin v. Bayside Fish Flour Co., a judgment was entered on the 14th day of May, 1964, against Bayside Fish Flour Co., for the sum of $761.-62, together with interest and costs, and a writ of execution was issued upon such judgment, and by virtue of such writ of execution the Sheriff of Monterey County on the 7th day of June, 1964, sold certain personal property of the defendant to satisfy said execution; that upon the sale said property was purchased for the sum of $4,200.00, leaving a balance over and above the amount necessary to satisfy the execution under which the property was sold, in a sum of approximately $3,500.00; that thereafter a writ of execution was issued in the above entitled action upon the judgment aforesaid therein on the 10th day of December, 1962, directed to the Sheriff of Monterey County and said writ of execution was delivered to said Sheriff while the amount realized from said execution sale in the Irwin case was still in the hands of said Sheriff; that the said Sheriff thereafter delivered the amount received by him on said execution sale (about $3,500.00) less his costs to the above entitled court to be applied as the court should direct upon the writ of execution in the O. W. Irwin case and upon the writ of execution in the above entitled case."

It is then recited that on the 10th day of July 1964 the Del Mar Canning Corporation served upon petitioners and filed a notice of motion that it would apply for an order directing the clerk to turn over said moneys to it. It is further alleged that on the 24th day of July, 1964, the defendant Bayside Fish Flour Company, through petitioners as its attorneys, served and filed a notice of motion to recall the execution issued to the Del Mar Canning Corporation. Continuing the order recites: "That on July 20th, 1964, Judge H. G. Jorgensen, the judge of the above entitled court was on his summer vacation, and said Judge James L. Atteridge, the judge of Santa Cruz county, California, was acting in his place in the hearing only of uncontested matters; that Judge Atteridge was not familiar with the calendar and the various motions and counter motions above referred to; that said Judge Atteridge had no knowledge of any of the judgments or executions above referred to, or any facts in reference thereto; that on the said 20th day of July, 1964, both the said motion of plaintiff and the said motion of defendant in the above entitled action, being on the calendar of the above entitled court, together with various other matters, said James L. Atteridge, acting as judge of said court, being present and presiding, and both said attorneys, Roy Daily and Theodore M. Monell being present in the court room, at about the hour of ten o'clock a. m. of said day, said Judge Atteridge prior to calling said calendar asked if there were any ex parte motions, whereupon said Theodore M. Monell purporting to appear in said action of Irwin v. Bayside Fish Flour Company presented an ex parte motion to have all the said excess moneys realized on the writ of execution, in the said Irwin case, and then in the hands of the court as aforesaid, and amounting to approximately $3,500.00 delivered to defendant, Bayside Fish Flour Company; that said Roy Daily was present at all times during the presentation of said ex parte motion and on one occasion during the argument thereof between said Judge Atteridge and said Theodore M. Monell said Daily engaged said Monell in a whispered conversation; that at said time said attorneys Roy Daily and Theodore M. Monell fraudulently misled and deceived the court in that they, and each of them, failed to inform the court that the plaintiff, Del Mar Canning Corporation, through its attorney, John Thompson, was claiming that fund and had made a motion to obtain the same money prior to the motion of Del Mar Canning Corporation. That said attorneys, Daily and Monell, and each of them fraudulently misled and deceived the court by failing to inform the court that the motion of the Del

Mar Canning Corporation was on the calendar and involved the right of said Del Mar Canning Corporation to the same moneys, and by failing to inform the court that the defendant had a motion upon the calendar to recall the execution of the Del Mar Canning Corporation, and that there was a conflicting claim of the Del Mar Canning Corporation against those same moneys; that the attorneys Roy Daily and Theodore M. Monell took advantage of the court's ignorance concerning the state of the calendar, the record in the above entitled action, the judgment of the plaintiff therein, the writ of execution issued in the above entitled action and the motion pending on behalf of the plaintiff to deliver the moneys over to it; that Judge Atteridge not being advised as to these matters, and relying upon the deceit and misrepresentation of said attorneys, ordered the moneys above referred to delivered to the defendant. That had Judge Atteridge known of the judgment in the above entitled action, or of the writ of execution issued herein, or of the motion of the plaintiff to have the moneys delivered to it herein, or of the notice of said motion on file herein, or of the motion of the defendant to recall the execution herein, or any of said matters, he would not have made the ex parte order which the said attorneys persuaded him to make; that said attorneys failed to inform Judge Atteridge of the judgment of the plaintiff herein, or of the writ of execution issued herein, or of the motion of plaintiff herein to deliver the moneys to it, or of the notice of motion on file herein on behalf of plaintiff, and failed to inform said Judge Atteridge that plaintiff herein had a conflicting claim to the same moneys which were the subject of the order, but led said judge to believe that there was no conflicting claim to the money, and that no other party would be affected by the order, and that there was no opposition to the granting of the ex parte motion, which said Judge Atteridge was led by said attorneys, Daily and Monell, to believe, and did believe, at the time of making the order above referred to. That no person connected with or representing the plaintiff in the above entitled action was in court on said July 30th, 1934, said plaintiff and its said attorney having been advised by the clerk of said court that the motions would be postponed by the court, being contested matters. That at all times herein mentioned said Roy Daily and said Theodore M. Monell were attorneys at law duly admitted and licensed to practice in the courts of the state of California, and having their offices in the city and county of San Francisco, said state; that prior to said 30th day of July, 1934, neither of said attorneys were known to said Judge Atteridge."

[1-4] The petitioners claim that the order does not show they were guilty of deceit. Before passing on that claim it is necessary to notice some general propositions of law. In 12 California Jurisprudence, 770, the author states: "Deceit may be negative as well as affirmative; it may consist in suppression of that which it is one's duty to declare, as well as in the declaration of that which is false." Macdonald v. De Fremery, 168 Cal. 189, 203, 142 P. 73. It is not claimed that the petitioners made any false statements, but it is claimed that they concealed. As to whether their concealment was actionable depends on other rules. In 12 California Jurisprudence, at page 772, it is said: "Where there exists a relation of trust and confidence, it is the duty of the one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question, and any concealment of material facts is a fraud." In Matter of Shay, 160 Cal. 399, at page 406, 117 P. 442, 445, Mr. Justice Shaw speaking for the court said: "The persons here named are all persons engaged in the service of the court, assisting it in the exercise of its jurisdiction, and in the performance of its functions. They are actually or potentially officers of the court. They stand in confidential relations toward the court, and in consequence thereof they owe to the court the duty of greater fidelity and respect than are due from other persons." That language was quoted and followed in Falloon v. Superior Court, 79 Cal. App. 149, 157, 248 P. 1057 (application for transfer to Supreme Court denied). In Furlong v. White, 51 Cal. App. 265, at page 271, 196 P. 903, 906, the court said: "Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice." In the case of In re Peairs, 80 Cal. App. 672, 252 P. 745, was an application to cancel the order admitting Howard A. Peairs to practice as an attorney. It was based on the fact that he had been admitted to practice in this state on the representation that he had been admitted to practice in Kansas, and that in fact he had not been so admitted. In truth and in fact he had been so admitted and the applicants knew the fact

more than three weeks before the hearing but did not withdraw their petition nor call the fact to the attention of the court. On page 674, of 80 Cal. App., 252 P. 745, 746, the court said: "The conduct of petitioners in these matters is inexplicable and reprehensible. They knew more than three weeks before the hearing of their petition, or had the means of ascertaining, that their charge of fraud against respondent was utterly baseless, yet they permitted the charge to stand. Such a course of conduct, under a charge of fraud against any man and regarding any subject-matter, would deserve the severest censure. Under the circumstances which here exist such conduct deserves a particular notice. The petition involves more than a mere attack upon respondent. He occupies a high judicial office and has been a trusted servant of the people for many years. The charge of fraud was not only unjust as to him, but it tended to impair the confidence of the public in one of the three great branches of government. Under the law and under the oaths of petitioners as attorneys, they are charged with the duty of maintaining 'the respect due to the courts of justice and judicial officers.' Code Civ. Proc. § 282. This duty they have violated.

"Under the control which we may justly exercise over the conduct of attorneys, and which we ought to exercise whenever proper occasion for it arises, we are bound to condemn in no measured terms the conduct of petitioners. As an evidence of such condemnation we now administer to petitioners the stern reprimand of this court." No further citations are necessary to show the generality of the application of the rule. When, as here, the charge is contempt, the rules concerning concealment have special application. Bowles v. United States (C. C. A.) 50 F.(2d) 849, 851; Clark v. United States, 289 U. S. 1, 11, 12, 53 S. Ct. 465, 77 L. Ed. 993.

[5] The court found that Mr. Daily "did not appear as an attorney for the Bayside Fish Flour Co. in the Irwin suit," but the fact that Mr. Daily was not an attorney of record in the Irwin suit is immaterial. He and Mr. Monell were the attorneys of record for the Bayside Fish Flour Company in the Del Mar case. In the last-named case he and Mr. Monell as attorneys for the Bayside Fish Flour Company had served upon counsel for plaintiff a motion by means of which they sought to obtain the fund in question for their client. The plaintiff in the Del Mar case had also served upon Mr. Daily and Mr. Monell, as attorneys for the Bayside Fish Flour Company in that action, a motion seeking to obtain the fund in question for the plaintiff. Both of said motions had been filed and they appeared upon the calendar on the day on which the ex parte motion was made. Mr. Daily and Mr. Monell knew these were contested motions and both were present in court. While Mr. Monell purported to make the ex parte motion in the Irwin case, in which he alone was the attorney of record for the defendant Bayside Fish Flour Company, the granting of the ex parte motion was in effect a ruling upon the contested motions appearing upon the calendar in the Del Mar case. As recited in the order, while Mr. Monell was presenting the ex parte motion, Mr. Daily sat by his side and they held a whispered conversation. Furthermore, there was evidence that after the motion had been granted, Mr. Daily in a conversation with Mr. Slack, said: "Was not that a hot one I slipped over on Thompson down in Monterey. * * * I got the $3800 that was left upon the execution." Under these circumstances it was the duty of each of them, as officers of the court, to speak and to make to the court full disclosure of the facts when the ex parte motion was presented and we attach no importance to the fact that the ex parte motion was made in the Irwin case and not in the Del Mar case.

[6] It is claimed that the affidavit and order are insufficient because intent is not alleged. The petitioners cite and rely on Hutton v. Superior Court, 147 Cal. 156, 159, 160. 81 P. 409. Comparing the pleading in that case with the pleadings in this case, the point may not be sustained.

[7, 8] It is next asserted that the proof should establish the charge by clear and satisfactory evidence. The petitioners cite and rely on In re Buckley, 69 Cal. 1, 3, 10 P. 69. It is not helpful. It was an original proceeding and not a proceeding brought to review an order or judgment of an inferior court or tribunal as is the instant case. In the proceeding before us the extent of our power is to inquire whether there was any evidence before the trial court sustaining its jurisdiction (Strain v. Superior Court, 168 Cal. 216, 142 P. 62, Ann. Cas. 1915D, 702), but the power to weigh that evidence rested with the trier of the facts. Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780. As to what was said, or left unsaid, by Mr. Monell, there were distinct conflicts. But, as stated above, the weighing of the evidence rested with the trial court.

[9] Both upon the hearing in the trial court and at this time the petitioners disclaim any wrongful intent. Under the facts found by the trial court that claim is not a sufficient defense. May Hosiery Mills v. F. & W. Grand 5-10-25 Cent Stores (D. C.) 59 F.(2d) 218; Clark v. United States, 289 U. S. 1, 19, 53 S. Ct. 465, 77 L. Ed. 993; People v. McCaffrey et al., 232 Ill. App. 462, 483.

The order under attack is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.



4 Cal.App.2d 284

MORCOM v. SAN FRANCISCO SHOPPING NEWS CO. et al.

Civ. 9265.

District Court of Appeal, First District, Division 1, California.

Jan. 31, 1935.

Hearing Denied by Supreme Court April 1, 1935.

1. Libel and slander ⇐48(2)

Newspaper or other publication, or private citizen, within proper limits, may express opinions and criticism upon character or qualifications of public officers and candidates for office, and newspaper's privilege is no different from that of any citizen (Civ. Code, § 47, subd. 3).

2. Libel and slander ⇐101(4)

In action for libel, defendant ordinarily has burden to allege and prove privileged character of publication and absence of malice (Civ. Code, § 47, subd. 3).

3. Libel and slander ⇐93

Defendant relying on qualified privilege applicable to communications by persons interested is not relieved of pleading privilege as defense, unless complaint itself shows that communication was privileged and was made without malice (Civ. Code, § 47, subd. 3).

4. Libel and slander ⇐5

Where publication is claimed to be privileged, no malice is presumed, but defendant has burden to show absence of malice, by demurrer, if absence of malice appears on face of complaint, otherwise by answer and proof (Civ. Code, § 47, subd. 3).

5. Libel and slander ⇐83

Complaint alleging that defendant, engaged in free distribution of publication devoted to advertising, had, with intent to injure, disgrace, and defame, accused president of city council of falsehood, deception, and improper motives, in connection with proposed ordinance designed to prohibit circulation of advertising matter, *held* sufficient on demurrer, since allegations as to character of publication did not refute direct allegation of malice (Civ. Code, § 47, subd. 3).

6. Libel and slander ⇐83

Allegations of malice will not avail pleader in libel action, if character of publication is inconsistent with such allegations (Civ. Code, § 47, subd. 3).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Fred N. Morcom against the San Francisco Shopping News Company and others. Judgment for defendants, and plaintiff appeals.

Reversed, and cause remanded, with instructions.

Hearing denied by Supreme Court; CURTIS and THOMPSON, JJ., dissenting.

O. G. Foelker, of Oakland (J. H. McKnight, of Oakland, of counsel), for appellant.

Daniel A. Ryan and Thomas C. Ryan, both of San Francisco, and Breed, Burpee & Robinson, of Oakland (James W. Harvey, of San Francisco, of counsel), for respondent.

JAMES, Justice pro tem.

We are invited, by this appeal, to examine a judgment for the defendant, rendered by the court below after sustaining a general demurrer to plaintiff's complaint and after the plaintiff had failed to avail himself of the granted permission to amend.

The complaint, so successfully assailed, attempts to state a cause of action for libel. It alleges that the plaintiff is a member and president of the city council of Oakland, ex officio mayor of that city and a candidate for Congress; that the defendant is a corporation, engaged in publishing and distributing, gratis, an advertising weekly of some ten or more loose sheets, called "Oakland Shopping News," which are left at the doorsteps, porches, and yards, entrances, and vestibules of residences and apartment houses in Oakland and other adjacent communities, and which are quite generally read by the public; that in six different issues of this publication defendant printed and published the several articles complained of, in which it is alleged, said defendant had printed "with malice, knowingly, false and unprivileged statements and representations with the intent and design to injure, disgrace and defame plaintiff,

to expose plaintiff to hatred, contempt, ridicule, obloquy." It further alleges that there was introduced and under consideration before the city council of Oakland, during this period, a proposed ordinance, which is set forth as an exhibit to the complaint, and which is designed to prohibit the throwing or placing or scattering of handbills, samples, dodgers, cards, or other advertising matter upon public or private property, etc.

The complaint then details the contents of the alleged libelous articles, and pleads the meaning of the same as designed and intended by defendant and as read and understood by readers of the publication. The several articles are set forth, also, in hæc verba, in Exhibits B, C, D, E, F, and G, attached to the complaint. They all have reference to the attitude of the plaintiff, as mayor, toward the ordinance pleaded, as above recited, and form a series of articles attacking the action and impugning the motives of plaintiff with respect to that ordinance, from which the conclusion is drawn, by the pleading, that the plaintiff was actuated in his official capacity, as mayor and member of the council, by selfish, unworthy, and dishonest motives having to do with his candidacy for Congress.

As the articles, when considered together, as they should be, would unduly extend the length of this opinion, we will content ourselves with the above general statement as to their character. Suffice it to say, for the purpose of this opinion, these articles, as pleaded, if false and if unprivileged, would fall within our statutory definition of libel, as exposing the plaintiff to hatred, contempt, ridicule, or obloquy, etc. Civ. Code, § 45.

The ground upon which the demurrer was sustained and the judgment so rendered is that the publication was privileged; but it is contended by appellant that the allegations of actual malice, with a prayer for punitive damages, will not admit of the raising of the issue of privilege by demurrer.

[1] The contention is also made that, because the Oakland Shopping News does not come within the legal definition of a newspaper, it is not entitled to claim the publication as privileged. This contention may at once be disposed of. The law recognizes no special privilege in a newspaper. The privilege of a newspaper is in no wise different from that of any citizen of the community. Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1.

Section 47 of the Civil Code defines five classes of publications which are declared to be privileged. The claim of privilege in the instant case is made under subdivision 3 of that section, which defines the privilege thereby protected as one made "in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information." When one offers himself for public office, or occupies a position of public trust, he is held to have proffered himself for public investigation, and his conduct is open to public criticism, as it is for the interest of society that his acts may be freely published with fitting comments or strictures. This right, of course, does not warrant aspersive attacks upon the motive or character of the officer.

A newspaper, or other publication, or private citizen, within proper limit, may express opinions and indulge in criticism upon the character or qualifications of public officers and candidates for public office.

Inasmuch as the articles complained of dealt primarily with the alleged ordinance, it may well be argued that the privilege of the publication would find support in the quoted subdivision of the section for another reason. The effect of the ordinance in question would be to prohibit, or, at least, seriously hamper, the continued operation of the distribution of the publication. The subject of the articles complained of would, therefore, be a communication by the defendant (who would naturally be interested therein because it vitally affected its business) to its readers (who would also be interested therein) because of the information they derived of shopping bargains, sales, etc., which they obtained without cost from their perusal of such publications.

But, in order that the privilege accorded by subdivision 3 of section 47 of the Civil Code, be available, it must appear that the publication was made without malice. If it be made to appear that the defendant acted with malicious intent in uttering the libel, it cannot successfully invoke the protection of this privilege.

[2] Ordinarily, the question of privilege is a matter of defense. Taylor v. Lewis, 132 Cal. App. 381, 22 P.(2d) 569. The burden is on the defendant to allege and prove, primarily, the privileged character of the publication, including the absence of malice. Taylor v. Lewis, supra; Snively v. Record Pub-

lishing Co., supra; Longsworth v. Curson, 56 Cal. App. 489, 497, 206 P. 779.

[3] Where, however, these defensive elements appear clearly on the face of the complaint, the necessity of their being set up by way of answer no longer exists, for two reasons: (1) Because the complete defense to the action is thereby confessed; and (2) because the complaint thereby fails to state an actionable libel, that is, an unprivileged one.

It will therefore seem clear that before the defendant, relying on this class of qualified privilege, can be relieved of the necessity of pleading it by answer, the complaint must show that the conditions under which the utterance complained of was made were such as to bring it within the particular class of privilege claimed, and that the same was without malice.

[4] In the instance of a false and unprivileged utterance, which is libelous per se, malice is presumed; and the plaintiff need neither allege nor prove it. But, where the publication is claimed to be privileged, no malice is presumed; but it is incumbent on the defendant, as a part of the privilege, to show the absence of malice. This he may do by demurrer, if it appears on the face of the complaint, or by answer and proof, if it does not.

The absence of malice is an essential element of the privilege; and, in the presence of malice, the privilege does not exist. The law does not accord to any one the privilege of publishing maliciously a false and defamatory statement concerning another.

It will be understood, of course, that we are, in this opinion, dealing only with the qualified privilege defined in subdivision 3 of section 47, Civil Code.

[5, 6] The complaint in the instant case clearly sets out circumstances under which the alleged libel was uttered, which, if the publication was without malice, would render it privileged. The sole question, then, presented by this appeal, is whether or not the absence of malice in the publication sufficiently appears on the face of the complaint. If it does, the ruling of the lower court was sound, and the judgment must be affirmed; if not, the judgment must be reversed, and the defendant put upon his defense in the court below.

The complaint here alleged that the defendant "did print with malice, knowingly, false and unprivileged statements and representations *with the intent and design to injure, disgrace and defame plaintiff*," etc. (Italics ours.) This would appear to be quite a definite allegation of actual malice.

In Davis v. Hearst, 160 Cal. 143, 116 P. 530, 538, the subject of malice is extensively discussed; and actual malice, as applied to the law of libel, is there defined as "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another"; and "* * * the motive and willingness to vex, harass, annoy, or injure." The allegations above quoted fully respond to the test of these definitions.

Respondent cites Taylor v. Lewis, supra, as authority for the proposition that to allege the publication was made "maliciously" is but stating a mere conclusion. With this we have no quarrel; but the cases are not analogous. The pleader in the instant case has not contented himself with a bare conclusion, as was the case in the cited authority; but has pleaded the motives actuating the publication. He pleads, in effect, that the defendant, with malice, published the false and defamatory statements, knowingly (i. e., knowing them to be false and defamatory), and with the intent and design to injure, disgrace, and defame plaintiff. This is not a mere conclusion; it is a clear and definite allegation of actual malice.

But, it is further contended, allegations of malice will not avail the pleader, if the character of the publication complained of is inconsistent with such allegations. This is so obvious as to require little comment.

In the case of Eva v. Smith, 89 Cal. App. 324, 264 P. 803, 804, this court approved a ruling of the lower court sustaining a demurrer to the complaint, without leave to amend. But there, while actual malice was alleged, the publication, itself, was a mild, dignified, and obviously sincere expression of opinion as to the merits of several candidates for election to the office of city council of San Mateo. Mr. Presiding Justice Tyler there said: "Taking the article as a whole, it seems clear to us that it amounts to no more than a criticism of plaintiff's qualifications for office, and one which defendant was entitled to make. No malversation on the part of plaintiff is charged. On the contrary, the article states that for his associates, of whom plaintiff was one, defendant held the kindest personal regards, but, by reason of lack of zeal and temperament, neither incumbent should be returned to office."

The later case of Taylor v. Lewis, supra, applied the same principle as was laid down in Eva v. Smith, supra, with regard to a similar character of publication and under very

similar circumstances. In that case, too, the defendant expressed his kindly personal feeling toward plaintiff. But in this latter case there was no definite allegations of actual malice; and the decision must be regarded as controlled primarily by that consideration.

The publications complained of in these cases are not to be compared with those counted on in the cause before us. In the latter, as pleaded directly and through innuendo, the plaintiff is accused of falsehood, deception, and chicanery; of improperly using his office of mayor and member of the city council to further his political ambition for a national office; of being a tool of a group of newspapers; of being improperly influenced in his official action as mayor and member of the city council, by considerations of his own personal interests. These articles were neither dignified, temperate, nor harmless. It cannot be said, with reason, that they carry, in themselves, a refutation of the direct allegation of actual malice found in the complaint.

We are of the opinion that the complaint states a cause of action, and that the demurrer thereto was improperly sustained.

Accordingly, the judgment appealed from is reversed; and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and permit the defendant to answer.

We concur: TYLER, P. J.; CASHIN, J.



4 Cal.App.2d 370

KIRBY v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 9140.

District Court of Appeal, Second District, Division 2, California.

Feb. 4, 1935.

Hearing Denied by Supreme Court April 4, 1935.

1. Limitation of actions ⊂=24(2)

Where trust and savings bank's written receipt stated that specified bonds had been received for collection, proceeds of which were to be deposited to owner's account, four-year statute of limitations applied to owner's action for bank's negligent surrender of bonds and refusal to pay owner value thereof, and not two year statute of limitations (Code Civ. Proc. §§ 337, 339).

2. Banks and banking ⊂=171(2)

Where trust and savings bank surrendered, without payment, bonds received by it for collection and made no serious effort to recover bonds or money due thereon before insolvency of company liable thereon so that owner of bonds received nothing, bank was liable to owner for amount due on bonds together with interest and bonus therein provided.

Appeal from Superior Court, Los Angeles County; Robert B. Lambert, Judge.

Action by S. P. Kirby against Bank of America National Trust & Savings Association. From a judgment for plaintiff, defendant appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for appellant.

Patrick F. Kirby, of Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff left four promissory notes or "bonds" with defendant for collection on August 9, 1930. The latter gave him a written receipt as follows: "6th & Main Branch Collection No. 6032345 Date 8-9-30 Bank of America of California Name S. P. Kirby Address Box 1573, Station C. L. A. Received for collection: Date 8-9-30 payor American Mortgage Co., Amount *Over* Due de documents attached, 1047-49 S. Hill, Bonds #m-1o-11-12 & 13 Promissory Gold Note—Mayfair Instructions $1000.00 each 7%. This is an advice only, is not negotiable and is not to be construed as establishing any credit direct or indirect Credit account of S. P. Kirby, 63105 Term (old) (Signed) W. W. Behrman, teller (On reverse side of foregoing) $4-1000 Bonds called—terms are—Principal & plus accrued int to date of redemption plus a 2% bonus on principal. $4000 prin. Int at 7% to date 80.00 Bonus (Signed) W. W. Behrman, teller." Three days later defendant sent the notes by messenger to office of American Mortgage Company and left them there with that company having secured its receipt therefor. The mortgage company had been the original payee of the notes, the maker apparently being an insolvent "dummy," and said company before sale of these instruments to plaintiff had execut-

ed an indorsement on the notes which purported to be "without recourse." Said mortgage company, upon receiving the notes from defendant, surrendered them to the holder of the trust deed securing the notes and the property was reconveyed. The notes thereby became valueless. The mortgage company never remitted the value of the notes to defendant and plaintiff never received the notes again nor any compensation therefor.

In October, 1930, he demanded the notes or the money of the defendant and made repeated visits to the bank making the same request. Defendant neither secured the notes nor compensation therefor from the mortgage company for the plaintiff. Finally on April 7, 1931, the mortgage company became insolvent. This action was filed October 13, 1932. The matter was submitted to a jury which returned a verdict for plaintiff for the amount of the notes, interest, and bonus which was provided for in the notes. From judgment entered thereon defendant appeals, contending that the action was barred by the statute of limitations and that the evidence is insufficient as to any negligence of defendant.

[1] It is appellant's contention that the Code of Civil Procedure, § 339 fixing a two-year limitation in case of an action on a contract not in writing would preclude recovery because more than that time elapsed between August 9, 1930, when plaintiff left the notes at the bank and October 13, 1932, when the suit was filed. It is apparent, however, that the limitation of four years applied in this case because the receipt above set out constitutes such a memorandum in writing so as to bring it within the terms of Code of Civil Procedure, § 337. The only reasonable meaning of the words is a promise to collect the money for the bonds and credit it to the account of plaintiff. Such promise is embodied in the writing although not expressed in exactly those words. O'Brien v. King, 174 Cal. 769, 164 P. 631, and cases therein discussed.

[2] Evidence of negligence on the part of defendant is ample and convincing. On August 9, 1930, plaintiff called at the window of the collection teller of defendant bank, showed him a letter from the American Mortgage Company asking plaintiff to bring in the "bonds," told the teller he did not want to indorse them and send them in to the mortgage company, asked if he could leave the bonds there and the teller could get in touch with the mortgage company and find out when the bonds were going to be paid and credit plaintiff's account with the proceeds of them. To this the teller replied: Yes, that was his business. The notes were handed to him and the receipt was given. The notes contrary to plaintiff's wishes were transmitted to and left with the mortgage company without receiving the money for them and without substantial effort by defendant to recover either the notes or the money up to the time of the insolvency of the mortgage company eight months later, notwithstanding the insistence of plaintiff that it do so. An inquiry by telephone and messenger to the mortgage company was the sole effort in this direction, although the teller testified that when such bonds were collected by the method employed in this case they usually got their money in two or three days or sometimes in a week.

There was no evidence that plaintiff requested or consented to the sending of the notes to the mortgage company to be left there subject to the money being paid at some future time. The reasonable inference to be drawn from plaintiff's acts and words when he left the notes at defendant bank was that he was using the bank to avoid dealing with the mortgage company, in a relationship which might involve trust or credit.

Appellant defends its course of conduct on the ground that it followed the custom of banks in dealing with mortgage companies, citing San Francisco Nat. Bank v. American Nat. Bank, 5 Cal. App. 408, 90 P. 558, and 17 Corpus Juris, 463 and 467. Evidence on this point offered by respondent consisted of testimony of a former employee of the mortgage company who had never worked in a bank, and of the collection teller of appellant bank who handled this transaction. In the light of other undisputed evidence the jury may well have attached little weight to their testimony. Luckehe v. First Nat. Bank of Marysville, 193 Cal. 184, 223 P. 547, and cases there cited effectually disposes of this contention of appellant.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIL, J.

STONE DRILL CORPORATION v. STOODY CO.

Civ. 8482.

District Court of Appeal, Second District, Division 1, California.

Feb. 4, 1935.

Hearing Denied by Supreme Court April 4, 1935.

1. Contracts ⇐116(6)

Written instrument providing for exclusive distribution of certain products *held* not valid contract where it provided that retail price, which was essential element of agreement, was to be maintained "by mutual agreement," and that in no case would retail price be less than double cost to distributor, since such provisions in effect were no contract.

2. Evidence ⇐413

Oral modifications of written agreement for exclusive distribution of certain products, relating to term of contract, extent of territory, price and delivery of goods, *held* inadmissible under parol evidence rule (Code Civ. Proc. § 1856).

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by the Stone Drill Corporation against the Stoody Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Wellborn & Wellborn and Vernon Barrett, all of Los Angeles, for appellant.

Harold Richardson, of Whittier, for respondent.

PER CURIAM.

The alleged cause of action filed in the lower court primarily was based upon a breach by the defendant of the following instrument:

"Stone Drill Corporation, 633 West Colo. Blvd., Glendale, Calif.

"Gentlemen: Confirming our recent conversation we will agree to give you exclusive distribution in the United States, Canada and Mexico on hard abrasive alloys that you assist us to develop.

"It is understood that you will give us exclusive and adequate representation in the above outlined territory.

"You are to furnish us with samples of the various materials of a superior quality now in use and to try out the material that we develop and to furnish us with any other information that you may have in regard to abrasives.

"It is understood that the retail prices are to be set and maintained by mutual agreement, but in no case will the retail price be less than double the cost to the Stone Drill Corporation.

"If the above proposition is acceptable and you will sign the acceptance below, this letter will constitute our working agreement.

"Yours very truly,

"Stoody Company,

"[Signed] By W. F. Stoody, President.

"Above Agreement Accepted by Stone Drill Corporation,

"By Fred Stone, Pres."

The complaint in the action contained the following allegation: "That simultaneously with the execution of said written agreement, it was covenanted and agreed by and between plaintiff and defendant Stoody Company that said written agreement should be and become effective, and the term thereof should commence on February 19, 1927; that said written agreement should remain effective, and the term of duration thereof should continue, so long as the alloys therein referred to were manufactured by the defendant; that the term 'United States,' as used in said written agreement, should include and embrace the forty-eight states of the United States of America, the District of Columbia, the territory of Alaska, and all of the dependencies, colonies and territorial or other possessions of the United States of America, anywhere in the world to be found or situate; that the price which defendant Stoody Company would charge plaintiff for the hard abrasive alloys referred to in said written agreement, would be set and maintained by mutual agreement, based on the wholesale list price of defendant therefor; that said hard abrasive alloys would be delivered by defendant Stoody Company to plaintiff when, where and as directed by plaintiff; that defendant Stoody Company would sell and deliver to plaintiff all such hard abrasive alloys as plaintiff could sell, pursuant to the provisions of said written agreement; that plaintiff was to have the exclusive right to buy said hard abrasive alloys at wholesale, and sell and distribute the same at both wholesale and retail; and that plaintiff was to pay defendant Stoody Company for said hard abrasive alloys on delivery thereof to plaintiff."

It is admitted that none of such additional provisions to the written agreement of the parties was in writing.

A general and special demurrer to the complaint was sustained by the trial court, "ten

days to amend." Plaintiff having failed to amend its complaint, judgment was rendered and entered in favor of the defendant. It is from such judgment that the instant appeal is taken.

[1] Without reference to other alleged defects in the written agreement, it will be noticed that the only means therein provided by which the retail price of the commodity (which is one of the essential elements of the agreement) is "to be set and maintained" is "by mutual agreement," which in effect is no agreement whatsoever. And the same conclusion applies to the provision that "in no case will the retail price be less than double the cost to the Stone Drill Corporation."

[2] With reference to the allegations concerning oral modifications and amplifications of such provisions of the written agreement, it need only be said that evidence of such modifications or amplifications would be in violation of the rule which forbids that a written agreement be altered by parol. Section 1856, Code Civ. Proc.

The judgment is affirmed.

4 Cal.App.2d 298

VOGEL v. SHERIDAN et al.

Civ. 9624.

District Court of Appeal, First District, Division 2, California.

Jan. 31, 1935.

Rehearing Denied March 2, 1935.

Hearing Denied by Supreme Court April 1, 1935.

1. Evidence ⇐588

Trial court may give due consideration to inconsistencies in testimony in determining its weight.

2. Fraudulent conveyances ⇐295(1)

In judgment creditor's action to set aside as fraudulent transfers made by corporate convenience and its owner to owner's wife, evidence sustained findings that transfers were voluntary, that they were made with intent to defraud creditors of both corporate convenience and its owner, and that they were accepted by transferee with full knowledge of such intention (Civ. Code, § 3439).

3. Fraudulent conveyances ⇐57(1)

Transfers with intent to delay and defraud creditors may be set aside irrespective of the insolvency of grantor, since insolvency of grantor is of controlling importance only where voluntary transfers or incumbrances are made or given while grantor is insolvent or in contemplation of insolvency, in which case grantor's actual intent is immaterial (Civ. Code, §§ 3439, 3442).

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Action by Jerry J. Vogel against Edna M. Sheridan and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hudson & Martin and Geo. Allan Smith, all of Monterey, and J. A. Bardin, of Salinas, for appellants.

Mott, Vallee & Grant, of Los Angeles, Wyckoff, Gardner & Parker and Hubert C. Wyckoff, all of Watsonville, and Paul Vallee, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff, a judgment creditor of the defendants John F. Sheridan and John Franklin Music Company, a corporation, brought this action seeking a decree declaring void, as against the plaintiff herein, certain transfers made by said judgment debtors to defendant Edna M. Sheridan. Plaintiff had judgment as prayed, and from said judgment, defendants appeal.

The parties to this controversy have submitted voluminous briefs covering the story of the financial affairs of the defendants. This story is an interesting one not only because of the fact that the defendants rose practically from poverty to affluence through the promotion and sale of a single song entitled "Marcheta," but also because of the manner in which their financial affairs were handled. The briefs are filled with figures, including computations and recapitulations; but in setting forth the facts for the purposes of this discussion, it appears that we may eliminate much of the detail and may deal only with approximate amounts.

The attack upon the judgment is based upon the alleged insufficiency of the evidence. We shall therefore set forth some of the evidence upon which the trial court based its findings to the effect that the transfers made to Edna M. Sheridan by the judgment debtors were made with the intent to delay and defraud creditors.

Defendant John Franklin Sheridan was an actor. He stated that he was known as

Frank Sheridan "theatrically and legally." As far back as 1909, a judgment of $3,000 was obtained against him in California based upon an unsatisfied judgment previously obtained against him in Utah. This judgment had never been paid up to the time of the trial herein, and because of his absence from the state of California, the statute of limitations did not begin to run thereon until his return here in 1925. In the meantime, Mr. Sheridan had spent most of his time in New York City. While continuing his work as an actor, he entered the music business under the fictitious name of John Franklin Music Company. It will be noted that this fictitious name bore no apparent relation to the name Frank Sheridan under which Mr. Sheridan was commonly known. In 1916, he married Mrs. Sheridan. The business was not prospering in 1917 and 1918, and Mr. Sheridan was heavily indebted. He admitted, in certain testimony given in New York, that in 1917 he was "very, very broke." In order to continue in business and to protect his printer Lawson, to whom he was indebted, he incorporated the business in March, 1918, under the same fictitious name. The authorized capital stock of the corporation was $5,000 divided into 100 shares of $50 each. Of these, 98 shares were issued to Lawson as security for his debt. Mrs. Sheridan testified that prior to incorporation, she loaned $3,000 to Mr. Sheridan for use in the business. When asked if this money was loaned or given to him by Mrs. Sheridan, Mr. Sheridan replied: "Loan, or give, she was my wife." He didn't know whether this amount was carried over as a charge against the corporation. He said: "I simply had it here (indicating head)."

Sheridan had previously purchased the song Marcheta from its composer for the sum of $50, but there had been practically no sales made. In the latter part of 1920 or the early part of 1921, plaintiff, who believed this piece had great possibilities, made an agreement with Mr. Sheridan whereby plaintiff agreed to "plug" this song. The word "plug" was used to mean to boost, advertise, and promote the song. It was agreed that plaintiff should have a "25% interest" and that after deducting 5 cents per copy for printing and overhead, Mr. Sheridan was to receive three-fourths and plaintiff one-fourth of the balance. Plaintiff performed the services, and after about a year's work, the song became exceedingly popular not only in the United States but in other countries. Sales were tremendous and the music company launched into an era of prosperity which lasted until 1925. In the meantime, some money had been paid to plaintiff; but in 1925 a dispute arose between plaintiff and Mr. Sheridan. This dispute resulted in an action brought by plaintiff in New York against Mr. Sheridan and the corporation upon the above mentioned agreement in which action plaintiff obtained a judgment in 1928 for approximately $25,000. In September, 1925, the Sheridans had moved to California and had remained here. After obtaining the New York judgment, plaintiff brought an action in California based upon the New York judgment and obtained a judgment against Mr. Sheridan and the corporation in a similar amount. Execution was returned wholly unsatisfied and thereafter plaintiff commenced this action.

We now come to a consideration of the transactions and dealings between the Sheridans and the corporation which were claimed by plaintiff to include transfers to Mrs. Sheridan with intent to delay and defraud creditors of Mr. Sheridan and the corporation. Preliminarily we may state that the corporation itself does not appear to have been taken seriously by the Sheridans. In fact, the testimony showed that Mr. Sheridan had referred to it as a "joke corporation." In 1923, Lawson, the printer, had been fully paid and all of the stock of the corporation was issued by Mr. Sheridan to himself. Almost immediately thereafter, he issued half of the stock to Mrs. Sheridan, and in 1924, he issued the remaining half to Mrs. Sheridan, as trustee for their son. It is conceded that the transfer of the stock to Mrs. Sheridan as trustee was ineffective, but it does not appear that any change was made on the stock books of the corporation. While Mrs. Sheridan was designated as the president and Mr. Sheridan was designated as the secretary of the corporation, no directors' meeting was ever held. Counsel for appellants admits that Mrs. Sheridan was merely a figurehead so far as the management of the corporation was concerned and that Mr. Sheridan ran the business in substantially the same manner as before the incorporation. Prior to the time that the corporation began to make a profit, he deposited his salary checks from other sources in the corporation account. During all of the time, he withdrew moneys from the corporation account for business purposes and also for every purpose for which a personal account might be used. As the income of the corporation grew, large sums of money were withdrawn from the corporation but no dividends were ever declared by the corpora-

tion. Despite the fact that large sums of money went through the corporation's account, we find no time at which the balance therein was permitted to reach the sum of $10,000. Whenever the balance amounted to a few thousand dollars, a check for a substantial sum was drawn thereon to Mrs. Sheridan or to Mr. Sheridan and indorsed by him to Mrs. Sheridan or was drawn to some firm on account of purchases of real estate or stock which was placed in the name of Mrs. Sheridan. After the dispute with plaintiff in 1925 and when the Sheridans came to California in that year, all of the money in the corporation account was withdrawn and was brought to California. Thereafter, the music business was continued in New York through a representative but the money received from sales was forwarded to California. In 1927, the remaining assets of the corporation were sold for an agreed price of $21,000, of which $10,000 was paid in cash. The proceeds of the sale were likewise brought to California. Practically all of the withdrawals mentioned above together with the proceeds of the sale found their way either directly or indirectly into the bank accounts or investments in the name of Mrs. Sheridan. The result was that there was no property standing in the name of Mr. Sheridan or the corporation out of which plaintiff's judgment against said judgment debtors could be satisfied. Summarizing the amounts received by Mrs. Sheridan from the judgment debtors and either deposited in banks in her name or invested in real estate or stock in her name, we arrive at a total of approximately $180,000.

The real property subjected to the decree in this action consisted of numerous parcels of real estate in the county of Monterey standing in the name of Mrs. Sheridan. The total purchase price paid for said parcels exceeded $34,000, all of which money came from the sources above mentioned. A portion of this real estate was purchased from the Del Monte Properties Company during the years 1923 to 1926, inclusive, for the sum of approximately $22,500. The remainder was purchased from the Monterey Building Corporation during the years 1925 to 1927, inclusive, for the sum of approximately $11,700. With respect to the purchases of the parcels from the Del Monte Properties Company, it is significant to note that the correspondence with respect to the same was written on the stationery of the music company by Mr. Sheridan; that while he requested that the deeds and contracts be made out in the name of Mrs. Sheridan, he always referred to the purchases as his own, and dealt with the property as his own; and that approximately half of the purchase price for said parcels was paid directly by checks drawn by Mr. Sheridan on the account of the music company. Some but not all of these checks bore notations such as "Loan repayment on loans E. M. S.," the initials being those of Mrs. Sheridan, but it is also significant to note that the amount of these checks purporting to be drawn in repayment of loans exceeded the sum of $30,000. Mrs. Sheridan admitted that she loaned only $3,000 to the company, and while Mr. Sheridan endeavored to show that her advances amounted to approximately $7,000, it is apparent that the checks purporting to repay the alleged loans amounted to many times the amount of said loans. It may be further stated that Mrs. Sheridan showed but little knowledge of these purchases when examined as a witness. It does not appear that she had ever seen the parcels before the purchases were made. She did not know how much had been paid for any of them and did not know whether the lots were purchased on contract or by mortgage. In her testimony on the trial, she referred on one occasion to "purchasing for us." In her deposition, she made several corrections, crossing out the word "he," referring to Mr. Sheridan, and inserting the word "I," referring to herself.

[1] We shall not pause to enumerate the many inconsistencies in the testimony of Mr. and Mrs. Sheridan. Counsel for appellants endeavors to explain these by the lapse of time between the occurrences and the trial, but the trial court was not bound to give full faith to this explanation. It was proper for the trial court to give due consideration to these inconsistencies in determining the weight to be given to the testimony.

[2] In our opinion there was ample evidence to sustain the findings that the transfers to Mrs. Sheridan were made by the judgment debtors with the intent to delay and defraud creditors. The record presents the picture of a man who never had his obligations fully paid at any time. The California judgment obtained against Mr. Sheridan in 1909 remained unsatisfied at all times up to the trial of this action. He was otherwise heavily indebted and "broke" during the early years of the music company. Thereafter he incurred heavy obligations, including his obligation to plaintiff. He started the music company under a name which did not disclose the identity of its owner and

he continued the business under that name after incorporating for the purpose of protecting one of his creditors. There was practically no time after the incorporation of that business in which he permitted any of the stock to remain of record in his name. The corporation was merely a matter of convenience and was only a corporation in form. Mr. Sheridan handled the business entirely as his own, but designated Mrs. Sheridan as president and relegated himself to the less conspicuous position of secretary. No directors' meetings were held and no dividends were declared, yet we find Mr. Sheridan continually transferring the assets into the name of Mrs. Sheridan. It was these assets which were used for the purchase of the property involved in this litigation. From the detailed account of the handling of the affairs of Mr. Sheridan and of the corporation as it appears in the record, the trial court could very properly conclude that all of the transfers of these assets to Mrs. Sheridan were voluntary transfers made with the fixed intent and purpose of delaying and defrauding creditors and that Mrs. Sheridan accepted these transfers with full knowledge of such intent and purpose. We therefore conclude that there was ample evidence to support a judgment under the provisions of section 3439 of the Civil Code.

[3] Appellants contend that findings are deprived of support because the corporation was solvent in 1923, 1924, and 1925 when the transfers with which certain property was purchased were made to Mrs. Sheridan. In this connection, it may be stated that the corporate books were not all before the court and it is not possible to ascertain definitely whether the corporation was solvent or insolvent at the time said transfers were made. This action, however, may be sustained under section 3439 of the Civil Code regardless of the question of solvency as the evidence was sufficient to show an actual intent to delay and defraud creditors. Such intent invalidates the transaction as against creditors even though the debtor is not entirely stripped of assets and may still have sufficient property after such transfers to satisfy his creditors. Title Insurance, etc., Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542; First National Bank of L. A. v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64; Alpha H. & S. Co. v. Ruby Mines Co., 97 Cal. App. 508, 275 P. 984; Benson v. Harriman, 55 Cal. App. 483, 204 P. 255; Johns v. Baender, 40 Cal. App. 790, 182 P. 55; Bekins v. Dieterle, 5 Cal. App. 690, 91 P. 173; 12 Cal. Jur. pp. 976, 977. It is only in actions maintained under the proviso in section 3442 that the insolvency of the transferror becomes of controlling importance, and in such actions, the question of actual intent becomes immaterial. The distinction is pointed out in Hanscome-James-Winship v. Ainger, 71 Cal. App. 735, 236 P. 325, and Allee v. Shay, 92 Cal. App. 749, 268 P. 962. It has been stated that both sections should be liberally construed to effect their purpose which "undoubtedly is to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach." Borgfeldt v. Curry, 25 Cal. App. 624, 626, 144 P. 976, 977. It is hardly necessary to resort to a liberal construction of said section 3439 to bring the facts of the present case within its terms.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.



4 Cal.App.2d 25

DERRICK v. CITY OF VALLEJO.

Civ. 5195.

District Court of Appeal, Third District, California.

Jan. 21, 1935.

1. Animals ⇐105

City poundmaster, who was without cause voted 90-day leave of absence without his consent, but was not relieved of his office, *held* entitled to compensation for such period as necessary incident to title to his office, where he held himself in readiness to perform his duties (St. 1911, p. 1958).

2. Officers ⇐94

Right to compensation attaches to public office as incident to title thereto and not to mere exercise of functions thereof, and fact that officer does not actually perform duties of office does not necessarily deprive him of right to compensation, provided he has legal right to office and holds himself in readiness to perform functions thereof.

Appeal from Superior Court, Solano County; Thomas D. Johnston, Judge.

Suit by F. W. Derrick against the City of Vallejo. From a judgment for plaintiff, defendant appeals.

Affirmed.

Russell F. O'Hara, of Vallejo, for appellant.

F. W. Sawyer, of San Francisco, for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The city of Vallejo has appealed from a judgment which was rendered in favor of the plaintiff for the fixed salary to which he was entitled as poundmaster during a period of time in which, by a resolution of the city, he was enforced to take a vacation, or refrain from performing his duties as such officer.

The cause was heard on stipulated facts. The city of Vallejo operates under a charter. Stats. 1911, p. 1958. Pursuant to the charter an ordinance was adopted creating the office of poundmaster and authorizing the city council to appoint that officer. The ordinance authorizing the appointment provides that: "The Poundmaster shall be appointed by the Council and shall hold office at its pleasure." The resolution employing him reads as follows: "Be it resolved * * * that F. W. Derrick be and he is hereby appointed Poundmaster of the City of Vallejo, said appointment to date from December 1st, 1918." He was placed under bond in the sum of $1,000. His salary was definitely fixed at $150 per month. Prior to December, 1932, the plaintiff was appointed, qualified, and served as poundmaster of Vallejo for some time at a fixed salary of $150 a month. There was ample money in the fund from which his salary was payable for the satisfying of that obligation during the fiscal year which is involved in this suit. The faithful performance of the plaintiff's official duties during his incumbency is not questioned. On December 21, 1932, "without the request or consent of the plaintiff," the following resolution was adopted by the city council: "Be it resolved * * * that a leave of absence for Ninety (90) days, without pay, from December 26, 1932, be, and the same is hereby granted to F. W. Derrick, Poundmaster, during which time he is hereby relieved from all duties in connection with the office of Poundmaster of the City of Vallejo."

The plaintiff was not again permitted to resume the performance of his official duties. The plaintiff was not relieved of his office. He was merely granted a temporary "leave of absence." March 23, 1933, the office of poundmaster was abolished. The plaintiff thereafter presented his claim to the city of Vallejo for the fixed salary to which he was entitled during the period of time he held the office of poundmaster without being permitted to perform the duties of that office by virtue of the enforced vacation. The claim amounted to $545. This claim was rejected. Suit was thereupon commenced against the city to recover that sum. Upon the foregoing facts the court adopted findings favorable to the plaintiff and rendered judgment accordingly. From that judgment the city has appealed.

The appellant contends that since the ordinance which creates the office of poundmaster provides that, "The Poundmaster shall be appointed by the Council and shall hold office *at its pleasure*," the plaintiff may be suspended without pay at the will of the council during any period of time, and that the power to remove an officer necessarily includes the power to suspend him. Burnap v. United States, 252 U. S. 512, 40 S. Ct. 374, 64 L. Ed. 692; Shannon v. Portsmouth, 54 N. H. 183; State ex rel. v. Lingo, 26 Mo. 496. There is no doubt of the soundness of that principle, when one is suspended from office for cause. 46 C. J. 1016, § 236. But it has been held that an officer who has been suspended without cause is entitled to his compensation while he retains his office. Mechem on Public Officers, p. 581, § 865; Wardlaw v. New York, 137 N. Y. 194, 33 N. E. 140; Emmitt v. New York, 128 N. Y. 117, 28 N. E. 19.

In the case of Burnap v. United States, 252 U. S. 512, 40 S. Ct. 374, 375, 64 L. Ed. 693, upon which appellant relies, it was held that in the absence of the existence of a statute to the contrary, the power to remove an officer is incident to the power to appoint him, and that the power to suspend him is incident to the power to remove him. But in that case the officer was suspended *for cause* under the provisions of rule 12 of the Civil Service Rules. The court says in that regard: "On September 14, 1915, he [the officer] was suspended, *upon charges*, from duty and pay."

[1, 2] In the present case the plaintiff was not relieved of his office. He was merely granted "a leave of absence" without pay. During all the time in question he retained his tenure of office, and is therefore entitled to his compensation as a necessary incident to holding the office. There is a distinction between suspending one's tenure of office, and

merely granting one a leave of absence. Webster's New International Dictionary defines the word "suspend" as "to cause to cease for a time." It is the right to the tenure of the office and not a merely temporary relief from the duties thereof which is determinative of the right to compensation in this case. The plaintiff's right to his office was not caused to cease for any period of time until the office was finally abolished.

We are of the opinion that while the plaintiff as a duly appointed officer lawfully retained his office of poundmaster and held himself in readiness to perform the duties of his office, he could not be deprived of his right to compensation. It is conceded that the plaintiff retained his office and the right thereto until it was abolished March 23, 1933. It is stipulated that his "leave of absence" was declared by the council without his request or consent. It is conceded that his temporary suspension or relief from the performance of his duties was voted without cause. We may assume that at all times during the interval that he was unemployed he held himself in readiness to perform his duties as poundmaster. No reason for suspending the performance of his duties is assigned. Indeed, the appellant asserts that the council had power to suspend him at will without cause. When an officer is able to and does hold himself in readiness to perform his duties during a certain period of time for the purpose of determining whether he has earned his salary, it may be implied that he has performed his duties, and the liability for the payment of salary under such circumstances attaches. It is a well-established rule of law that the right to compensation attaches to a public office as an incident to the title to the office and not to the mere exercise of the functions thereof. The fact that an officer does not actually perform the duties of an office does not necessarily deprive him of the right to compensation provided he has a legal right to the office and holds himself in readiness to perform the functions thereof. 46 C. J. p. 1014, § 233; 21 Cal. Jur. p. 942, § 120; Elliott v. Van Delinder, 77 Cal. App. 716, 720, 247 P. 523; City of Oakland v. Lyckberg, 95 Cal. App. 71, 272 P. 606.

For the reason that it appears the plaintiff was never relieved of his office during the period of time which is involved in this action, but, on the contrary, that he was merely granted a leave of absence, the court properly held that he was entitled to compensation as a necessary incident to the title to his office.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.



3 Cal.App.2d 580

MILLER v. FIDELITY & DEPOSIT CO. OF MARYLAND.

Civ. 8999.

District Court of Appeal, Second District, Division 2, California.

Jan. 15, 1935.

Hearing Denied by Supreme Court March 14, 1935.

1. Receivers ⇐214

Under bond conditioned on receiver's faithful discharge of duty and obedience to orders of court, receiver is excused from performance when prevented by law or overruling necessity (Code Civ. Proc. § 567).

2. Receivers ⇐214

Where receivership funds were, without court order, deposited in bank, which subsequently failed, so that receiver was unable to pay judgment as directed by court appointing him, receiver's surety on bond conditioned on receiver's faithful discharge of duty and obedience to orders of court *held* liable to judgment creditor, notwithstanding receiver exercised due care in selection of bank (Code Civ. Proc. §§ 567–569; Pol. Code, §§ 947–986, and §§ 959, 960, 963, 981; Gen. Laws 1931, Act 652, §§ 91, 93).

3. Receivers ⇐100

Receiver may not deposit receivership funds in bank without court order, since deposit is simply a loan payable on demand, and receivership funds may be lent only as provided by statute (Code Civ. Proc. §§ 567–569; Pol. Code, §§ 947–986, and §§ 959, 960, 963, 981; Gen. Laws 1931, Act 652, §§ 91, 93).

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Louis Miller against the Fidelity & Deposit Company of Maryland. From a judgment for defendant, plaintiff appeals.

Reversed and remanded, with directions.

Hearing denied by Supreme Court; PRESTON and THOMPSON, JJ., dissenting.

Wheeler & Wackerbarth, of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

WILLIS, Justice pro tem.

A receiver was appointed in an action between partners and furnished bond in the sum of $10,000, executed by respondent, a commercial surety company. In course of administration, the receiver accumulated $8,099.72 in cash, and deposited the same in a bank of his own choice, without authorization of court, in an account in his name as receiver and separate from any personal account. In a subsequent judgment in the action, the court ordered the receiver to pay a specified sum in his possession as receiver to appellant, a party to the action. Upon his failure so to do, this action was commenced against the surety on the bond, respondent herein. After trial, the court found that the receiver had come into possession of the sum of $8,099.72, cash, and, without authorization of the court, had deposited the same in a bank which subsequently failed and refused to repay the deposit; that the receiver was not negligent in his choice of such bank as a depositary; and that by reason of such failure of the bank and loss of the deposit the receiver was unable to obey the order of the court to pay such moneys to appellant. On the findings, the court concluded that respondent was not liable, and judgment in its favor was accordingly entered from which this appeal is taken.

Appellant's first point, that the evidence is not sufficient to sustain the finding of lack of negligence in the receiver's choice of a bank as depositary, is not well taken. We find ample evidence in the record to sustain such finding, and under familiar rule this court must accept the same as conclusive. This leaves for decision the question of correctness of the trial court's conclusion.

In respect to the question of liability on a receiver's bond for loss of funds deposited in a bank which afterwards fails, there are herein advanced two contrary rules. The one relied upon by respondent may be stated as follows: If the court and law is silent as to the keeping of receivership funds, the receiver must keep and deal with them as received, with that degree of care which is ordinarily exercised by reasonable and cautious men in transacting their own business of like importance; and, if the receiver, acting with such degree of care, deposits such funds in a bank of good standing and repute, he and his sureties are not liable for loss due to subsequent failure of the bank. The other rule, relied upon by appellant, may be stated thus: When funds are in the hands of a receiver, and he has no further duty in respect thereto except to preserve them, he cannot part with the custody thereof by depositing them in a bank, save at his own risk, without some order or authorization of the court so to do; and, if he does deposit them in a bank of his own choice without such authorization, both he and his sureties are liable for loss due to a subsequent failure of the bank.

This case appears to be one of first impression in this state, and we lack the guidance of precedent among our own decisions. In other jurisdictions the problem presented herein for solution has been met and decided; some adopting the rule invoked by appellant and others adopting that relied upon by respondent. We have examined all such decisions as have been brought to our attention by the briefs and by independent research, and conclude that the almost evenly balanced conflict thereof renders both groups ineffective as persuasive authority or certain guide, and that our primary recourse, therefore, is to a study and consideration of the statutes of this state and the general rules pertinent and controlling in receivership matters, and of the terms and conditions of the bond in question.

Section 567 of the Code of Civil Procedure requires a receiver to give a bond in a sum fixed by the court or judge "to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein." Section 568 of the same Code provides that the receiver shall have power, among others, "to take and keep possession of the property * * * and generally to do such acts respecting the property as the court may authorize." Section 569 authorizes investment of the funds in the hands of the receiver upon order of court based on consent of all parties to the action. Sections 91 and 93 of the Bank Act (Deering's Gen. Laws 1931, Act 652, vol. 1, p. 287) provide for deposit of moneys by a receiver with a trust company upon order of court after notice. Section 981 of the Political Code makes the provisions of sections 947 to 986, inclusive, of such Code applicable to receivers. Upon examination thereof, it appears patent that many of such provisions are quite inapplicable to receiver's bonds, but sections 959, 960, and 963 in effect declare the obligatory nature of official bonds upon the principal and sureties therein for breach of condition, and that such conditions must be expressed therein.

[1-3] The condition of the bond here in question is expressed in conformity with the

requirement of section 567, supra. It comprises two obligations: (1) Faithful discharge of duty; and (2) obedience to orders of court. The obligations in this bond do not amount to an absolute agreement to do the things required by the terms of the bond, but constitute a condition to do those things. Under the force of such condition, the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. City of Healdsburg v. Mulligan, 113 Cal. 205, 216, 45 P. 337. The obligation of faithful discharge of duty embraces the duty to take and keep possession of the receivership funds and property, and generally to do such acts respecting the property as the court may authorize. The clear import of the language of section 568, supra, creating this power and its correlative duty, is that the receiver shall take the property and keep it in his possession and control, and shall do no act respecting such property which involves surrender of possession without an order of court. By such enactment the law has added to the common-law liability of the receiver, if he may be considered as a bailee of the receivership property, and furnishes the measure of his obligation. This construction is in harmony with the spirit of section 569 of the Code of Civil Procedure, relating to investment of receivership funds only on order of court, and of sections 91 and 93 of the Bank Act, relating to deposit of such funds with trust companies only on order of court. Such construction was also long ago reflected by the decision in Adams v. Haskell, 6 Cal. 114, 65 Am. Dec. 491, wherein the court said: "The receiver is the officer of the Court, and the fund in his hands is in Court, in the custody of the law, and can only be disposed of by the order and direction of the Court."

From the nature of a receiver's duties and his attitude and relation to the court as its representative and officer, he is held to a strict accountability for the faithful performance of the trust reposed in him. The court itself is obliged to keep a strict hand over the property in the hands of a receiver in order to preserve entire jurisdiction over the whole matter and to do what is just in the cause between the parties. Only by order of the court in the first instance does the receiver come into possession of the property and money of the receivership estate, and consequently it is property and money subject to the order of the court, and the receiver can only discharge himself by delivering or paying it in obedience to the direction and order of the court, unless excused by law or overruling necessity. Herein the receiver was ordered to pay over the funds in his possession to appellant. This order he failed to obey, and in this action upon the bond, based on this breach of its conditions, the excuse and defense interposed by the surety and recognized as sufficient and sustained by the trial court consists in a showing that the receiver in the exercise of diligence and without negligence deposited the funds in question in a bank of then good repute, but which later failed, resulting in loss of the deposit and the consequent inability of the receiver to secure its return and obey the order of court to pay the same to appellant. The deposit of such money by a receiver in a bank operates to surrender possession of the money, and, if done without authorization of the court, constitutes a distinct breach of his duty to "take and keep possession." If, as a result of such breach, the money is lost, and such loss renders the receiver incapable of obedience to the order of the court to pay it to the one adjudged entitled thereto, the breach of duty is complete, regardless of the care and good faith of the receiver in his choice of bank depositary, and the obligation of the surety on the receiver's bond to make good the loss, within the limits of the bonds becomes absolute. For in such case the inability of the receiver to perform his bounden duty is not due to law nor overruling necessity, as recognized in the case of City of Healdsburg v. Mulligan, supra, but rather to the receiver's own voluntary act in depositing the money in a bank without an order of the court. By the deposit in bank, the title to the money passed to the bank, and the transaction was nothing more or less than a loan, with a special provision implied that repayment shall be made as demanded by the checks of the depositor. People v. Wilson, 117 Cal. 242, 49 P. 135. Loan of receivership funds may only be made in accordance with the provisions of section 569 of the Code of Civil Procedure and of sections 91 and 93 of the Bank Act, above referred to.

Before concluding this decision, it should be noted that the rules announced in various decisions of this and other states to govern and measure the obligation of sureties on bonds of public officers and guardians and administrators are not applicable to the extent of determining liability on a receiver's bond, as the bases of such obligations are quite different under the law creating them from that underlying a receiver's bond. The latter is in a

class apart and singular. The receiver is the agent and representative of the court. His possession of receivership assets is the possession of the court. That possession may not be parted with by the receiver without authorization of the court. The law is not silent; it has spoken on the subject of keeping receivership funds; and the rule above stated and relied upon by respondent, allowing a receiver to deal with receivership funds with that degree of care ordinarily exercised by cautious men in transacting their own business, is therefore not applicable. A receiver's bond is conditioned on his faithful discharge of duties and obedience to order of court. Herein clearly there was an inexcusable failure of the receiver to obey the order of court, for which the surety must be held liable.

As the facts herein are without substantial dispute and a new trial is not required in the interests of justice, the judgment herein should be reversed and the cause remanded, with directions to the lower court to enter judgment in favor of plaintiff and against defendant for the sum of $8,099.72, with interest thereon at the rate of 7 per cent. per annum from March 3, 1933, and it is so ordered.

We concur: STEPHENS, P. J.; CRAIL, J.



3 Cal.App.2d 705

CRAWFORD v. HERZOG.

Civ. 9079.

District Court of Appeal, Second District, Division 2, California.

Jan. 18, 1935.

1. **Pleading** ⇐246(3)

In action for injuries received in automobile accident, refusal to allow amendment of answer by declaring injured party was guest instead of passenger and denying that plaintiff was injured or had any earning capacity prior to injury *held* error (Code Civ. Proc. § 473).

2. **Automobiles** ⇐244(20)

Evidence that defendant motorist attempted to pass truck and trailer on left side, that highway was muddy, that both vehicles were going down hill at 25 and 35 miles per hour, and that plaintiff, riding in defendant's automobile, did not call defendant's attention to specific danger, but warned him as he started to pass truck, *held* not to sustain finding of willful misconduct so as to permit plaintiff's recovery for injuries received when automobile ran off road and overturned (St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Robert H. Crawford against D. W. Herzog. Judgment for plaintiff, and defendant appeals.

Reversed, with instructions.

Irving E. Read, of Los Angeles (Walter F. Keen, of Los Angeles, of counsel), for appellant.

James W. Briscoe, of Santa Barbara, for respondent.

SCOTT, Justice pro tem.

Plaintiff recovered judgment for injuries received when the automobile in which he was riding, and which was owned and driven by defendant, left the highway and overturned. From such judgment defendant appeals.

[1] In his original answer to plaintiff's amended complaint, defendant admitted that plaintiff was a passenger at the time of the accident. Several weeks before trial he asked leave to amend by declaring that plaintiff was a guest and not a passenger, and to include in his proposed amended answer certain modifications in effect denying that plaintiff was injured or that he had any earning capacity prior to injury. The amendment was not permitted, and the request when renewed at time of trial was again refused. It appears doubtful whether at the time the original answer was filed defendant had in mind the legal distinction between "passenger" and "guest" as applied to section 141¾ of the California Vehicle Act, as added by St. 1929, p. 1580, amended by St. 1931, p. 1693, and construed in Crawford v. Foster, 110 Cal. App. 81, 293 P. 841, and Sullivan v. Richardson, 119 Cal. App. 367, 6 P.(2d) 567. The amendment to defendant's answer should have been permitted by the trial court, so as to clearly present the issues at the trial. As stated in Hurley v. Lake County, 133 Cal. App. 219, 23 P.(2d) 838, 839, "good reason must exist to justify a court in refusing a request to so amend." Code Civ. Proc. § 473. "It can very rarely happen that a court will be

justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading." Guidery v. Green, 95 Cal. 630, 30 P. 786, 787.

The trial court found that plaintiff was riding as a passenger. We are unable, however, to discover evidence to support such a finding, and the error in rejecting the proposed amendment therefore becomes important.

[2] Plaintiff, defendant, and one Ansel, on the day of the accident, had ridden in defendant's roadster to inspect a mining property in which a fourth party was interested. No one of them was buying or selling the property or any interest therein to the other, and no money or other valuable thing passed to the defendant from either of the other men by way of compensation. The theoretical consideration paid by plaintiff so as to make him a passenger rather than a guest is asserted to be the value of his services as a guide to help defendant find the property. The excursion, however, bore indicia of a joint venture, the details of which are not furnished to us. On the way back it was raining, and, in trying to pass a truck and trailer, the automobile went off the highway to the left and down an embankment, overturning and injuring plaintiff. The court found that "defendant operated his said automobile so negligently and carelessly and with such lack of regard for the safety of the plaintiff, and with such willful misconduct" that the car skidded and went off the road. It is to be observed, however, that the issue of willful misconduct was not essential to plaintiff's case if the trial court was correct in finding that he was a passenger, since that relationship, if it existed, warranted recovery if the driver's negligence, not amounting to willful misconduct, was the sole proximate cause of the accident and injuries.

The trial court made specific findings on many elements which formed the basis of the finding as to the negligence and willful misconduct, as follows: That, while attempting to pass the truck and trailer, defendant turned to its left side; that it was raining and the highway was wet and muddy; that both vehicles were then going downhill (10 per cent. grade); that, just before and at the time defendant attempted to pass, the trailer was swaying, but wholly on the right side of the highway, and such swaying was visible to defendant; that the truck was going 25 miles per hour and defendant 35 miles per hour, and that such speed of defendant was greater than was reasonable and proper, having regard for traffic and the condition of the highway; that plaintiff did not call defendant's attention to the specific danger, but, when the latter started to pass the truck and trailer, plaintiff warned him to be careful. The highway was about 19 feet wide, with dirt shoulders which had become soft and slippery from the rain. It seems that just as defendant started to pass the truck the latter accelerated its speed somewhat.

In view of our conclusion that plaintiff was not a passenger, we have analyzed the court's findings and examined the evidence to discover whether, in the event plaintiff was merely a guest at the time, they furnish sufficient basis for determination that defendant was guilty of willful misconduct so as to render him liable under section 141¾ of the California Vehicle Act. Viewing the evidence in the light most favorable to plaintiff, we conclude that it is not sufficient to support a finding of willful misconduct as defined in Olson v. Gay, 135 Cal. App. 726, 27 P.(2d) 922, and Norton v. Puter, 138 Cal. App. 253, 32 P.(2d) 172. What constitutes willful misconduct has also been considered in the following cases: Nelson v. Westergaard, 130 Cal. App. 79, 93, 19 P.(2d) 867; Howard v. Howard, 132 Cal. App. 124, 22 P.(2d) 279; Walker v. Bacon, 132 Cal. App. 625, 23 P.(2d) 520; Turner v. Standard Oil Co., 134 Cal. App. 622, 25 P.(2d) 988; Gibson v. Easley, 138 Cal. App. 303, 32 P.(2d) 983; Manica v. Smith, 138 Cal. App. 695, 33 P.(2d) 418; Meek v. Fowler (Cal. App.) 35 P.(2d) 410. In other words, we have taken the facts found by the court and have added all additional evidence in the record which would tend to support a finding of willful misconduct, and are compelled to say that it is insufficient.

The judgment is reversed, and the trial court is instructed to allow the proffered amendment to the answer relating to the status of plaintiff while riding in the automobile.

We concur: STEPHENS, P. J.; CRAIL, J.

4 Cal.App.2d 257

GUNDERSON v. GUNDERSON.

Civ. 7298.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1935.

1. Pleading ⇐48

Complaint must contain statement of facts constituting cause of action in ordinary and concise language.

2. Pleading ⇐48

Complaint need allege only facts required to be proved, except to negative possible performance of obligation on which action is based or inference from act indifferent in itself.

3. Pleading ⇐48

Complainant must allege every fact he is required to prove, but must not allege affirmatively anything which he is not required to prove.

4. Pleading ⇐374

Negative allegation of complaint must be proved only where it constitutes part of original substantive cause of action on which plaintiff relies (Code Civ. Proc. § 1869).

5. Divorce ⇐271

Complaint in divorced wife's action against her former husband for sums due her under divorce decree if not remarried *held* fatally defective in not alleging that she was unmarried.

6. Divorce ⇐271

Presumption that thing once proved to exist continues as long as usual with things of its nature *held* inapplicable in action by divorced wife, not alleging that she was unmarried, to recover sums due her under divorce decree if not remarried.

7. Pleading ⇐8(8)

Allegation of complaint in divorced wife's action against her former husband that he refused to furnish her written evidence of his payment of premiums on life insurance policy payable to her, as required by divorce decree, *held* demurrable as mere conclusion respecting his breach of obligation under decree.

8. Divorce ⇐326

Minnesota court's divorce judgment, requiring husband to pay wife stated sum monthly for support of herself and minor son until she remarried and smaller monthly sum for son's support if she remarried and to keep in force life insurance policies payable to them, *held* valid under Minnesota laws.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Katherine H. Gunderson against Harley J. Gunderson. Judgment for plaintiff, and defendant appeals.

Reversed and remanded with directions.

Chas. L. Nichols and H. L. Pratt, both of Los Angeles, for appellant.

Scott N. Thompson, of Los Angeles, for respondent.

WILLIS, Justice pro tem.

The parties herein were formerly husband and wife. In 1927, by judgment of a court of the state of Minnesota, they were divorced, and by the decree therein it was adjudged that the husband, appellant herein, should pay to respondent for the support of herself and a minor son the sum of $300 per month, commencing September 1, 1927, until such time as respondent remarries; and that should she remarry, then appellant was to pay to her the sum of $150 per month for the support of the minor son, while the son lived with her and until he attained the age of twenty-one years. It was further adjudged that appellant should carry and keep in force upon his own life $30,000 of life insurance, with respondent as beneficiary, not to be changed except in the event that respondent remarry, and in that event the appellant would be permitted to change the beneficiary from respondent to the minor son; that appellant should pay all premiums thereon when due and deliver to respondent the receipts for such payments; that appellant should obtain and carry and keep in force a policy of life insurance in the sum of $10,000, with the minor son as beneficiary therein, on which appellant should pay all premiums when due and furnish respondent the written evidence of such payments.

By an amended complaint filed October 20, 1929, in the superior court of Los Angeles county, respondent set forth the judgment above referred to in haec verba, and alleged that appellant had failed to pay any sum required thereby except the sum of $200 per month from November 1, 1928, to October 1, 1929, inclusive, and that there was unpaid the sum of $100 per month for the months above mentioned, amounting to the sum of $1,200; and further alleging that appellant had failed to deliver receipts for premiums paid on the $30,000 insurance policy. In a second cause of action she complains that appellant had

failed to comply with the dictates of the decree of the Minnesota court in respect to the $10,000 insurance policy, and has refused and still refuses to furnish respondent with any written evidence of payment of premiums on said policy. To this complaint and to each cause therein appellant interposed a general demurrer, and a special demurrer on the grounds of ambiguity and uncertainty in respect to the validity of the divorce decree and whether respondent had remarried, and whether respondent had ever demanded or requested delivery of the receipts for premiums on the two insurance policies. The demurrer was overruled, and appellant having declined to answer, his default was entered, and on December 16, 1929, after hearing the evidence, the court entered judgment against appellant for the sum of $1,100 with certain specified interest thereon, and that appellant keep in full force the $30,000 insurance policy, respondent to be named therein as beneficiary, and that receipts for premiums thereon be delivered to respondent; and, further, that appellant keep in full force the $10,000 policy with the minor son as beneficiary therein, and deliver to respondent receipts showing payment of premiums thereon.

Appeal from this judgment was taken and the record thereof lodged in this court on April 1, 1930, and an opening brief was filed August 4, 1930. The subsequent delay in hearing was due to stipulations of the parties to postpone until a decision was made in the Minnesota court on a pending motion to modify the judgment entered therein and on which this action was based. That decision was not made until June 9, 1934, whereupon by leave of this court appellant was permitted to offer and present as additional evidence herein a certified copy of the modified judgment so entered. By consent of both parties, the cause was submitted on the merits of the appeal and as affected by such additional evidence. Appellant earnestly contends that the court erred in overruling his demurrer and that the judgment should therefore be reversed, on the ground that the first cause of action in the complaint was fatally defective for failure to state therein that plaintiff was still unmarried or had not remarried since the Minnesota judgment had been entered; and, as to the second cause of action, that it fails to state facts sufficient to support any relief.

The Minnesota judgment which may be considered as a contract, provided in effect that appellant pay respondent $300 per month "until such time as plaintiff should remarry," and only $150 per month if she should remarry. She sued for $300 per month over a period, alleging that only $200 per month thereof had been paid. It is at once patent that if she had remarried prior to the period mentioned, she would not be entitled to $300, but to only $150 per month under the judgment, which was a lesser amount than she had already received. The complaint is silent in respect to this event. It cannot be ascertained therefrom, nor does it appear in the evidence given at the trial, whether she was still unmarried or was remarried at the time in question.

[1-5] In this state the complaint must contain a statement of the facts constituting the casue of action in ordinary and concise language. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action or to negative an inference from an act which is in itself indifferent. Payne & Dewey v. Treadwell, 16 Cal. 221, 243. The party must allege every fact which he is required to prove, but must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved. A negative allegation is to be proved only where it constitutes a part of the original substantive cause of action upon which the plaintiff relies, and this is an exception to the general rule. Melone v. Ruffino, 129 Cal. 514, 520, 62 P. 93, 79 Am. St. Rep. 127. This is undoubtedly the rule, entirely in accord with section 1869 of the Code of Civil Procedure, where it is provided that evidence need not be given in support of a negative allegation except when such negative statement is an essential part of the statement of the right on which the cause of action is founded. In re Estate of Latour, 140 Cal. 414, 421, 73 P. 1070, 74 P. 441. Herein an allegation that the plaintiff had not remarried was an essential part of the statement of the right on which she founded her cause of action. There should have been an allegation negativing remarriage, because without such negation in the complaint a possible previous performance of the contract by defendant would appear. As written, all the allegations in respondent's complaint may be true and yet she might not be entitled to recover. She was entitled to the $300 per month only until she remarried. After remarriage, a different and lighter obligation was imposed on appellant, which by the other allegations of the complaint would be shown to have been fully performed. We are satis-

fied that the failure to negative remarriage in the complaint constitutes a fatal omission to allege a part of the original substantive cause of action.

[6] Nor can the presumption that "a thing once proved to exist continues as long as is usual with things of that nature" have any application herein. Beside the doubtful question of the application of such presumption to the status of a person in respect to marriage, it has been held that the presumption is a rule of evidence and has no application to the statement of facts in a pleading, and cannot take the place of an allegation of an essential fact. Fredericks v. Tracy, 98 Cal. 658, 33 P. 750; Irish v. Sunderhaus, 122 Cal. 308, 54 P. 1113; Pettit v. Forsyth, 15 Cal. App. 149, 158, 113 P. 892.

The right of respondent to recover under her first cause of action depended on her continued status as an unmarried person. In Lee Doon v. Tesh, 68 Cal. 43, 6 P. 97, 8 P. 621, the court held that when a right is conferred upon a particular class of persons, or by reason of possessing some special qualifications or status, he who claims such right must show himself to belong to the class designated, or to possess the qualification prescribed or the status mentioned as the basis of the right. The clause in the judgment herein, "until such time as the plaintiff remarries," may be transposed and read with the same effect as follows, "while plaintiff remains unmarried." In Allen v. Home Insurance Co., 133 Cal. 29, 65 P. 138, and in Arnold v. American Insurance Co., 148 Cal. 660, 84 P. 182, 25 L. R. A. (N. S.) 6, the court was considering the sufficiency of complaints to recover insurance on a policy wherein it was provided that loss would be paid if occasioned by destruction of a building by fire "while occupied as a dwelling house." With the similarity of this clause to that in the divorce judgment herein in mind, it is significant to note that the court in those cases held that as it was in the contract that the premises were insured while occupied as a dwelling house, it was essential to allege and prove that at the time of fire the building was occupied as a dwelling house; that the allegation was not merely a condition precedent, as referred to in section 457 of the Code of Civil Procedure, but went to the very essence of plaintiff's right to recover.

For the reasons above given and under the rules above stated, we must hold that the demurrer to the first cause of action herein was improperly overruled.

[7] The demurrer to the second cause of action should have been sustained. The allegation that "defendant has refused and still refuses to so comply with the dictates of said decree and has refused and still refuses to furnish this plaintiff with any written evidence of payment of premiums on said life insurance policy," does not contain a statement of facts in support of a cause of action, but is merely the pleader's conclusion in respect to a breach of the obligations imposed on appellant by the judgment in question. In regard to this second cause of action, we deem it appropriate at this time to suggest that in the event respondent exercises her right to replead such cause by an amended complaint, careful consideration be first given to the question whether she may sue to enforce the contract made solely for the benefit of the minor son, a third party thereto. Concerning this question, we do not herein make or intend to make any decision, it not being presented on this appeal.

[8] As this cause must be remanded for further proceedings in the court below, it is necessary to determine one other point raised by appellant by his demurrer and argued herein, relating to the validity of the judgment pleaded. We have examined the record and Minnesota law in the light of appellant's contentions and are satisfied that the document certified as a judgment is substantially in compliance with the laws of Minnesota, and constitutes a valid judgment thereunder.

As a reversal of the judgment herein is required, it becomes unnecessary to pass upon, nor do we herein decide, the effect of the additional evidence of the later modification of the Minnesota judgment on respondent's rights under the original judgment.

The judgment is reversed and the cause remanded with directions to sustain the demurrer.

We concur: STEPHENS, P. J.; CRAIL, J.

4 Cal.App.2d 206

PEOPLE ex rel. CHIROPRACTIC LEAGUE OF CALIFORNIA v. STEELE et al. (SIPES et al., Interveners).*

Civ. 9545.

District Court of Appeal, First District, Division 2, California.

Jan. 28, 1935.

Rehearing Denied Feb. 25, 1935.

Hearing Denied by Supreme Court March 29, 1935.

1. Nuisance ⇐3(1)

Generally, violation of penal statute does not constitute nuisance, unless acts prohibited thereby would constitute nuisance in absence of statute (Civ. Code, § 3369, as amended by St. 1933, p. 2482).

2. Nuisance ⇐60

Modes of treatment, which licensed chiropractors are competent to practice and are not in themselves harmful to patients, cannot be rendered nuisance per se by mere adoption of statute forbidding them (Gen. Laws 1931, Act 4811, § 7; Civ. Code, § 3369, as amended by St. 1933, p. 2482).

3. Nuisance ⇐80

Chiropractic league *held* not entitled to injunction against licensed chiropractors' practice of modes of treatment prohibited by statute as constituting public nuisance, where not nuisance in fact (Civ. Code, § 3369, as amended by St. 1933, p. 2482; Gen. Laws 1931, Act 4811, § 7).

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Suit by the People of the State of California, on the relation of the Chiropractic League of California, against Roscoe C. Steele and another, partners, doing business under the style of Drs. Steele & Steele, in which Glen J. Sipes and another intervened. From a judgment for plaintiff, defendants and interveners appeal.

Reversed.

J. H. McKnight, of Oakland, Edward A. Stuart, of Los Angeles, for appellants.

Thomas Morris, of Los Angeles, amicus curiæ.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Frank V. Kington, of San Francisco, for respondent.

DOOLING, Justice pro tem.

This is an appeal from a judgment enjoining appellants, all of whom are licensed chiropractors under section 7, Statutes of 1923, p. lxxxviii, Deering's Gen. Laws 1931, Act 4811 (the Chiropractic Act), from practicing or attempting to practice or advertising or holding themselves out as practicing certain designated modes of treating the sick and afflicted. It was claimed by the plaintiff that a license to practice under the Chiropractic Act did not authorize the use by the licentiate of any of the modes of treatment enumerated in the judgment, and that consequently the practice of such modes by appellants constituted a public nuisance which could be enjoined by the state. While claiming that their licenses did authorize the use of the enjoined modes of treatment, appellants also urged in the trial court and are urging on this appeal that in any event under the evidence produced in the trial court, there was no basis for the finding that the practices enjoined constituted a nuisance and consequently that the remedy by injunction was not available to the state. It is obvious that if appellants are correct in this contention the judgment appealed from must be reversed.

Whatever may be the rule in other jurisdictions, by express provision of our Civil Code, § 3369, as amended by St. 1933, p. 2482: "Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition." Unless the practice of the methods of treatment enjoined constitutes a nuisance it seems clear that injunction as a remedy is expressly forbidden by the quoted section.

[1] It is the theory of respondent that the practice of medicine without a license is a menace to public health and hence a public nuisance. It is the general rule, however, that the violation of a penal statute does not constitute a nuisance unless the doing of the prohibited acts would constitute a nuisance in the absence of the statute. 46 C. J. p. 660. The question has been fully discussed and the above rule followed in two recent cases in our Supreme Court, Perrin v. Mountain View Mausoleum Ass'n, 206 Cal. 669, 275 P. 787, and Carter v. Chotiner, 210 Cal. 288, 291 P. 577, and in another case in the District Court of Appeal, People v. Seccombe, 103 Cal. App. 306, 284 P. 725.

In Carter v. Chotiner, supra, the Supreme Court said at page 291 of 210 Cal., 291 P. 577, 578: "It is elementary that violation of a penal ordinance does not of itself create a private nuisance per se. * * *"

In People v. Seccombe, supra, at page 311 of 103 Cal. App., 284 P. 725, 727, we read:

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing denied 41 P.(2d) 946

"But as a nuisance may exist without a concomitant crime, so may criminality exist without the criminal act or course of conduct constituting a nuisance as defined by the laws of this state. It follows that, where the action is for abatement of a nuisance by injunction or otherwise, facts which bring the act or course of conduct within the definition of a nuisance must be pleaded, and it is not sufficient to allege merely that the defendant has committed and intends to commit additional criminal acts."

[2] The specific question of whether practicing a healing art without a license required by statute is a nuisance per se has not been before the appellate courts of this state, but in a majority of the jurisdictions of this country in which the question has been passed upon the courts have held that the practice of a healing art in violation of the terms of a statute is not per se a nuisance. State v. Johnson, 26 N. M. 20, 188 P. 1109; Dean v. State, 151 Ga. 371, 106 S. E. 792, 40 A. L. R. 1132; State v. Maltby, 108 Neb. 578, 188 N. W. 175; Redmond v. State, 152 Miss. 54, 118 So. 360; State v. Smith (Ariz.) 29 P.(2d) 718, 31 P.(2d) 102, 92 A. L. R. 173; People v. Universal Chiropractors' Ass'n, 302 Ill. 228, 134 N. E. 4.

The rule is thus laid down by the Supreme Court of Arizona in State v. Smith, supra, 29 P.(2d) 718, at page 721: "The practice of medicine and surgery is not per se a nuisance. A license does not add to one's qualifications. It only shows that the holder thereof has complied with the law. His skill and ability as a practitioner would be the same before as after he secured the license."

The Supreme Court of Mississippi similarly said in Redmond v. State, supra, at page 367 of 118 So.: "A person might acquire the very greatest learning and skill in medicine, and might practice most usefully upon people in cases calling for that skill, and still not be a licensed physician. * * * Consequently, whether a man is examined by the board, or not, does not, of itself, furnish the requisite skill and knowledge. Therefore such practice of medicine is not a nuisance per se, and if a nuisance at all, would be made such by the manner in which it is pursued."

So in Dean v. State, supra, page 793 of 106 S. E., the Supreme Court of Georgia said: "Will equity, at the instance of the state, enjoin a person from practicing the profession of medicine simply because such person has failed to take the prescribed examination and to obtain a license from the state board of medical examiners authorizing him so to do, in violation of the penal laws of the state? To state the question is to answer it. The chancellor did not find that the practice of plaintiff in error's profession worked hurt, inconvenience, or damage to any particular person or to the public or to any particular part of the public. If the plaintiff in error had obtained the license required of practitioners of medicine, the same acts and conduct complained of in the petition, so far as determined by the chancellor, would have been legal and would have worked no hurt, inconvenience, or damage. * * *"

It is plain from the foregoing quotations that the reasoning by which the courts have reached the conclusion that the practice of a healing art in violation of a statute is not a nuisance per se rests upon the broad basis that that which is not a nuisance per se, in the absence of a statute forbidding it, does not become a nuisance by virtue of the fact that it is forbidden by a statute. To put the matter more concretely unless it be found either that appellants are not competent to practice the modes of treatment enjoined or that the modes of treatment enjoined are in themselves harmful and injurious to the patients upon whom they are practiced, they would not constitute a nuisance in the absence of a statute forbidding them; and since the adoption of such a statute would neither render incompetent a practitioner who was otherwise competent, nor render injurious a method of treatment which was otherwise beneficial or innocuous, its mere adoption could not render that a nuisance which otherwise was not.

Respondent cites and relies upon Kentucky State Board v. Payne, 213 Ky. 382, 281 S. W. 188, and State v. Anderson, 6 Tenn. Civ. App. 1. These cases represent the minority view that the practice of a healing art in violation of a statute becomes per se a nuisance, and are in conflict with the majority view expressed in the cases from other jurisdictions hereinabove cited, and in principle likewise conflict with the California cases cited above. There are certain jurisdictions wherein the statute expressly authorizes the remedy by injunction against the unlawful practice of a healing art. Board of Medical Examiners v. Blair, 57 Utah, 516, 196 P. 221; State v. Fray, 214 Iowa, 53, 241 N. W. 663, 81 A. L. R. 286. Such cases are not in point upon the question of whether injunction may be availed of in the absence of a statute expressly authorizing its use.

The trial court did find in this case that the use of the enjoined methods of treatment by appellants is "dangerous and injuri-

ous to the health of the community or neighborhood or a considerable number of persons of said city and county and state so as to interfere with the comfortable enjoyment of health and life of the people thereof." Appellant attacks this finding as unsupported by the evidence, and we have been pointed by respondent to no evidence in the transcript which would support this finding, nor have we found any such evidence, although in view of the importance of the case the entire typewritten transcript has been read. In justice to the trial court it should be said that we read the quoted finding as being based upon the proposition that the violation of the statute constituted a nuisance per se, a proposition that we have decided against on this appeal.

The pleadings contain allegations of incompetence and lack of skill of appellants in the use of the modes of treatment sought to be enjoined and danger to the public by reason thereof. Upon a new trial evidence addressed to these issues may be introduced, but the trial resulting in the judgment appealed from was apparently conducted by respondent on the theory that the competence and skill of appellants was immaterial, and no evidence was introduced upon that subject.

Respondent apparently relies strongly on In re Wood, 194 Cal. 49, 227 P. 908. An examination of that case shows that the injunction there involved was sustained not on the ground that the enjoined acts constituted a public nuisance because in violation of the Criminal Syndicalism Act (St. 1919, p. 281), but because they constituted a public nuisance in themselves without regard to that act. The court held that acts which in themselves constitute a public nuisance may be enjoined although they are forbidden by a penal statute. It did not hold that acts which are not in themselves a public nuisance, may be enjoined because they are in violation of a penal statute.

[3] We conclude that as there was no evidence introduced which would support a finding that the practicing of the enjoined modes of treatment constituted a nuisance in fact, and as the practicing of such modes could not become a nuisance merely by virtue of their being forbidden by a penal statute, the case was not a proper one for injunction. Civ. Code, § 3369. That being so, we need not here attempt to construe section 7 of the Chiropractic Act, or to determine whether or not the trial court's findings as to the rights given a licentiate under that act are correct or supported by the evidence.

For the reasons given the judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.



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